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Human rights, rhetoric or reality?

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The question of effectiveness is the main theme of this article, notably as this refers to the rights contained in the European Convention on Human Rights and Fundamental Freedoms and to the main issues at stake today. The second part of the article, explains the role played by the European Convention on Human Rights among all the universal and regional instruments for the protection of human rights. Finally there is a critical look at what might be termed a degree of 'inflation' of the fundamental rights.

1. Introduction

In the *Dictionary of Ethics and Moral Philosophy*, the author of the entry 'Rights. Rights and freedoms' poses the following question:

> Déclinés au pluriel, les droits et libertés semblent désigner la situation des personnes au sein d'une communauté plutôt que la position du sujet d'un droit universel construit par référence à l'idée d'autonomie… : comment évoquer en même temps une diversité d'objets et l'unité d'un principe, la pluralité des manifestations juridiques et politiques de l'individu moderne et l'identité de l'homme? Le sens commun démocratique a depuis longtemps déjà acclimaté ce paradoxe par l'idée des droits de l'homme où se conjugent harmonieusement l'invocation d'une humanité universelle abstraite et la dérivation des formes de liberté et des contenus de droit qui lui correspondent.[1]

In this contribution, I will confine myself to certain aspects of the positive side of human rights; in so doing, I will deal mainly with the rights set out in the international instruments and, in particular, the *European Convention on Human Rights and Fundamental Freedoms of 4 November 1950*, whose 50th anniversary we recently celebrated. Nowadays, accession to the Convention is a prerequisite for joining the Council of Europe, an organization formed in 1949 (in circumstances that warrant recording) in the aftermath of the Second World War. The Council has now opened its doors to an enlarged Europe, stretching from Vladivostock to Coimbra, which it is important to attach to the 'principles of pluralism, tolerance and broadmindedness without which there is no democratic society'. As René Cassin noted in 1950, the Convention rights are the seeds of peace. They are also the 'essential bridges to building the future', as the President of the new European Court of Human Rights pointed out at the

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inauguration ceremony on 3 November 1998. The text of the Convention operates at two levels: the rights guaranteed and the guarantee of the rights[2]. Those two levels in turn raises two questions. First, are human rights rhetoric or reality? Second, how can 'high ideals' be translated into 'credible action'? That is the crux of the matter and we are asked to judge it in a context in which the problem currently is perhaps not so much a lack of protection as too much protection, with the risk that that entails of the benefit being 'taken for granted' (*la banalisation du bien*).

Through the question of effectiveness, which will serve as my main theme, I will refer in the first part of this contribution to the rights contained in the European Convention on Human Rights and Fundamental Freedoms and to the main issues at stake today. In the second part, I will attempt to explain the role played by the European Convention on Human Rights among all the universal and regional instruments for the protection of human rights[3]. Finally, in the third part, I will take a critical look at what might be termed a degree of 'inflation' of the fundamental rights.[4]

2. The European Convention on Human Rights and the rights it guarantees

The rights guaranteed are contained in Section 1 of the European Convention on Human Rights, the Preamble to which traces the outlines of a *European ordre public*. If the aim of the Council of Europe 'is the achievement of greater unity between its members', one of the methods of achieving it is 'the maintenance and further realisation of human rights and fundamental freedoms'. These rights and freedoms 'are the foundation of justice and peace in the world' and are best maintained 'by an effective political democracy'. Democratic society is the focal point of human rights, the unifying force within a Europe of human rights in which the Convention acts as a sort of basic law.

Democracy is the central value of European *ordre public*. Yet much remains to be done for, as C. Lefort has said, democracy is 'ce régime inouï qui fait l'expérience historique de l'indétermination de ses repères'[5]. Furthermore, in the light of what has happened, for instance, in the former Yugoslavia and of what is happening before our eyes in other parts of the world – events as serious as those that saw the birth of the Convention – we are entitled to pose questions about European *ordre public*: reality or simply pious hope?

