

In defense of moral rights

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In this paper I would like to defend, against its critics, the possibility of a rights-based normative theory of ethics, starting from the view that to answer today's moral questions we cannot avoid to confront with the question of what rights and, peculiarly, what moral rights should be granted to people, where for 'moral rights', I mean 'rights which are not the product of community legislation or social practice, which persist even in the face of contrary legislation or practice and which prescribe the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends' (1).

I.

Debate is divided over this issue: on the one hand the concept of moral rights, its nature, and its relation with the concept of legal rights, are being discussed at length (2); on the other, there is a lack of interest in the question of the justification of moral rights and the possibility of making them a starting point for moral reflection.

Thus, while utilitarianism or contractualism are at the centre of debate, almost nobody seems interested in the suggestion of examining in more detail the idea of a rights-based moral theory (3). It is this state of 'neglect' of the question of the possibility of developing a moral theory starting from rights, that led to the idea of this paper in the first place.

Working on the conviction that the concept of moral rights can justify and explain moral life in a way that allows it to stand up to comparison with more established ethical concepts (like that of goal, utility, or duty), this paper attempts to explain, through a direct comparison with some of its main objections, how the view expressed by a rights-based moral theory can resist criticism and represent a valuable starting point for normative ethics.

But, what does it mean for a moral theory to be based on rights?

In a broad sense, we can distinguish at least three ways in which a moral theory can be based on X:

- X is assumed as the only indefinite term and the other terms are defined

on the basis of X;

- some statements on X are assumed as fundamental and the other statements are derived from these, even with the help of non-moral, purely factual premises;

- the fundamental statements on X do not merely constitute the starting point of the theory, but rather its aim too, in the sense that any proposition derived (which can also contain elements not directly based on X) will have as its aim the defense and the promotion of X.

It is in this last sense that we look to a rights-based moral theory, one in which the various aspects of moral reflection may well seem as not based on rights, but will still have rights as their aim, and the defense and promotion of rights will decide their moral force (4).

There are two very general forms of skepticism regarding a morality based on rights: on one hand the view that rights are too 'weak' a basis for an ethical theory because they are not able to capture the salient aspects of life and moral reflection; on the other, that human beings deserve a higher form of morality than one based on rights, because the discussion of rights is fed by social inequality and individualism. More or less all the objections we will now examine revolve around these forms of skepticism.

II.

a) A morality based on rights does not allow us to grasp the meaning and the moral weight of ordinary reasons for action

This objection is well exemplified by the peremptory words of R. Louden: "Right-based theories are conceptually and normatively impoverished [...] Their lack of conceptual resources prevents right-based theorists from offering guidance on many important moral problems" (5).

The idea is that a rights-based morality would only be able to give an account of actions based on the rights-duties correlativity, such as promises, contracts, etc., and not ordinary actions, which are not necessarily compulsory nor depend directly on the rights of someone, actions like the pursuit of certain objectives, the exercise of certain prerogatives, or the display of certain virtues.

The idea that rights give rise to an 'impoverished' morality is associated with two prejudices, that the discussion of rights has to do only with duties and the correlativity between rights and duties (6), and that the idea of a narrow morality, that is a morality concerned only with action and restriction for action (7), is unacceptable, and hence leads to the failure of attempting to base moral reflection on rights, since only as a narrow morality can we

talk of a rights-based morality.

At most, the discussion of rights concerns a part, perhaps even slight, of morality. Some, for example, think that rights have to do merely with freedom and its restrictions, or with the interests of individuals which are to be protected through a system of correlation between rights and duties and no more.

The first prejudice goes back at least to J. Bentham, who was persuaded that having a right simply means being the 'beneficiary' of a duty (8), prejudice which is today at the basis of the so called interest's theories, according to which the only function of rights is to promote the individuals' interests by ensuring benefits, that is, essentially through the imposition of duties (9). Whether or not rights can be translated in terms of duties, the morality they give rise to only regards the corresponding benefits and obligations which can derive from an individual's pursuit of his or her interests. Rights and duties are intrinsically correlatives.

But a rights-based moral theory will be based on a system of basic rights, among which can figure the right to mind one's own business and to pursue one's own interests, as well as others. And, at first sight at least, it seems J. Feinberg is right when affirming that "it is difficult to imagine how one could know what one ought to do (generally) without first determining what rights various persons are likely to have against one and which of these rights are likely to be waived" (10). That is, it seems not so implausible to defend the moral priority of your rights over my duties.

Besides, it seems to me that rights are neither freedom nor interests, neither claims nor 'disguised' duties, as Bentham thought. They seem, rather, to be titles. Indeed, we can consider that what qualifies the nature of a right is that it confers on its possessor a title to something, and it is the position of entitlement of moral agents with respect to whatsoever aspect of their moral life (and not, necessarily, only with respect to someone) which can direct ethics towards rights, and not the pursuit of specific elements such as interests, freedom, or duties.

