EXPLICATIVE-EXISTENTIAL JUSTIFICATION
OF HUMAN RIGHTS. ANALYSIS OF ROBERT ALEXY'S
ARGUMENT IN CONTEXT OF IS-OUGHT PROBLEM

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Abstract: This paper analyzes Robert Alexy's explicative-existential justification of human rights. According to the author, there are two problems connected with this concept. It cannot establish human rights universally and explain why we should accept them. In the paper, these questions are addressed in the context of the Is-Ought problem. Alexy's approach is compared with other theories that strive for human rights justification (basic needs approach, capability approach, and the foundationalism of Alan Gewirth). The author finds that in this respect all other theories have similar disadvantages. The inability to adequately elucidate the transition from Is to Ought is a general problem in moral philosophy, and therefore cannot diminish the position of Alexy's justification in this context. Although his approach does not really meet certain absolute requirements for good justification, if we evaluate it in relation to other available alternatives, we have to acknowledge its significant place in the philosophy of human rights. Even with Alexy's theory, however, the problem persists that it establishes rights of human persons rather than rights of human beings. It is therefore not able to fulfill some of its universalist aspirations.

Keywords: Human rights; justification; explicative-existential justification; is-ought problem; universality of human rights.

Summary: 1. Introduction. 2. Explicative-existential Justification: Alexy's Argument for Human Rights. 3. Why Accept Human Rights: Is-Ought Problem in Human Rights Theories. 3.1 General Remarks. 3.2 Alexy's Justification of Human Rights. 3.3 Basic Needs Approach and Capability Approach. 3.4 Foundationalism of Alan Gewirth. 3.5 The Best Possible, Not Perfect Justification. 4. Problem of Universalization: Rights of Human Beings or Human Persons?. Conclusion

1.   Introduction

Human rights are an integral part of our moral, political, and legal thinking. These rights are successful, and in practice they seem to be increasingly gaining influence. Yet there remains a strong intellectual skepticism toward them (Beitz, 2009, p. xi; Sen, 2004, p. 316). One of those who seeks to respond to this skepticism and provide credible justification for these rights is German legal theorist Robert Alexy. His explicative-existential justification is an interesting concept that deserves more detailed analysis. In this text I will try to understand its main difficulties in the context of the Is-Ought problem. I will argue here that this justification cannot establish human rights universally, and also has normative assumptions that we may or may not accept. However, these disadvantages

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must be evaluated in the context of competing approaches and theories. In the following lines, I will try to show that they too face similar problems, so Alexy's approach deserves a prominent place among the theories of justification of human rights.

The structure of the whole text will correspond to the above objectives. In its first part, Alexy's explicative-existential justification of human rights will be described, and its main difficulties outlined. The second part will consider the Is-Ought problem in relation to human rights justification. It will show how various theories deal with it. There are, of course, many such theories. Therefore, the focus will be on the three most discussed, most representative, or sophisticated – namely: basic needs approach, capability approach, and foundationalism of Alan Gewirth. The main objective of this part is to demonstrate that the objection that this problem is not satisfactorily addressed can be raised not only against Alexy's theory, but also against competing approaches. In the third part, the problem of the universality of the rights justified by Alexy's theories will be analyzed in more detail.

2. EXPLICATIVE-EXISTENTIAL JUSTIFICATION: ALEXY'S ARGUMENT FOR HUMAN RIGHTS

Robert Alexy focuses on justification of human rights in several of his texts, particularly in close connection with discourse theory. He defends the Kantian position. This position can be classified as liberal, because it understands as a function of human rights the protection of private and public autonomy (Alexy, 1996, pp. 209-210). According to Alexy, there are two credible justifications of these rights: explicative and existential. However, neither can stand on its own, so they must complement each other (Alexy, 2004, p. 21).