2.1. Rights-freedoms

Human rights constitute a 'bedrock of principles' on which democratic political regimes are built, but what form do they take? There is the right to life: the fundamental expression of the right to the integrity of the person (Article 2); the prohibition on torture and inhuman or degrading treatment (Article 3), which constitutes an absolute right and one that may be used indirectly to deal with situations in which, with the turning away of despairing people (notably aliens), human dignity is at stake; the right to liberty and security, notions which, contrary to what is often said, are not contradictory (Article 5); the 'right of access to the law' and thus to receive a fair hearing and justice (Article 6); the right to respect for private and family life – quite simply, to get on with one's life (Article 8); the right to freedom of conscience, thought and religion – an end to intolerance (Article 9); and finally, the right to freedom of expression

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(Article 10) and freedom of assembly and association (Article 11) which, while laying the foundations to the right to communication in the public sphere, is also subject to limits that, in turn, raise issues at the fringes of the social order. The legitimacy of a right stems not from the majority's acceptance of it, but from the minority's ability to contest it. The distinctive feature of democratic debate is that everyone is permitted to express different opinions.

The provision of an effective remedy for violations of the rights and freedoms thus guaranteed (Article 13) and the prohibition on any discrimination in their enjoyment on grounds such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status (Article 14) provide the natural complements to the recognition of civil and political rights, even though currently this is undoubtedly the area that is most fraught with difficulty. The Salgueiro da Silva Mouta v. Portugal judgement of 21 December 1999, in which the European Court of Human Rights held that awarding parental responsibility for a child to the mother solely because of the father's sexual orientation was contrary to the non-discrimination rule, provides a clear illustration.[6]

This base of rights-freedoms (described by Marx as 'selfish' rights) reflects, as Ricoeur noted, 'la primauté éthique du vivre-ensemble sur les contraintes liées au système juridique et à l'organisation politique'.[7] Now, however, with the redefinition of the role of the State, human rights are being increasingly relied on in disputes between private individuals or groups with the result that their horizontal application – individual against individual – is developing alongside their vertical application – individual against the State. Moreover, increasingly, a requirement that States take action is now being added to the requirement that they be passive. The requirement takes the form of positive obligations, even including obligations to take preventive action. Thus, for example, in its Nasri v. France judgement of 13 July 1995, the European Court of Human Rights held that the deportation of a young deaf mute Algerian national who had never received in the host country the healthcare that his condition demanded was contrary to Article 8 of the Convention. Lastly, the State's obligations exist not only on the national territory, but also in areas over which it exercises its control (for example, the international airport zone in the Amuur v. France judgement of 25 June 1996). As Judge Evrigenis stressed, the responsibility of the State is becoming an 'ecological' one: it is increasing in depth, space and time.

2.2. Equality rights

Rights and freedoms are not exercised in a vacuum. They necessarily relate to a particular person in a particular situation within a community. The concept of welfare law provides a good illustration of the notion that the holder of the right is the actor in the social relations through which he establishes or destroys his identity, through which he lives or merely subsists. Education, health, employment protection, housing, work, and culture all become rights entitlements that require action or intervention if the necessary conditions for their fulfilment are to be created. As Touraine has said: 'the recognition of fundamental rights would be devoid of substance unless it helped to provide security for everyone and continually enlarged the domain of legal guarantees and State intervention that protect the weakest'.[8] That is precisely why, at times, talk about human rights becomes intolerable, if not insulting, for some.

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There is here a sort of reversal of perspective: whereas rights-freedoms are 'rights to do something …', equality-rights are 'rights to obtain something …', a further feature being that they are more likely to be exercised collectively. As the European Court of Human Rights has often stated, it is important to give the rights recognized their full scope since the Convention is a living instrument whose interpretation forms one body with the text and whose aim is to 'guarantee rights that are not theoretical or illusory, but practical and effective'. In the Airey v. Ireland judgement of 9 October 1979, which concerned a woman's inability, through lack of funds, to seek a divorce, the Court acknowledged that there was no watertight division separating the sphere of economic and social rights from the field of rights covered by the Convention and that 'hindrance in fact can contravene the Convention just like a legal impediment'.