Depending on the circumstances and the elements at stake, the title in question can concern freedom, interests, goods, or duties, but it will be the entitlement which will determine its special priority in moral discourse. This does not mean that the concept of rights be reduced to that of title: the concept of rights remains primitive, but it is explained by means of the idea of title. A right is what gives rise to a title, endowed by merit of right, with a special priority and a permissive force. By means of the concept of title, thus, it seems also easier to give an account of the salient features of moral rights in ethical reflection, that is their special priority and their eminently permissive and relational character.

Anyway, it is because of the relational character of rights that rights and duties have been so persistently conceived together. When a right is affirmed or vindicated by an individual, someone else is 'affected' by this affirmation, etc. But this does not mean that a rights-duties relationship is necessarily created. This correlation does not seem at all necessary in understanding the value of the concept of moral rights.

The notion of title shows this clearly: we can have a relationship in which the part 'affected' by the right abstains from doing anything, precisely by virtue of the permissiveness of the title. Consider the famous examples of D. Lyons, regarding rights which do not have corresponding duties (11), or the emblematic cases of the duties of charity, etc., which have no corresponding rights. Or again, ambiguous cases such as the right-duty to vote (12).

The judgment of an impoverished morality, then, derives from a certain conception of what it means for a moral theory to admit rights: "A moral theory admits the existence of rights if it considers the interests of an individual a sufficient reason for maintaining that some other individual is subject to duties" (13).

It is this conception which is poor and reductive for rights. It is not generally a morality of rights to be impoverished, but rather a morality of rights based only on W. Hohfeld's analysis and on a justification of the type offered by the interest's theories.

In this respect, the rival of the interest's theories, that is the choice's theories, which maintain that, whatever the interests at stake, the central value in the life of individuals is their capacity to choose and their autonomy, are more convincing to hold the idea of a rights-based moral theory.

Although even choice's theories end up by tying rights to duties (since the power of choice is exercised by imposing duties on others), what is important for us is the idea that rights guarantee individuals the capacity to choose regarding their life.

The idea suggested by choice's theories can thus be reinterpreted by distinguishing between theory and praxis of rights: the question of what duties correlate to a certain right comes after (and not necessarily) the existence and the function of the right in question have been recognized, that is to say, in practice. The correlation with duties is not necessary from a theoretical point of view in order to assert the existence of a right: it will depend on practice.

All this shows, even though it is not possible to treat the question extensively here, that the rights-duties correlativity is not at all necessary to

the existence and the recognition of moral rights, which can stress, as regard to duties at least, full conceptual and justificatory autonomy.

If all of this is true, we can also take another look at the criteria for normative ethics. It is certainly true that a normative theory has to do with actions first of all, and that its acceptability is therefore tied to its ability to provide rules for action; but normative ethics, as the 'anti-theorists' have argued (14), is not obliged to provide universal prescriptive criteria for moral action and is not obliged to extend beyond the confines of a narrow morality, as Mill rightly said when he stated that the moral rules which prevent individuals from coming into conflicts with each other are the most vital rules for human well-being (15).

Thus, a normative theory of rights can represent a 'self-critical, non-intellectualistic, and socially responsible moral philosophy' (16), and fulfill with dignity the task indicated by narrow morality of regulating conflicts between the freedoms and interests of moral agents, ensuring that everyone is respected and held reasonably in consideration.

b) Through rights you cannot manage to identifying precise ethical criteria

Only through consequentialist or deontological reasoning is it possible to arrive at precise ethical criteria. A rights-theory, that is, is fundamentally characterized by a lack of rational coherence, by a 'genetic' incapacity to give rise to a complete and autonomous theoretical framework. Rights, therefore, have to be viewed only within theoretical frameworks such as utilitarianism, consequentialism, contractualism, or deontology.

At the basis of this opinion there seems to be a prejudice regarding the value of rationality in ethics: why must the determination of a precise ethical criterion depend solely on forms of monistic rationality, such as utilitarianism, or deductive rationality, such as the neokantian theory of Gewirth?

Prudential forms of rationality, conforming to pluralist argumentative models and games theories, with particular emphasis on criteria for the resolution of conflicts based on cooperation and negotiation, can carry out the main task of normative ethics, of guiding the actions of individuals, equally well (17).

