

The ethical foundation of human rights

Michele Indelicato

University of Bari “Aldo Moro”, Italy

Abstract

For many years towards the end of the twentieth and the beginning of this third millennium the question of ethical foundations of law and of politics itself has been set aside in many areas of contemporary culture under the pretext that every claim to an objective and universal truth would be a source of intolerance and violence, and that only relativism could safeguard the pluralism of values and democracy. You can not safeguard human rights, the dignity of the person, regardless of the underlying reasons that they find their ultimate explanation and foundation, reason and justification. The latter can only be phylosofical, ethical and religious, because they are based on man's ontological structure.

Key words: *ethics, foundation, human rights.*

Introduction

For many years towards the end of the twentieth and the beginning of this third millennium the question of ethical foundations of law and of politics itself has been set aside in many areas of contemporary culture under the pretext that every claim to an objective and universal truth would be a source of intolerance and violence, and that only relativism could safeguard the pluralism of values and democracy. People are going on claiming the legal positivism that refuses to refer to something absolute, established to an objective, ontological criterion of what is right. In this perspective, the final horizon of law and of the moral norm is the law in force, which is considered just by definition, being the expression of the will of the legislator. Needless to say, such a position opens the way to the arbitrary of power, the dictatorship of the statistical majority and to ideological manipulation to the detriment of the common good value. Giovanni Paolo II, in his Encyclical *Fides et ratio*, hopes as «required a metaphysical philosophy, that is capable

of transcending empirical data in order to reach in the search for truth, to something absolute, ultimate and fundamental. This is a need, implicit both in sapiential and analytical knowledge; in particular it is a peculiar requirement of the knowledge of the moral good, the foundation of which is the supreme good, God himself» (Giovanni Paolo II, 1998, n. 83).

The error of modern rationalism has consisted in claiming to build the system of human rights and the general theory of law, considering the nature of man as an entity in its own right, to which there is no reference needed to a higher Being whose creative and ordering will the man depends on essence and action.

Modern rationalism puts the reason as the only criterion of truth, goodness, of right and claims to have absolute certainty without preconditions excluding the idea of God who manifested himself in history with Christ, in favor of a moral to follow “*etsi Deus daretur not*” putting God in parentheses. It is known in this context the formulation of the autonomy of the Kantian morality which excludes God in the philosophical reflection not to infringe upon human freedom and self-adhere to the moral good and morality itself. At this point one might spontaneously ask: who does not admit God and does not recognize that man is *imago Dei*, on what does he base the moral, human rights and dignity of the person himself? If it is true that nowadays an ever deeper awareness of the dignity of the human person has gained, his unique value, and so the respect and inviolability of his rights, it is also true that the vision of man as person is born and has established itself with Christianity, which has put the person in the center of the Christian vision of man, the image of God. Wherever man discovers the presence of a call to the absolute and transcendent, there «a ray of hope towards the metaphysical dimension of reality is opened: in truth, in beauty, in moral values, in other person's, in being itself in God» (Ibidem). Therefore, even Giovanni Paolo II warns, the great challenge that lies ahead is to «know how to take a step as necessary as it is urgent, from *phenomenon* to *foundation*. You can not stop short at experience alone; even if experience does reveal the human being's interiority and spirituality, speculative thinking must penetrate to the spiritual core and the grounding that sustains it» (Ibidem).

This is more necessary today as we witness the “crisis of meaning”, the so deep crises that many people wonder «whether it still makes sense to ask about the

meaning and so you live in a total absence of meaning» (cfr. *Ibidem*, nn. 81–91), and all this comes from the fact that people «give up asking radical questions about the meaning and foundation of human personal and social life» (*Ibidem*, n. 5).

The crisis of meaning, as a crisis of the same question of meaning, the foundation of the crisis and the crisis of metaphysical thought as an access to the foundation skills also affect contemporary religious experience. The most serious problem with which we must compare today's Christianity in Europe is the nihilism, while yesterday was atheism. With the death of God, so much acclaimed by Nietzsche, came the man's death. What is envolved today, at the beginning of the third millennium is the question of meaning. The nihilism is the crisis of hope, the sense of things, of life, of existence itself; and this because it is not recognized the ethical foundation of human rights, of our being, of our living and living together, and because, the ultimate reasons that guide our lives are in crises and allow that, this can be seen as a project. In this regard Bobbio, which defines this problem of the foundation or theoretical justification «the illusion of the absolute foundation», states that can not be placed as such and that the real test of human rights today is not so much «to justify them, but rather to protect them», and that is not a philosophical problem but a political one and the only test of its validity is «the general consensus of mankind» (Bobbio, 1979, p. 29). He adds: «The absolute foundation is not only an illusion; sometimes it is also a pretext to defend reactionary positions» (*Ibidem*, p. 127)¹.