As regards a legal basis, a new draft protocol (Protocol No. 12) to the European Convention on Human Rights, is likewise geared towards securing a better recognition of equality, and was open to the signature of the States, in Rome, on 4 November 2000, the anniversary of the Convention. It is a symbol. The draft contains a general equality and non-discrimination clause, reflecting the notion that the tools of fundamental rights are constantly being forged, made ever sharper, ever more precise.

2.3. Solidarity rights

The subject of the interdependence and indivisibility of fundamental human rights is now more than ever on the agenda. Viewed from one angle, it suggests a deepening, a widening of the rights in time: the third-generation rights – solidarity rights concerning the right to peace, the right to development, the right to a sound environment and the right to respect for mankind's common heritage – are already on the horizon. Admittedly, there has yet to be devised a means of protecting them through the technique of human rights, but our grasp of them is now far beyond the purely imaginary. From another angle, it suggests a widening in space: human rights are also on the horizon of the European Union, which could harness its formidable economic power to promote them. On 17 December 1999 the European Union opened the workshop on the *Fundamental Rights Charter* in Brussels. The work continued throughout 2000 and reached its climax at the Nice summit in December. The issues raised by this draft Charter – such as which rights should be recognized, for whom and against whom? – provide an opportunity for a critical re-examination of the very notion of fundamental rights.

3. Effectiveness and the methods for achieving it

Today, perhaps the real issue here is how rights – especially human rights – are taken 'seriously', to borrow Dworkin's expression?[9] 'When it comes to human rights', Judge Pettiti used to say, 'there is only one valid criterion to apply and that is the effectiveness of the protective measures. All the rest is but diplomatic language, comparative-law academicism, proclamation, self-satisfaction, keeping up the appearance of the rule of law'. Human rights are neither an ideology, nor a system of thought. If they are to have any meaningful bearing on the life of individuals and communities, they must be translated into action. Human rights

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are not just *logos*, they are also *praxis*. That constraint means that the recognition of human rights is inseparable from the machinery used to ensure the rights' respect and protection.

But what do we mean by effectiveness? When the objective of a norm is compared with the degree to which that objective is attained, it is the norm's efficiency that is measured; i.e. whether it has adequately produced the desired effects. On the other hand, when the effect of a norm is compared with the intended effect, it is the norm's effectiveness that is measured; i.e. whether it has succeeded in putting the new rule into everyday practice. In the study of the sociology of law, the value of the concept of effectiveness in terms of what it explains is that it enables the gap separating law from the social reality which the law is supposed to regulate to be measured; i.e. effectiveness is a tool for measuring the gaps.

Where human rights are concerned, effectiveness is a complex issue as it is linked, positively, to the manner in which human rights are recognized and implemented and, negatively, to the manner in which forms of resistance are organized. Effectiveness is thus inseparable from its converse, ineffectiveness.[10]

With the large number of institutions now providing human-rights protection, the means of achieving effectiveness are numerous and may interlink. I will not refer to the prior political measures (which are essential), but will confine myself to legal remedies. In so doing, I will refer to both the national and international levels, the former because they constitute an absolute priority, the latter because that will enable me both to clarify matters regarding the multiplicity of existing instruments and to express some views on that very subject.

3.1. The national level

At the outset, it should be recalled that: 'notwithstanding the vital role played by international mechanisms, the effective protection of human rights begins and ends at the national level'[11].