In a theory of rights, moreover, goals and duties can be justified in the light of rights: duties can be used to realize the normative power of rights, in practice; while goals can serve to put into practice, through substantive and institutional rights, prima facie, fundamental, abstract rights, which constitute the framework of the theory (18).

c) A moral theory of rights is not capable of resolving conflicts

Theories of rights have dealt at length with the problem of conflicts, starting from the evidence they do not have an ultimate criterion or principle to which they can refer in case of conflicts between competitive rights. Conflicts between, say, the moral right of a pregnant woman to decide what happens in and to her body and the moral right of the fetus to life, or between the fundamental right to life of an aggressor and the right to self-defense of the victim of the aggression are to be solved directly, weighting the interests, needs, ideals and so on at stake, on a case by case basis, looking for compromises worked out in practice and not a priori. The general problem, so, is 'How can a theory of rights resolve the irreducible conflict of rights?' Two questions are involved in this problem: first, are conflicts between rights even possible? And, secondly, if they are possible, how could we try to solve them?

The first question is directly tied to the absolutism with which rights are usually conceived: we usually think to have an inalienable or absolute right to, say, life, liberty and property. But, if things are left in this way, the second question does not arise at all: between two absolute competitive rights we cannot even discuss the possibility to solve their conflict on a case by case basis.

It is for these reasons that among theorists of rights have become consolidated the proposal of considering rights not from an absolutist point of view, but rather through the notion of *prima facie*, the notion first introduced by D. Ross for duties, but today mostly in use for describing moral concepts liable to be weighed against each other without necessarily being traded-off (19).

Describing a right as *prima facie* has the primary function to indicate that it is not absolute and that it is not possible, if not case by case, to provide a definitive account of its weight. This allows us to offer a plausible explanation as to why a right, in given circumstances, can be infringed without being violated, and it indicates, therefore, a way of approaching, if not resolving, conflicts. And so we can try to answer the second question.

In given circumstances, that is, a certain right can be overwhelmed by other considerations or other rights, through mechanisms of negotiation or strategic interaction, or through criteria of comparative evaluation of the moral priority of rights or the elements through which these rights enter into conflict.

For example, we could think in terms of a model in which each person is represented by a point-centre of force and the forces (the *prima facie* rights) obey an inverse square law: "there will be some matters so close to each person that, with respect to them, his rights will nearly always outweigh any aggregate of other rights, though admittedly it will sometimes

happen that issues arise in which the equally vital interests of two or more people clash" (20).

But, anyway, by means of this model we look for compromises which will have to be worked out in practice and, so, will be morally defensible in so far as they reflect the equality in value, that is the equal weight in front of violation, of the prima facie rights.

It has to be noticed that, in this way, the value of a certain right remains unaltered and its reclaiming preserves the characteristic of universalization which is demanded by morality. Even if my prima facie right to, say, free speech is, in some circumstances, infringed by the right of others non to be disturbed, my right remains universally valid, in so far it has not been violated and can be applied, in the correct circumstances, when its weighing with other competitive rights will assign priority to it. All this, then, allows us to explain how a theory of rights, in normal circumstances, can deal with conflicts (21).

But the more interesting suggestion is about the possibility of explaining, differently, the infringement and the violation of rights in the light of a two-level strategy. A theory of rights could in fact make use of something similar to R.M. Hare's 'two-level' reasoning (22) and explain the infringement of a given right by means of the distinction between what happens at the intuitive level and what happens at the critical level: at the critical level, the right is not violated since it is fully considered, while at the intuitive level the right might, on the basis of reflections at the critical level regarding the comparison with other rights and the need for cooperation, be infringed. But, let's clarify this point.

The utilitarian thinker R.M. Hare attempts to explain the centrality of rights in contemporary moral thought by referring to his two-levels theory, within which rights are justified by virtue of the 'egalitarianism of interests' (23). At the intuitive level, he says, we see individuals appealing to a lot of conflicting rights; at the critical level, we use the utilitarian principle of the equal consideration of the interests of all as the criterion to explain the real value of the intuitive rights and to solve their apparent conflicts.

But this idea, defended by Hare, of basing moral reasoning on the distinction between the two levels of thought, can be taken up again within a moral theory of rights, by reading it, so to speak, the other way round. Rights, that is, can be conceived of as reasons excluding utilitarian motives, reasons of the second level which are able to exclude utilitarian reasons of the first level. That is, through the distinction between the two levels of thought, it is possible to determine principles for the resolution of conflicts between rights which respond to criteria of negotiation and debate, and not to higher criteria of utility to which the rights themselves lead.

Transactions like promising, for example, lend themselves well to confirming the possibility of applying the two-level reasoning within a theory of rights: at the intuitive level we observe the right-duty relationship just as fixed by their correlativity; at the critical level, we account both for the bonds of compulsoriness and those of entitlement (which a promise confers, respectively, on he who promises and he who receives the promise), through one or more fundamental rights possessed by all individuals as moral agents.