Protection and justification of human rights

Certainly human rights must be protected, but they also must be justified because it is not easy to separate implementation from justification. Without justification ceases to apply any reason, but a fundamental reason for their defence and for the protection of human rights; whose future among other things, is entrusted to a gradual realization of the reasons that justify them. If the latter values are not justified, but assumed, it is a sign that all values are equal and that there is not a criterion to prove the superiority or the preference of one over the others.

It is difficult to see how one can beat for the rights that are considered only as assumptions of which you can not account having a basis, conventional, contingent and therefore necessarily characterized in arbitrary way, both collective (political will), and individual (the subjective intention). So

to say that it is important not to base human rights, but defend them, it means to build them on sand. This position may be low, because human rights are founded, not by a vague cultural or emotional need, but because it is a requirement of reason. And the foundation of human rights is first of all and above all of an ethical nature, whose size is therefore not a superstructure, it is an integral part of the person, it is fundamental openness to otherness and to the mystery that presides over every relationship and encounter among human beings. Nor consciousness can be considered, by itself, the place of determination of the moral law: it needs a specific scientific and philosophical approach, which illuminates certain aspects of reality and the human condition.

The fundamental and decisive question of the foundation of human rights indicates the need to enlarge the area of our rationality, to reopen it to the larger questions of true, of good, of right, of ethics of life, in the respect of human life, individual dignity of person and then to combine together theology, philosophy and the sciences, in full respect of their own methods and their reciprocal autonomy, but also by the awareness of the intrinsic unity that holds them together. The consideration of humanity as a natural and essential subject and for this transcendental, founding human rights, give, to the same legal architecture, the shapes of the totality, unity and universality, not only with regard to the extension of the same rights, but also for their applicability.

The non neutrality of law

The legal formalism has, as a starting point, the neutrality of ethics within the law, but a theory of law is not only about what the law is in itself in order to distinguish it from non-right, but also covers a scope that is inscribed inside a practical philosophy, school and politics, both as a prerequisite and as a consequence (cfr. Viola-Zaccaria, 2002, p. 3).

Philosophers and jurists as Rosmini, Jacques Maritain (cfr. Maritain, 1952, pp. 12–18)², Mounier, Capograssi, Moro, Perlingieri, reject the concept of neutrality of the law because it is connected in everyday life to some great values and existential experience of people, in regard to that, Moro talks this way: «We reject this neutrality of the right face of the great problems of humanity and we believe that the right instead is qualified by its connection

with some great values, with some of the civilization data. Among these data, the fundamental is given freedom (...). And it is incredible that in an age like ours, in which you are moving towards large implementations of justice and human civilization, an era in which the man is called to give account of himself with his courageous decisions in the sense of justice, freedom and human dignity, right at this time, you can imagine the man entered, so to speak, natural, man entered into a set of data that are followed in social life, without his participation, without his choice, without a ruling, without his merit, without his responsibility» (Moro, 2005, p. 107)³.

The person as a subject of rights, is a *prius* than sorting: is given the existence of the person who the law exists as a whole (cfr. Barbero, 1958) and let's say with Giustiniano that «(...) the law is very little if you ignore men because of which it was created» (Giustiniano, *Institutiones*, 1, 2, 12). The philosopher Rosmini will affirm that «the person has in his nature all the constituents of the law: it is therefore the subsisting law, the essence of the law» (Rosmini, 1967, p. 192). And no doubt that the research and the proclamation of universal moral standards implies a choice of a metaphysical nature, that is involving the implicit recognition that individual human beings as men are in relationships of superiority towards the society and the collective nature of any entity. This is, as Capograssi says, «the most famous concept, because older, and coincides with the spontaneous certainties of common consciousness. Supreme value is the human person and therefore inviolable end, not reducible to any way in the middle; and everything else, natural and collective, political and social, society and state are means and instrumental values for this purpose (...). With the Declaration (...) the United Nations have chosen the concept that coincides with the certainties of the human and common conscience. Here is the immense scope of the Declaration» (Capograssi, 1950, pp. 17–18).

The ethical-philosophical foundation of human rights

You can not safeguard human rights, the dignity of the person, regardless of the underlying reasons that they find their ultimate explanation and foundation, reason and justification. The latter can only be phylosophical, ethical and religious, because they are based on man's ontological structure. The real obstacle and bottom is the innate resistance of States to recognize that their