Explicative justification has a close connection with discourse theory (Alexy, 2006, p. 21). Its very name indicates that it should reveal something that is implicitly but necessarily contained in human practice (Alexy, 2006, p. 19). According to Alexy, discourse practice presupposes discourse rules. These rules express the ideas of equality and freedom that are the basis of human rights (Alexy, 2012, p. 11). As Alexy writes: "*To recognize another individual as free and equal is to recognize him as autonomous. To recognize him as autonomous is to recognize him as a person. To recognize him as a person is to attribute dignity to him. Attributing dignity to someone is, however, to recognize his human rights.*" (Alexy, 2012, p. 11) [1]

Alexy is aware that explicative justification alone is not enough. The first problem is that, despite all good reasons, one may not accept participation in discourse. The second is that one accepts participation, but only partially (for example, within some community but not outside of it) (Alexy, 2012, p. 11).[2] The third is that there may even be people who are unable to participate in the discourse at all (for example, those intellectually disabled).

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[1] Also compare Alexy, 2004, p. 20. However, some transitions that Alexy makes from an individual's autonomy to recognition as a person; from recognition as a person to attributing dignity to that person; and ultimately from the very concept of dignity to the granting of human rights, also pose difficulties. These leaps are not adequately explained in his theory

[2] Also compare Alexy, 1996, p. 217.

Alexy had previously considered these problems in the context of discourse theory: Discourse rules lead us to treat others as equal partners in the discourse, from which it cannot yet be inferred that they are to be treated as persons in other spheres. For such a conclusion to be valid, further premises must be added to this argument. Depending on what precisely is supplemented, he distinguishes the argument by autonomy, consensus, and democracy (Alexy, 1996, p. 222). For example, the argument of autonomy says that anyone involved in discourse assumes the autonomy of their partner, which excludes the rejection of certain human rights (Alexy, 1996, p. 222). If protection of individual autonomy is necessary, then, according to Alexy, the principle of autonomy corresponds to the general right to autonomy. A catalog of other special rights may be derived from such a right. Certain rights can be conceived as prerequisites for acting autonomously (e.g. social rights) (Alexy, 1996, p. 227). However, the argument of autonomy must be complemented by a consensus argument related to elements of impartiality and equality, as well as an argument of democracies linked to the thesis that those who are interested in democracy must also have an interest in human and fundamental rights (Alexy, 1996, pp. 228-233). However, such a solution does not answer all the questions raised. Why should we accept such premises? Ultimately, even accepting all these premises may not compel us to grant human rights to all human beings (including the intellectually disabled, unable to participate in discourse).

However, Alexy responds to these problems later with his concept of existential justification. The point being that we want to see ourselves as discursive and rational beings – that we decide to be such beings (Alexy, 2012, p. 12). Such a decision is of an existential nature (Alexy, 2006, p. 22). But why should we do it? To make this approach meaningful, does it not presuppose versions of perfectionism and essentialism? Interestingly, Alexy himself states that the discursive nature of a human being can be characterized as the ideal dimension of an individual (Alexy, 2012, p. 12). He claims that man cannot live without argumentation. The consequent rejection of argumentation would have fatal consequences (Alexy, 1996, p. 217). At this point, however, we can take over one of Alexy's earlier thoughts, which was originally related to our interest in adhering to discursive rules (Alexy, 1996, pp. 218-220). Even if one is not interested in understanding people as discursive beings and accepting the consequences of such a decision, he can accept them because it will be beneficial to maximize his individual benefit. But if we were to let utilitarianism enter into Alexy's theory through the back door, wouldn't that break his intentions?

Thus, the key issue associated with the approach discussed is that it fails to sufficiently explain why the rights it establishes should be universally accepted.[3] Here, we encounter problems of acceptance and universality.

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[3] The requirement for universal acceptability is often associated with human rights. How could these rights be universal if someone did not have to accept them? The reviewer of this text asked an interesting question whether Alexy also places such high demands on these rights. Klatt points out that the necessity of Alexy's justification "is conditional upon the game of giving and asking for reasons." (Klatt, 2020, p. 169) This, of course, creates a limit to its necessity and makes it relative. At the same time, however, Alexy emphasizes that we cannot live without argumentation (Alexy, 1996, p. 217). I therefore conclude that Alexy assumes that human rights in practice will be accepted by all because everyone sometimes participates in discourse.