At the intuitive level, therefore, the enormous proliferation of the appeal to rights, the 'rhetoric of rights' which seems to characterize the contemporary ethical debate could be explained; at the critical level, it would be possible to justify the centrality of the concept of rights for normative ethics and the method of looking for compromises which will be worked out in practice by means of a case by case basis. A method that can easily be considered 'weak', in the sense of a refusal of a rationally stringent derivation from an unitary principle, as in utilitarianism, but that can avoid the unpalatable results of trade-offs.

Besides, by means of the two-level strategy we can also explain the relation there is between the concrete, institutional rights which individuals claim case by case and the cluster of formal abstract prima facie rights which individuals appeal to in order to resolve conflicts. That is, at the intuitive level, we see the particular, substantive rights as they are conceived by individuals; at the critical level we understand the reason of that substantive rights and explain their conflict in the light of prima facie, abstract rights, which will form a model on the basis of which to construct a theory of rights.

Even if all of this is true, there is another aspect of the question. The problem at this point, in fact, is not the infringement of a certain right in given circumstances of practical conflict at the 'intuitive' level, but rather its violation at the level of 'critical' thought. The violation of a right, in fact, directly involves an injustice towards its possessor.

Violating a right means not considering its moral force at any level, not taking it into consideration, at the critical level, in negotiation or interaction. The sense of moral indignation, of 'injustice' which is created in consequence of the violation of a right, is, in this sense, an important indicator of the special status which rights enjoy within moral life and thought ([24](#)).

The main difficulty concerning the violation of rights, therefore, is to establish on what bases we must distinguish between the violation of a right, which is unjust, and its infringement, which, however, is lawful. Appealing to some higher principle which does not depend on rights is

tempting; but we could try to solve the difficulty directly on the level of relations between prima facie, fundamental rights and not on the basis of their derivation from something else.

The solution is offered in the light of the two-level strategy, distinguishing between concrete, institutional rights and prima facie, abstract rights and also by means, for example, of the concept of compensation and those judicial practices relative to the questions of sanction and responsibility. It is not possible to examine these questions in detail here, but the suggestion is that a theory of rights can solve conflicts between competitive ideals, needs, interests and so on without violating any rights of individuals, working out compromises and infringements at a practical level, by means of the criteria of justice, a sort of intermediate between the 'two levels' of rights.

It is in this way that a theory of rights shows its profound link with the concept of justice and proves the possibility of giving an account of such important aspects of moral and social practice as justice of actions and institutions and justice in the cases of responsibility and punishment and in transactions between moral agents, without appealing to some unitary principle as in the case of Hare's egalitarianism of interests ([25](#)).

A theory of rights, thus, starting from an abstract system of prima facie, fundamental, moral rights can directly intervene in the affairs of social justice - as the theories of Nozick, Dworkin, or Rawls demonstrate. But, rather than asserting that moral rights are the means of maintaining the justice of social institutions, we could say that justice is the means of maintaining, promoting, realizing, modifying, and so on, the system of prima facie, fundamental, abstract rights which is developed at the critical level.

If, that is, the starting point is not institutions, but rather the abstract system of prima facie, fundamental, moral rights, the link between justice and rights, between actions and institutions, can be maintained and consolidated in the light of the ways in which a substantive system can be derived from a formal system, without the intervention of higher universal principles, but rather through negotiation, compensation, cooperation, and interaction.

Surely, substantive, institutional rights can stray, even quite considerably, from the prima facie rights they derive from. But this is due to the complex, stratified ways in which a substantive theory can relate to the formal model from which it derives. The derivation of substantive rights can be a complicated operation, and it is important to distinguish the system of institutional rights which it is the task of institutions to defend and promote, from the system of prima facie, fundamental rights from which they derive

on the basis of a moral theory grounded on rights.

From this we can say that a theory of rights can deal with conflicts, since prima facie rights can be considered within this theory as morally fundamental without being absolute, and it is precisely in this that their strength and special priority lie. Substantive, institutional rights, those that are taken up, claimed, infringed, etc., in practice, derive their *raison d'être* precisely from prima facie, fundamental, abstract rights.

d) The discussion of rights is fed by social inequality because it is a highly individualistic morality

The idea is that asserting and defending rights obeys the law of the most advantaged individual: he who is in the position to claim rights takes advantage of a system, like that of rights, which upholds these positions of advantage, to the disadvantage of he who is not in a position to claim rights.

However, the idea seems fundamentally vitiated by a misunderstanding of what it means to claim a right, and how far the concept of rights extend. Indeed the concept of rights constitutes a highly complex and polysemic element, and its reclaiming cannot be reduced within the limits of a advantage-disadvantage relationship between individuals. Indeed, it is often precisely the disadvantaged who claim rights.