In this connection, the process currently under way in the United Kingdom with the adoption of the Human Rights Act 1998 'incorporating' the Convention into domestic law (whose main provisions entered into force on 1 October 2000), is remarkable. Moreover, if one retraces the progress of the impact of the European Convention, the significance of the various stages stand out. It is almost like a life story. It started with a reaction of distrust and rejection, one characterized by a wariness of the European norms, which were considered to be 'a foreign nuisance' that put the proper administration of the domestic law at risk. A body of resistance formed. While, in some countries, such resistance takes the shape of competition between instruments, in England, as in others, it manifested itself as a presumption that, come what may, the domestic legislation was compatible with the United Kingdom's international obligations. The turning point proved to be the internal debate undoubtedly provoked by the European Court of Human Rights' Sunday Times v. the United Kingdom judgement in 1979. It was followed by a dialogue between the two jurisdictions that paved the way for the recognition of the international norm and ended with the establishment of a system of formal and substantive complementarity permitting sustained interaction between the two legal orders and perhaps leading to the anticipation of the European standards. A special effort made to provide the judiciary with training on the European Convention on Human Rights and the machinery of the Court is impressive and will, without a shadow of a doubt, bear fruit.

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3.2. The international level

I should like to add a word of explanation here as we are dealing with a multitude of instruments; they are used in different forums, are different in scope, and have different supervisory machinery. I will therefore briefly identify the main ones from the geographical standpoint.

A worldwide forum. In the worldwide forum constituted *par excellence* by the United Nations, although the Universal Declaration of Human Rights of 10 December 1948 is the solemn expression of a common ideal, a collective ethic, which is far-reaching (for example, no distinction is made between civil and political rights on the one hand and economic and social rights on the other), it is nonetheless 'innocuous', since it has no binding force and there are no penalties for a breach.

On the other hand, the International Covenant on Civil and Political Rights of 16 December 1966 (which also includes a number of collective rights, such as the right of peoples to self-determination, and clauses dealing with the protection of minorities) contains supervisory machinery organized through the Human Rights Committee, responsible for examining periodic reports that the States are required to submit on the measures they are taking to give effect to the rights recognized (Article 40). If such reports are truly to apprehend reality and serve as a vehicle for change, it is essential that they be fed by the dynamic forces of civil society through debate, proposals, even reports to the contrary. However, of greater immediate relevance to the ordinary citizen, an optional Protocol permits individuals who claim that any of their rights guaranteed by the Covenant have been violated to submit a *communication* against their Government with the Human Rights Committee.

The effectiveness of the International Covenant on Economic Social and Cultural Rights, also adopted on 16 December 1966 is undoubtedly less since the covenants take the form of objectives; each State 'undertak[ing] to take steps', 'to the maximum of its available resources', 'with a view to achieving progressively' the rights recognized. As Stengers has observed 'the right to think about the future' still appears remote. Thus, while under domestic law it is impossible to assert individual rights before the courts on the basis of the Covenant, any State that has signed it at least undertakes not to backslide (*stilstand* obligation). Are such rights 'purely cosmetic'? Perhaps, unless the courts can be relied on to be creative. At the international level, the supervisory machinery is limited to an obligation to submit reports to the Economic and Social Council.

There are, however, other instruments established within the UN that are directly or indirectly relevant to human rights. One is the International Convention on the Rights of the Child of 20 November 1989, many of whose provisions are directly applicable and may therefore be relied on before the courts. On the international level, the Convention obliges States to submit to the Committee on the Rights of the Child a report every five years on the measures they have taken to give effect to the recognized rights and to circulate it widely. In Belgium, a co-ordinating group of NGOs (non-governmental organizations) have played an important role as a sounding board for the acute problems that they encounter in their daily work. The Convention on the Elimination of all forms of Racial Discrimination of 21 December 1965 likewise uses the submission of reports – to the Committee for the Elimination of Racial

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Discrimination – for monitoring purposes. The Committee also has jurisdiction to receive individual complaints, although it has no power to take legally binding decisions. The Convention for the Elimination of Torture of 10 December 1984 is likewise noteworthy and possesses identical supervisory machinery. Here also, a coalition of NGOs is campaigning for a larger ratification of the Convention.