3.   Why Accept Human Rights: Is-Ought Problem in Human Rights Theories

3.1   General Remarks

One reason for doubts about human rights is that their justification theories have so far failed to satisfactorily address the problem of the transition from facts to norms. Human rights are a normative concept, so it is absolutely acceptable to ask whether we can in some way derive them from some facts and, if not, why we must accept their normative assumptions. In general context, this question is labeled as one of the fundamental and key problems of moral philosophy (Gewirth, 1973, p. 34).

The first possible answer to this problem is to accept that the transition from Is to Ought is not possible (Witkowski, 1975, p. 235). It is caused by a different function of the two spheres,[4] which in the first case is related to the description of (empirical) reality and in the second case to the prescription – setting standards for what should be. In support of that position, it may also be pointed out that in a logically correct manner, a normative element which would no longer be present in an argument premise cannot be contained in its conclusion. [5] So if we pretend that we derive norms from facts, we only conceal some normative assumptions in our argumentation. So, all we can do is make our argument more transparent and explicitly formulate these assumptions, then it depends on everyone's free will to accept them.

In the above case, however, the question always remains of how to justify the norm that stands first - the norm from which all other norms are derived. The validity of such a norm must be self-evident or there cannot be a generally valid standard for assessing whether something is right.[6] It is not at all easy to prove that any normative concept is self-evident. This is because claims of this type have historically been manifested as misleading, and therefore even justifications, which are based on self-evidence of a concept, do not have much confidence among academics (Alexy, 2004, p. 18; Bobbio, 2005, p. 13; Freeman, 2011, p. 68; Gewirth, 1984, p. 5). A positive answer to an Is-Ought problem would therefore be crucial. When we derive the norm only from another (perhaps more general) norm, we only postpone the question about its justification (Gewirth, 1973, p. 37). More precisely, we can continue in such questioning forever. If we put a set of facts at the beginning of our judgments, we could avoid this endless chaining.

There are a number of approaches which consider that deriving norms from facts is possible.[7] Although valuable, a number of fundamental objections against them can be

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[4] Compare some ideas in the text Searle, 1964, p. 53.

[5] In addition, Alan Gewirth gives several other reasons in Gewirth, 1973, pp. 38-40.

[6] As one possible solution, there is also a move toward coherentism, an approach that emphasizes the coherence of our beliefs. In its context, it is not necessary for the norm to be self-evident. Suffice it to fit into a certain coherence set. The disadvantage of this approach, however, may be that there may be many coherent but mutually conflicting sets of beliefs.

[7] Gewirth, for example, distinguishes seven such approaches (Gewirth, 1973, pp. 40-46). For more detailed characteristics and analysis of various theories seeking to bridge the gap between factivity and normativity, see Hudson, 1969, p. 99 et. seq.

raised (Gewirth, 1973, p. 46). Many of these theories are burdened with indeterminacy and do not guarantee that two persons will derive identical moral judgments from the same facts using the same mental procedures (Gewirth, 1973, p. 46). Others allow us to derive norms from facts only hypothetically, that is, assuming we accept a particular goal or purpose (Gewirth, 1973, p.43 et. seq). They thus require prior acceptance of some normative basis. It is therefore not possible to say that some of these theories offer us a completely credible solution. In the following lines, however, we will not examine these general theories, but will focus on how Alexy's approach and other selected theories of human rights justification deal with the Is-Ought problem.

3.2   Alexy's Justification of Human Rights

It has already been suggested how Robert Alexy is dealing with the IS-Ought problem. At first glance, it seems that a reference to fact in Alexy's justification is not needed because it is based on the assumption that people already accept certain norms. If they are to be consistent, they must subsequently embrace human rights. What is important is that from the factual statement that we participate in discourse, we can only logically correctly deduce that we act according to its rules – not that we accept them as something valuable. If Alexy's reasoning is to be correct, we must at the very beginning accept the assumption that these rules are of high value, but that cannot be inferred solely from acting in accordance with them. Even if we accept them as valid, we can attribute very little weight to them (e.g., in comparison with the requirements arising from the principle of utility). The question of their value is independent of our recognition. Similarly, the attribution of human rights to all human beings requires acceptance of some normative assumptions (see Part III of this article). Is the explicative part of Alexy's argument a justification? It only tells us what we do, but no longer gives us an argument why something is good.