What qualifies a rights-theory is not extreme individualism, but pluralism, that is, first of all, the respect for the separateness of individuals: it is precisely in the name of pluralism that we can recognize that a rights-based morality is a morality worthy of human beings.

Through pluralism, besides, the concept of the individual is also able to value collective claims and group rights, without giving up its own autonomy from society (26). The individual is fully realized only within society and yet is an end to himself: society only serves towards his realization, and not vice versa.

On closer inspection, then, a theory like utilitarianism for example, apparently among those most opposed to individualism, ends up by being even more individualistic than a rights-theory. On the question of individualism, the confrontation between utilitarianism and rights could turn nasty, since it is possible to argue that at the basis of the utilitarian calculation there is a highly individualistic vision of moral value, and that this calculation is none other than an authorization to mass selfishness (27).

Individualism, therefore, whether or not it is a problem for rights, is not a problem only for rights.

e) Collective goods cannot be integrated into an individualistic morality like that based on rights

This criticism is a direct consequence of the preceding one. Here too, the idea is that, if the individual is the only sphere in which rights can be understood, it is impossible to speak in any way of collective entities for which goods, interests, or other are appropriated. But collective goods are expressions of the plurality of social relations, of moral perspectives, precisely those things which a rights-theory seeks to defend.

The existence and recognition of so-called group-rights, for example, shows clearly that a rights-theory can give value to the collective dimension. It is said that group-rights are none other than 'magnified' forms - that is, groupings within isolated communities - of individual rights. But, if this is true, the same could be said of collective utility.

So called group-rights, however, appear more like titles put forward by a form of collectivity with respect to power or society, than individual rights interpreted in the light of some communitary practice. The example of the collective right to self-determination is often quoted: it is not just a question of a public good, but of a true collective right to be invoked even against public power in the case of abuses or a failure to recognize the autonomy of the group or collectivity in question.

It is objected, however, that the so-called collective right to self-determination is none other than the expression of an interest, by the individuals who make up the group, in their own autonomy. In this way, such a right would be reduced to the sum of the individual interests regarding self-determination. The same is said for other collective rights, like the right to information, to a certain cultural identity, and so on. But, if the rights represent first and foremost titles, and not interests, to claim to or to defend, there is no difficulty either in recognizing the legitimacy of collective titles and goods, nor in reconciling the idea of self-determination with the rights-theory, since the basis of the right to autonomy is pluralism, and not individualism (28).

The idea of collective goods, then, can be fully integrated into a rights-based moral theory, just as much as the idea of individual goods, and it is no good objecting that collective goods necessitate communitary or aggregative theoretical perspectives, such as utilitarianism or communitarism. Separate rights taken separately do not exist 'before society'; they exist 'in society' and are the genuine expression of its plurality and richness.

f) A morality based on rights cannot attribute an intrinsic moral value to virtues and the pursuit of excellence

Virtue has to do with character and not actions: what use can a rights-theory make of virtues other than an instrumental one, just like utilitarian theories?

This objection, besides being fundamentally marred by the idea that rights are only concerned with duties (and hence that we cannot speak of virtue just as we cannot within theories of duties), is also upheld by the opinion that a rights-theory is another way, just like utilitarian theory, of instrumentalizing morality with a view to promoting and defending rights.

But rights have also to do with good and not only with duty, as it is clear by now if we consider that rights are first of all titles which invest individuals with the capacity to choose how to act, that is, how to realize their own good. As Aristotle teaches, virtue is pursued through action, and the good which rights are linked to can easily be conceived of, according to the Aristotelian idea of eudaimonia, as something which has to do with the activity of moral agents ([29](#)).

And, if this is true, good dispositions, like virtues (for example, the virtue of benevolence), can be integrated into a rights-theory and the pluralistic vision which it promotes in an acceptable fashion.

The virtue of benevolence, that is to say, the good disposition regarding the good of others, far from being a factor independent of rights and obligations, is required of anyone who has rights or is linked to anyone who has rights. In fact, duty makes no sense if there is not some disposition towards the good of others, just as respect for rights makes no sense if there is not some interest in the good of others.

Virtues, then, can accompany a rights-theory with profit: the recognition, respect, promotion, and defense of rights cannot be merely compulsory or instrumental affairs in the life of moral agents. The idea that rights and duties do not involve demands for a good disposition towards others does not seem to be in any way plausible.

g) A morality based on rights does not allow a moral meaning to be given to supererogation

Supererogation is identified with action that goes beyond duty: an act is supererogatory if it is praiseworthy and not wrong, that is, if it is morally permissible not to do it.

That a rights-based morality cannot account for this type of action is the opinion which derives, yet again, from the prejudice that within such a morality we can only speak of rights and duties: virtue, merit, excellence are supposedly eccentric, respect to a rights-morality.