sovereignty is and should be limited not by this or that superpower, but by a superior natural and divine law. Human rights so lose their precise foundation with the negation of natural law, which in itself implies the recognition of the universality of human nature. The human rights being so abandoned to the historical contingency and, ultimately, to the will of the historical legislator, they remain a dead letter and everything remains on paper. One thing, in fact, are the Declarations and Conventions; and another is their practical, concrete, operational implementation, if international justice will not be able to establish themselves and to overlap with national jurisdictions. So if you avoid or remove the question of their foundation those statements eventually end to be axioms, even if they are of noble moral order, for which it was only possible to a practical agreement, while it was impossible to a theoretical agreement. Maritain in fact remembers, that the agreement can there be in the formulation of rights, provided that we do not ask why. Ultimately, Maritain says that «fundamental rights such as the right to existence and to life, the right to personal liberty and the right to lead our lives as masters of ourselves and of our actions, those responsible for these before God and before the law of the *civitas*, the right to pursue the perfection, of human life, the right to pursue the eternal good (...), the right to physical integrity, the right to private ownership of material goods, which is a safeguard of the person's freedom, the right to marry according to our own choice and to found a family, also guaranteed by the freedoms that are proper, the right of association, the right of each human dignity (...), all these rights are rooted in the vocation of the person, spiritual and free agent, the order of absolute values and with a superior destiny to time» (Maritain, 1991, pp. 12–13). If you deny the metaphysical knowledge, as the concept of person, it is not possible to give a solid foundation of human rights that would not have an objective foundation and solid and they would be reduced to statements of good will. For a stable and secure foundation for human rights we need a rational explanation and ethics that take them away from the variability and can be found in the natural law inherent in the human person, created in the image and likeness of God, precisely Rosmini says, the person has in his nature all the constituent of the right, since it is the “subsisting” right, the very essence of the right. So if we want that human rights are respected, and is re-established the moral and social order, so often violated in our time, we must hold fast

the conviction, as stated by Giovanni Paolo II, that they can not ignore the ethical foundation and natural law given by God to the men. In fact the natural law, as it regulates human social relationships is defined as “natural right” and as such requires complete respect for the dignity of individuals in the realization of the common good. An authentic conception of natural law, understood as the protection and inalienable dignity of every human being, is a guarantee of equality and real substance to those human rights that have been placed at the foundation of international Declarations. Human rights, in fact, should be related to what man is by nature and by virtue of his dignity not to the expression of the subjective choices of those who are able to participate in social life and those who get the consent of the majority.

Just in the Encyclical *Evangelium vitae*, Giovanni Paolo II denounces the serious danger that this false interpretation of human rights, such as rights of the individual and collective subjectivity, dropped by reference to ethics and truth of human nature, can lead democratic regimes to turn into a substantial totalitarianism (cfr. Giovanni Paolo II, 1995, nn. 20–21).

References

- Barbero D., *Sistema istituzionale del diritto privato italiano*, I, Torino 1958.
- Bobbio N., *Il problema della guerra e le vie della pace*, Bologna 1979.
- Capograssi G., *Introduzione e dichiarazione universale dei Diritti dell'uomo*, Padova 1950.
- Di Blasi F., *Dio e la legge naturale. Una rilettura di Tommaso d'Aquino*, Pisa 1999.
- Giovanni Paolo II, *Evangelium vitae*, Roma 1995.
- Giovanni Paolo II, *Fides et ratio*, Roma 1998.
- Giustiniano, *Institutiones*, in *Corpus iuris civilis*.
- Indellicato M., *Il fondamento etico-sociale del diritto nel pensiero di Aldo Moro*, in AA.VV., *Aldo Moro e l'Università di Bari. Fra storia e memoria*, Bari 2016.
- Indellicato M., *La centralità della persona nel pensiero di Jacques Maritain*, Lecce 2009.
- Maritain J., *I diritti dell'uomo e la legge naturale*, Milano 1991.
- Perlingieri P., *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli 2006.
- Rosmini A., *Filosofia del diritto*, a cura di R. Orecchia, Padova 1967, vol. I.
- Viola F.– Zaccaria G., *Diritto e interpretazioni*, Roma-Bari 2002.

Endnotes

- ¹ In the fifth chapter of the same work, entitled *Present and future of human rights*, Bobbio said: «The problem that is before us, in fact, is not philosophical but legal, is wider political sense» (Bobbio, 1979, p. 131), and again: «It can be said that today the problem of the foundation of human rights, adopted by the general Assembly of the United Nations on 10 December 1948. The universal declaration of human rights represents the manifestation of the test where a system of values can be recognized, and this test is the general consensus about its validity. The giusnaturalismi would talk of “consensus omnium gentium” or “humani generis” [...]. It’s a foundation, the historical consensus that can be fatally tried. Well, the Declaration of Human Rights can be hailed as the greatest historical evidence that has ever been given, the “consensus omnium gentium” about a certain system of values» (Ibidem, pp. 133–134). Cfr. on this subject also Di Blasi, 1999, pp. 32–38.
- ² Cfr. also on this subject Indelicato, 2009, especially Chapters I and II.
- ³ For a discussion of the ethical and social conditions of the law allows me recognize Indelicato, 2016, p. 107. The lawyer Perlingieri says that in the configuration of modern legal systems, the human person, as a priority value, is the cornerstone of the team regulated directions and ensures unity (cfr. Perlingieri, 2006, p. 717).