3.3   Basic Needs Approach and Capability Approach

If we criticize Alexy's approach to the Is-Ought problem, we should compare it to how other human rights justification theories address it. They are not too successful in its solution. Some of them rely on their normative assumptions to be accepted by at least most people as evident. This is true, for example, of approaches that seek the basis of human rights in various concepts of basic needs.[8] One of their main representatives, David Miller, argues that needs, in contrast to various interests, are capable of generating obligations. He admits, however, that this thesis is based solely on his intuition and that he is unable to adequately explain it (Miller, 2012, p. 422). The problem is that need itself is a descriptive, not prescriptive, category. Even if we state that we have needs, it does not imply that we also have the right to meet our needs. Such a claim does not follow from any fact and if it is not accepted as self-evident, then it must be justified by something.

Jeremy Waldron comes up with an interesting idea in this context. According to him, we strive to meet our needs. For this reason, the primary requirement that goes with

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[8] For the same reason, some earlier versions of these theories are strongly criticized by Alan Gewirth (Gewirth, 1984, pp. 7-8).

them is directed toward us. It can be expressed as: "P needs X. P should try to get X for P." (Waldron, 2000, p. 123) But this idea is misleading for two reasons. First, it confuses needs with desires. Undoubtedly, we tend to strive for something we desire. However, the same does not automatically apply to what we need. For example, a person may need the most to care for her health, yet she smokes cigarettes and drinks alcohol. Secondly, we cannot infer from the striving of something that we *should* strive for it. Waldron commits a common mistake here because his judgment contains a concealed normative premise that we should try to get what we are striving for (from his point of view, what we need).

The capability approach of Amartya Sen and Martha C. Nussbaum suffers from similar difficulties when it comes to the justification of human rights. While the previous theory focuses on the concept of needs to be met, the concept of capability is much more related to the freedom of agents, and focuses on what a person is able to do and able to be (Nussbaum, 1997, p. 285). It does not matter, therefore, that we carry out the activity itself, but rather that we are able to do it if we choose to do so. For example, everyone has a need for nutrition. If she can fulfill it, but freely chooses not to do so (e.g. she will fast for religious reasons), it is her business (Nussbaum, 1997, p. 288; Sen, 2005, p. 155).

Again, Sen and Nussbaum have strong intuitions that something (this time our capabilities) should be protected and guaranteed through certain rights. Yet even here, one can argue that we can recognize that someone is bearer of a certain capability, but at the same time we can deny that she has the rights to any specific treatment related to it (Nussbaum, 1997, pp. 295-296). Even in this case, the transition from facts to norms is not properly explained and the capability approach thus faces exactly the same problem as various concepts of basic needs.

3.4 Foundationalism of Alan Gewirth

Another approach to be considered here is the foundationalism of Alan Gewirth. It is one of the most sophisticated justification theories of human rights that still raises discussions among academics.[9] Interestingly, Gewirth himself rejects that the argument he seeks to justify human rights is foundational, because it does not begin with a moral or evaluative statement that is conceived of as self-evident (Gewirth, 1984, p. 13). On the contrary, he is convinced that his approach has not a normative but factual basis and that he (at least in the context of human rights justification) has succeeded in solving the Is-Ought problem.

Gewirth first seeks a common element of all moral principles. He identifies this in that all such principles focus on how persons should treat each other (Gewirth, 1984, p. 12); so they have a common emphasis on human action (Gewirth, 1978, p. 25). Every moral principle is directly or indirectly related to how people should act (Gewirth, 1978, p. 25). All therefore assume the existence of some actual or prospective agent (Gewirth, 1984, p. 13). Of importance, according to Gewirth, each action has a normative structure, which implicitly includes certain evaluative and deontic judgments. These lead us to a superior moral principle. By denying it we would find ourselves in contradiction. We

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[9] In recent years, for example, these two authors have paid close attention to Gewirth's human rights justification (Kohen, 2007, p. 38 et. seq; Boylan, 2014, p. 157 et. seq.)

would not meet the demands for deductive rationality and our moral principles would not be rationally justifiable (Gewirth, 1978, p. 26, 48; Gewirth, 1984, p. 12).