But, as noted above with regard to virtue, this is by no means true. The objection, moreover, has little value if it is only directed at rights, because we could also say the same thing, for example, about a morality of duty, seeing that supererogation is an act 'beyond duty'. How can we justify a duty to act in a supererogatory way?

In the same way, how can we justify a supererogatory act in the light of some goal extrinsic to it? We surely cannot say that acting in a supererogatory way is useful, or appropriate to the pursuit of welfare, because by doing so, the supererogatory act would lose its characteristics of excellence.

The problem raised, in essence, does not only concern a morality of rights. The type of reasoning that would be appropriate to put forward with regard to this problem appeals to the general question, on which the idea of narrow morality rests, of the pretensions of normative reflection: to what extent can individual's behaviour be guided by normative ethics?

If we are disposed to defend the idea of narrow morality, what moral reflection must do is to guide actions and restrictions on action and not justify every aspect of moral life. There are aspects of moral life which can contribute to the smooth running of actions, to perspectives such as those based on rights, but which must not necessarily be 'explained' in terms of rights or other.

Virtue, excellence, supererogation, are aspects of morality which do not need restrictions and guidance: they need to be recognized with praise and merit, and these elements can appear in the normal social relations which accompany the defence, revendication, and promotion of rights.

III.

In the light of the general picture which emerges from the criticisms faced above, we can draw the positive conclusion suggested at the beginning: a rights-based moral theory, albeit through doubts and difficulties, really does seem possible, and for the following reasons at least:

- Rights are good candidates for satisfying the demands of normative ethical reflection. Such reflection can in fact be conceived in the manner of both the 'anti-theorists' and Hume as "a self-critical, non intellectualistic and socially responsible moral philosophy" and, therefore, base itself on a concept, like that of rights, which provides acceptable but not rationalistically and intellectualistically stringent criteria for moral reflection.
- Rights are good candidates for guiding action. If it is true that normative reflection shows itself to be more coherent within the limits of a narrow

morality, rights can fulfill the task of guiding moral action in an acceptable fashion.

- The discourse on rights can satisfy the criteria of impartiality and universality required by normative ethics. Impartiality, in the form of a fundamental right to equal respect or equal consideration and respect, or again, to equal respect in the balancing between various rights, is satisfied in the perspective offered by rights; indeed, equality is one of the most salient points in the history of the discussion of rights. And even universalizability, if difficult to realize through the idea of absoluteness (because of the problem of conflicts, the question of cultural relativism, and also the impossibility of grasping the infinite turns of moral life), can, through the idea of *prima facie*, be properly integrated into rights-based moral reflection.

- Rights, therefore, can satisfy the task required of any normative ethical theory, just as well as other ethical notions. Rights, that is, come to constitute the basis for a moral theory which can tackle with dignity the task of regulating conflicts between liberties, needs, interests, etc. of various moral agents and to ensure that each one is respected and held reasonably in consideration.

- The normative system based on rights can account for, perhaps better than others, the pluralism which characterizes moral life. Pluralism, in fact, beginning with respect for the separateness of individuals, is one of the fundamental features of the discussion of rights; and, if it is starting from the individuals that *prima facie*, fundamental, abstract rights are formulated, it is, however, in the name of cooperation, negotiation, and debate, that a rights-based moral theory can account for moral life.

- The other relevant ethical notions and a systematic moral reflection can be derived from a system of rights. Derivation, in fact, in a rights-based moral theory, is not to be taken in the strict sense, but rather in the light of a criterion of reasonableness. It is in this sense, as we have said, that goals and duties can be justified in the light of rights, their defence and promotion.

- A rights-theory can therefore be based on rights in the most important sense, as we said above, in which a moral theory can be based on X.

- A rights-based theory can tackle the problem of conflicts to the same extent as theories based on utility or duties can. Principles of negotiation or debate, methods of cooperation, and comparative evaluation of titles that holders of rights boast, together, for example, with a two-level method of reasoning (in which rights represent second-level reasons which can exclude utilitarian, deontological, or any other type of first-level reasons),

allow the problem of conflicts to be tackled, even within a perspective based on rights, particularly if the rights are conceived of as prima facie.

- A rights-theory can be presented as a 'third alternative' respect to consequentialism or deontology, an alternative which can accept elements of a deontological or consequentialist nature, but whose framework is based on characteristics proper to rights, such as their special priority or their permissive force. It is possible, for example, to base a moral theory on rights by looking to some concept of a valuable life, because this criterion does not imply considerations directed to welfare. The criterion of a valuable life, in fact, involves only admitting that if a human life has no value or if some lives have more intrinsic value than others, then this is by virtue of the quality of their life. (1) Just as it is possible, through rights, to look at the good in moral life or the interests of moral agents, without having to turn to criteria of measurement of consequences, or maximization of good or interests, and limiting the consequentialist elements to an instrumental position in the light of the defense and realization of rights in practice.

- The criticisms directed against this type of theory do not seem to be more serious than those which can be directed against consequentialist or deontological theories. Questions like those of conflicts, inequality, or supererogation, strike at the heart of normative ethical reflection and not just at a reflection based on rights.

We can therefore draw the following conclusions.

IV.

Everything said so far, in fact, allows us to assert the idea that, by looking to some formal model (starting from the determination of one or more fundamental, abstract, prima facie rights), we can substantially derive, through principles of articulation and rules of derivation - in essence, as said above, through rules of justice and social cooperation and coordination - a system of moral rights, which serves as a guide for moral action. It is in this way that we can have a system of substantive, institutional, concrete rights, which can be judged in the light of the model of prima facie, fundamental, abstract rights.

All this does not dispense us from being conscious of the difficulties and the ambiguities that a moral theory of rights inevitable has to face, particularly when it no longer has to outline a formal model, but a substantive one.

But the possibility that a rights-based moral theory can tackle with dignity the task of guiding moral action seems an important point. It must be remembered above all that the force of a normative perspective, like

that based on rights, lies in the possibility that it offers of reading the polyvalence and plurality, that is to say, the richness of moral life, through a system in which it is in any case possible, starting from a basic notion - that of moral rights - to derive other ethically relevant notions; but in which derivation is not conceived of in a strict sense, but rather by searching for, in the manifold reasoning of moral thought, a manifestation of the desire to attribute all individuals, equally (even given the greatest respect for differences and separateness), with the greatest opportunity of acting, in conformity with their own plans, but also with the need for cooperation and negotiation which derive from human coexistence.

It is from this force, surely, that a rights-theory also derives its greatest difficulties, since in the lack of some unitary criterion, the solution of conflicts first of all, and the evaluation of concrete cases in the light of a theoretical structure, becomes particularly difficult.

But it remains that moral life is too varied and pluralistic to be reduced to any unitary criterion. Forms of strategic rationality and limitations on the prescriptive force can help moral thought 'to be more realistic'.

In conclusion, then, it seems clear that talking of moral rights in our contemporary world can be more than mere rhetoric or 'ideological inflation', and it is to be hoped that moral debate will dedicate itself, as it has done with utilitarianism and deontology, to develop specific ethical theories based on moral rights.

Note

(1) Cfr. R. Frey, *Interests and rights. The case against animals*, Clarendon Press, Oxford 1980, p. 7. This paper only deals directly with moral and not legal rights, and it takes for granted the various aspects of the debate over the comparison-relationship between moral and legal rights and the possibility of applying the analysis of legal rights to moral rights. 'Rights', here, are therefore first and foremost moral rights. The fundamental references for the comparison-relationship between moral and legal rights are W. Hohfeld, *Legal concepts*, 1919, and its developments in recent debate. See for example, Kramer, Simmonds, Steiner (eds.), *A debate over rights*, Clarendon, Oxford 1998. [back](#)

(2) Starting from the pioneering work of W. Hohfeld, a lot of authors have examined the meaning and nature of the concept of rights and of moral rights. For an incursion into this examination, let me refer to B. de Mori, *Cosa sono i diritti morali?*, Verifiche, Trento 2000. [back](#)

(3) Only a few, among whom J. Mackie (see his *Can there be a rights-*

based moral theory, in Mackie, *Persons and Values*, Oxford 1985, pp. 118-119), J. Griffin (see his *Towards a substantive theory of rights*, in J. Frey ed., *Utility and rights*, Oxford 1984, pp. 137-160), P. Jones (see his *Rights*, Oxford 1988), J. Waldron (see his *Introduction to J. Waldron ed., Theories of rights*, Oxford 1984), and J. Raz (see his *Rights-based moralities*, in J. Waldron, *Theories of rights*, cit., pp. 182-200) have spoken, for or against, this idea. Most writers share the opinion of Bentham that rights are 'slaves' of utility or, in any case, of consequentialist frameworks, or the kantian idea of justifying moral rights on a deontological framework. It must be remembered, moreover, that the theory discussed here is above all a normative ethical theory, and not a political theory, and therefore, it deals with the possibility of a rights-based moral theory directly at the level of individual ethics and not on that of public ethics or political morality. [back](#)

(4) Against the attempts of utilitarianism, deontologism, or contractualism, to 'reduce' rights within them, we attempt here to speak of duties, goals, etc. in the light of rights. [back](#)

(5) R. Loudon, *Rights infatuation and the impoverishment of moral theory*, "Journal of value Inquiry", 17 (1983), p. 89. [back](#)