According to him, every action has two key features (Gewirth, 1978, p. 45). First, it is free or voluntary, which means that the agent controls or can control his behavior through unforced choices. Second, it is purposive or intentional in the sense that the agent pursues it by the attainment of a goal which constitutes his reason for action (Gewirth, 1984, p. 14; Gewirth, 1978, p. 22, 27, 37; Gewirth, 1973, p. 48). According to Gewirth, the structure of action can be described as follows: "*I do X for end or purpose E.*" (Gewirth, 1984, p. 14) It is a purely descriptive sentence (Gewirth, 1973, p. 50). From it he deduces that "*E is good.*" (Gewirth, 1984, p. 15) This, he says, bridges the gap between Is and Ought (Gewirth, 1984, p. 15; Gewirth, 1978, p. 57). Every agent implicitly has to make an evaluative judgment that its purposes are good, and, therefore, also his freedom and well-being as the necessary conditions for his actions to achieve those purposes (Gewirth, 1978, p. 48, 52, 53). Of course, everyone can at the same time evaluate their goals from other perspectives as bad, but at least from an instrumental point of view they always consider it a good one. It is the result of his unforced choice. He confirms the good character of his actions and his goals by deciding to do them (Gewirth, 1973, pp. 50-51).

Thus, every agent recognizes his freedom and well-being as a necessary good (Gewirth, 1978, p. 62). Without them, it would not be possible for him to achieve his goals (Gewirth, 1973, pp. 50-52). In such a case, however, according to Gewirth, he must logically accept that he has a right to these generic features (Gewirth, 1978, p. 48, 63; Gewirth, 1973, p. 52). He must therefore state, on the basis of his prudential criteria, that others must at least not interfere with his freedom and well-being (Gewirth, 1978, p. 66; Gewirth, 1973, pp. 52-53).

However, such rights are prudential and not moral (Gewirth, 1984, p. 16). To change their character in this respect, we need to take one more step: according to Gewirth, I have the right to freedom and well-being because I am a prospective purposive agent. If I reject this, I should mention some other characteristic that gives me these rights. Otherwise, I must attribute the same rights to everyone who fulfills the same condition – that is, they are also agents in that sense. This requirement follows from the principle of universalization (Gewirth, 1978, p. 48; Gewirth, 1973, p. 54). Along with that, I have to accept that I have to refrain from interfering with these rights attributed to other agents (Gewirth, 1973 p. 57). These rights thus become moral (Gewirth, 1984, pp. 16-17). Since freedom and the well-being of the agent include certain physical and psychological dispositions such as life, physical integrity (and its means such as nourishment, clothing, shelter), mental balance, etc., (Gewirth, 1978, p. 54) human rights thus gain sufficient scope and are capable of incorporating most of the rights contained in the current positivized catalogs of rights.

This theory, of course, has its critics.[10] The fact that Gewirth managed to solve the is-ought problem is rejected, for example, by Paul Allen (Allen, 1982, p. 211, 223). According to him, Gewirth's steps would logically be correct if we understood them

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[10] A number of other criticisms can be raised against Gewirth's theory. One example is about a known patient in a permanent and irreversible vegetative state that can never be a normative agent and therefore should not have any human rights under this approach. (Hapla, 2016, p. 110).