(6) See *A debate over rights*, cit., pp. 25-44. [back](#)

(7) The idea of a narrow morality can be traced directly back to Hume and Mill. See D. Hume, *Treatise on human nature*, III ii 2, and J. Mill, *On liberty* (1859) and *Utilitarianism* (1863). [back](#)

(8) See J. Bentham, *Works*, ed. by J. Bowring, Edinburgh 1843. [back](#)

(9) Cfr. *A debate over rights*, cit. [back](#)

(10) J. Feinberg, *Freedom and fulfillment*, Princeton University Press, Princeton 1992, p. 205 [back](#)

(11) See the famous example of the American constitutional right to freedom of speech in D. Lyons, *The correlativity of rights and duties*, "Nous", 1970, p.53. [back](#)

(12) In this way, moreover, a rights-based morality can cope with the problem of conflicts, since it will not be a question of solving a conflict directly between contrasting interests, freedom, or duties, for example, but rather of weighing up the conflicting titles comparatively (perhaps even by means of principles delineated for that purpose). J. Mackie, for example, has hypothesized settling conflicts between rights (which, moreover, for him are liberties and not titles) in the light of a model in which individuals constitute "centre-points" of force. See his *Can there be a rights-based moral theory?*, cit., p. 115. The idea of entitlement moreover, applied to the

concept of rights, carries with it a value of special priority which also explains why, in practice, rights can be infringed but not violated. See below. [back](#)

(13) J. Raz, Rights-based moralities, cit., p. 42. [back](#)

(14) Starting from a statement of S. G. Clarke (in his Anti-Theory in ethics, "American Philosophical Quarterly" (1987), p. 237), 'anti-theorists' in ethics, influenced by D. Hume and J. Mill, insist on the narrowness of the traditional or prescriptivistic-rationalistic conception of normative ethics, as not able to catch the most important aspects of ethical experience. See authors, like B. Williams, Charles Taylor, Annette Bayer, Stuart Hampshire, Charles Larmore, who have sided in favour of a complete revision of the interpretative criteria employed in normative ethics. [back](#)

(15) J. Mill, Utilitarianism (1863). [back](#)

(16) Cfr. A. Baier, Doing without moral theory, in ID., Postures of the mind, London 1985. [back](#)

(17) A detailed investigation is needed to tackle these questions, not only on the normative level, but also on the metaethical level of moral reflection, something not possible here. But the suggestion is important for defending the possibility of a normative theory based on rights. See, for all, Ullmann Margalit, The emergence of norms, Cambridge 1977. [back](#)

(18) What is important is that it is not necessary for a duty or a goal to be explained in terms of rights: a strict type of derivation is not necessary to have a rights-based theory. [back](#)

(19) W.D. Ross, The right and the good, Oxford 1930. [back](#)

(20) J.L. Mackie, Can there be a right-based moral theory? in Persons and values, cit., p. 115. [back](#)

(21) Certainly, there are special circumstances in which conflicts of rights can not easily be solved on these bases, for example when the conflict is between the right of the pregnant woman to decide what happens in and to her body and the right of the fetus to life. But this case does not seem to undermine the argument, because even on other bases it seems not so easy to solve this conflict of rights. It is not a case against the possibility of a theory of rights, but a case against the possibility of deciding a priori what to do in similar special circumstances. The strategy of solving conflicts on a case by case basis could be even more acceptable in these special circumstances, precisely because they are special circumstances. [back](#)

(22) See R.M. Hare, Moral thinking, Oxford 1981. [back](#)

(23) See R. Hare, *Essays on political morality*, Oxford 1989, pp. 131-147. [back](#)

(24) See, for example, J. Thomson, *Rights, restitution and risk*, Cambridge 1986. [back](#)

(25) It is not possible to examine these questions in detail here, but the suggestion is that a rights-theory can 'work' on a practical level, using the criteria of justice. The link between the concept of rights and that of justice is deeply embedded in the idea of a rights-based moral theory. [back](#)

(26) Cf. below for the question of group rights and collective goods. [back](#)

(27) It is not possible to develop the argument here. See, for example, B. Williams, A. Sen (eds.), *Utilitarianism and beyond*, Cambridge 1982. [back](#)

(28) Anyway, the question of group-rights, whether or not they represent genuine rights, whether and how their autonomy can be defined and their authority can be exercised over the individual by the group, whether the individual is the mother-cell of the group, or whether the group constitutes a genuine nucleus, is hotly debated and a source of controversy. See, for example, J. Crawford, *The rights of people*, Oxford 1988. [back](#)

(29) See Mackie, *Can there be a rights-based moral theory*, cit., p. 112. [back](#)