all as descriptive, or prescriptive sentences. He refuses, however, that Gewirth could successfully bridge the gap between Is and Ought (Allen, 1982, p. 215). Gewirth does not at all justify the transition from the descriptive sentence "The agent recognizes that the purpose of his actions is good." To the evaluative judgment, "My purpose is good." It would be correct to infer from his premise that the agent has a certain state of mind, that is, to derive a statement like, "I must think that the purpose of E is good." Instead, Gewirth incorrectly derives value judgment from it (Allen, 1982, p. 217). If, as a starting point for his reasoning, he only takes some fact, then he is at most able to deduce that the agent has a state of mind in which he recognizes that his actions are good (Allen, 1982, p. 218). According to Allen, his reasoning blurs the distinction between the description of the prescription and the prescription itself (Allen, 1982, p. 219). Gewirth then makes the same mistake in other parts of his judgment (Allen, 1982, p. 221). His argument thus contains several concealed normative premises (Allen, 1982, pp. 223-224).

Another philosopher who criticizes Gewirth is W. D. Hudson. He again focused on the transition to the prescriptive judgement "E is good." He criticizes Gewirth for a similar mistake criticized by Allen, but already formulates Gewirth's possible answer: "[D]*ialectical method leaves no room for any such distinction. From the standpoint of the agent, what is thought good cannot be contrasted with what is good; the question whether the former is the same as the latter is not an open one.*" (Hudson, 1984, 116) Such an answer would make sense. Hudson, however, notices another mistake. There is still one question open, even from the standpoint of the agent (Hudson, 1984, p. 123). He literally writes: "*Namely, is it good that I do X for purpose E? This question may mean either of two things. First, it may mean, even though I think E good, is it good that I am doing X for the sake of E? The answer to this may be no. I may will the end but not the means, approve my purpose but not the action whose purpose it is. But, second, the question may mean, is it good that I think purpose E good? And again the answer may be no. I may evaluate negatively my own positive evaluation of E. I may wish I were an agent who wanted other things.*" (Hudson, 1984, p. 123) An agent can therefore evaluate his own evaluation (Hudson, 1984, p. 124). Gewirth does not seem to provide a completely satisfactory answer to this. Even this approach, despite its sophistication, is thus unable to cross the gap between Is and Ought. Even in this case, we must first accept certain normative assumptions in order to be logically correct.

Despite the above, many pluses must be added to the approach analyzed. It explicitly and in detail describes many steps that are not sufficiently discussed in other justification theories of human rights. At the same time its normative assumptions can be considered minimalist. Emphasis on the elements that are a prerequisite for all morals, and a requirement for consistency, puts this theory on a not-so-unshakable, but relatively solid foundation, compared to many other competing approaches. If I accept morality, I should also accept human rights or I logically contradict myself. If I accept being an agent with all the consequences, I must take these rights seriously.

3.5   *The Best Possible, Not Perfect Justification*

It seems that even the most sophisticated justification theories fail to cope with the transition from facts to norms. If we are to consider the procedures presented by them to

be logically correct, we must always identify within them the normative premises which must be accepted. At first glance, this appears to be a serious defect. How could justification of human rights be successful if it does not even fulfill the necessary condition of logical correctness? However, if we consider possible alternatives to these rights, will it not be possible to address this complaint against all approaches?

In any situation, we can ask why it is right to accept or reject something. If the transition from Is to Ought is impossible, not only in the context of human rights justification but also in general, it cannot testify to their detriment in relation to other theories. When considering what to accept, whether these rights, or something else, the reasons for our response must lie in something other than how successful such a concept is in solving an is-ought problem.

The ideal situation from the point of view of the defense of human rights would be if there were a general consensus on our normative assumptions, and any disputes would only be due to the logically erroneous judgments derived from them or to the addition of false empirical premises.[11] Alternatively, if it were shown that the same idea of human rights could be correctly achieved even from the different normative assumptions we have.[12] However, it is also possible that we are based on very different assumptions that can lead us to very different conceptions, many of which will have nothing to do with these rights. This is the most pessimistic option. Nevertheless, we have nothing better than to formulate our normative premises openly and to discuss them and what they imply. Confronting different approaches and arguments is the best possible guarantee of the quality of the winning position. Such justification will never be absolute, but will be optimal as far as possible.

Concepts against which alternatives are not formulated are at high risk of becoming lazy. That is why I am concerned not that the justification of human rights cannot fulfill any absolute demands, but that we can hardly find anyone in today's world to come up with a truly sophisticated concept that competes with those rights. Conversely, criticizing them from the absolute perspective may be a symptom that there are no serious alternatives to which they could be compared.

4.   Problem of Universalization: Rights of Human Beings or Human Persons?

By definition, human rights are considered to belong to all human beings (Donnelly, 2013, p. 10; Feinberg, 1992, p. 154; Freeman, 2011, pp. 66-67; Gewirth, 1984, p. 1; Kohen, 2005, p. 6). They should therefore be universal in the sense that they belong to everyone without distinction. However, not every theory of justification of human rights is capable of justifying them to this extent.

Let's stay with Alexy's theory first. If we accept performative contradiction as its starting point, then nothing compels us to grant human rights to all human beings. From trying to persuade someone by reasoning, we can infer that we at the moment recognize

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[11] I do not present these considerations as a solution to the Is-Ought problem. I only describe possible factual situations and evaluate them in terms of the goal of defending human rights.

[12] This idea corresponds to Rawls' concept of overlapping consensus (Rawls, 2005, p. 133 et. seq.)

her as a rational and autonomous being. However, the same logic no longer forces us to apply this recognition to other people, or even to the same person in other situations. To extend the validity of Alexy's reasoning in this way, we had to supplement it with the argument of universalization: we would have to ask ourselves what characteristics we attribute to human rights to someone, and then confess them to all who possess that characteristic. It could be our ability to participate in discourse. In this case, however, there remains a group of human beings who cannot participate and therefore should not be holders of human rights. Moreover, such an extension of the original reasoning deprives it of its previous elegance. While originally it was based on our own actions, it now becomes the attribution of some ability to people. Alexy himself tries to solve these problems by adding the existential component to the explicative justification, which cannot be considered too convincing for the reasons described above.

However, other justification theories of human rights suffer from very similar problems. Gewirth's theory, for example, has traditionally been criticized for establishing the rights of persons rather than the rights of human beings (Renzo, 2015, p. 64; Kohen, 2005, p. 64). For example, a patient in a permanent and irreversible vegetative state is no longer a normative agent, nor will he ever be. So why should he be a human rights bearer? (Hapla, 2016, p. 110) However, according to Massimo Renzo, theories of basic needs can solve this problem satisfactorily (Renzo, 2015, p. 575, 577). These people are not normative agents, but they certainly have needs. Personally, I am skeptical about Renzo's theory. How do people's needs in a coma differ from those of animals or plants? While Renzo emphasizes in his text that human biological needs also have a social dimension, (Renzo, 2015, p. 584) this is not the case with such people. If we wanted to conclude that even a human in a permanent and irreversible vegetative state is a bearer of human rights, while an animal is not, we would have to go for some kind of essentialism and approach that has religious roots (Hapla, 2018, p. 9).

So, it seems that the complaint we can make about the universal nature of human rights against Alexy's approach is equally relevant to most competing theories. It is therefore worth considering whether the attribution of human rights to such patients is justified at all. Of course, this is not to say that positive law should not grant them certain rights. However, it will do so for reasons other than that of certain universal moral rights.

CONCLUSION

It is true that Alexy's explicative-existential justification fails to deal with some serious problems. However, if we compare it to other theories of human rights justification, we find that the same complaints can be directed against them. In addition, it is very likely that even theories justifying concepts competing against these rights would have trouble solving the Is-Ought problem. This problem is of a general nature. If we evaluate the strengths and weaknesses of Alexy's approach, we must be well aware of this context.

The appreciation should be given to an explicative argument and the link between the concept of human rights and discursive theory rather than its existential justification, which is purely speculative. Alexy builds on Kant's tradition and thus adds one very

important stone to the construction of the justification of human rights. However, this must be seen as a task for many other theories. It is useful here to build on Rawls' idea of overlapping consensus and show that we can defend human rights on the basis of not one, but all of the most important ethical theories. In the context of Kant's, Alexy makes a good contribution to this. This is its unmistakable importance.

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