In addition, there is the work of specialized institutions, such as the World Labour Organisation (employment) and UNESCO (education), which also have a role in the promotion and protection of certain human rights and have their own supervisory machinery (investigation, inquiries, complaints, reports, recommendations, conciliation).

Lastly, there has been a new development in humanitarian law (crimes against humanity, genocide, war crimes), a field that warrants attention as a subject in its own right, with the adoption of the Rome Treaty of 18 July 1998 creating the International Criminal Court. In the words of Karl Jaspers when the Nuremberg Tribunal was set up, that development brings us 'a scarcely believable dawn'.

A regional forum. At the Council of Europe, the European Convention on Human Rights and Fundamental Freedoms is not only the first instrument, it is also the most fundamental since, in terms of effectiveness, the Convention offers the fullest protection. The rights it guarantees are actionable, that is to say they may form the subject matter of recourse before a wholly judicial body, the new European Court of Human Rights established on 1 November 1998. It would be interesting to examine in depth the *rationale* and the functioning of the European Court, which is today the largest international Court in the world.

The European Convention on Human Rights is supplemented, extended and reinforced by other conventions, with other methods of supervision. Examples are provided by the European Social Charter of 1961, which recognizes the fundamental social rights (and has been described as the social 'pendant' to the Convention) and the revised Social Charter of 3 May 1996 which, in addition to the reports procedure, now has a new system of collective complaints. One might also mention both the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981, which secures, in that domain, protection of private life, and the European Convention for the Prevention Of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, which uses the system of visits for monitoring purposes.

After the fall of the Berlin Wall, there was an acceleration in the process of establishing conventions in the human-rights field and it would be interesting to examine political events and the adoption of human-rights instruments in parallel (synoptically). On 1 February 1995, the Council of Europe adopted the Framework Convention for the Protection of National Minorities, which benefited at intergovernmental level from the help of an advisory committee on those issues. The Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997 concerns, in particular, respect for private life and the right to personal integrity in health matters. It has been supplemented by a Protocol of 12 January 1998 prohibiting cloning. There are also *sui generis* institutions, such as the European Commission against Racism and Intolerance (ECRI), created in 1996.

Lastly, a recent innovation, the Commissioner for Human Rights (whose office was

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established by resolution no. 99/50 of 7 May 1999), acts as a pendant to the United Nations High Commissioner for Human Rights, and whose mandate – which is not judicial and does not cover individual cases – concerns the analysis of the legal framework, effective respect for human rights in the practices of the member States of the Council of Europe and education in, and awareness of, human rights.

4. Critical issues

The multiplication of the instruments now guaranteeing human rights has, both in terms of quantity and of quality, been considerable – some speak of frenzied proliferation, others of the constructive progression towards a 'general law of human rights'. It leaves so many different remedies that it is sometimes difficult to know which one to use and how. This situation, which may produce both positive and negative effects, is also reflected by the number of NGOs specializing in the defence of human rights, thus explaining the need for co-ordination and common platforms.

It gives rise to a number of issues that I will look at in connection with the rights guaranteed, on the one hand, and the guarantee of those rights on the other. Nevertheless, despite having their own special characteristics, the instruments converge on numerous points, leaving us to choose between the complementarity model (the official line), the complex model (one remedy does not exhaust all others) or the interactive model (in which each has a role to play). Technically, the question arises as to where the intersection between these various rights lies. In that connection, it would be interesting to carry out a thematic study to determine how and to what degree each right is protected under the different texts.

4.1. The rights guaranteed

Instruments may be distinguished by their *object*: for some the object is civil and political rights, for others, economic, social or cultural rights. They may also be distinguished by their *beneficiaries*: some cover a 'wide spectrum', while others, on the contrary, target specific groups (such as women, children, refugees). A further distinguishing factor is the *situations* that they are intended to deal with (for example, racism or torture). Lastly, they may be distinguished by the *nature of the document* in which they are found: declaration, convention and, perhaps shortly in the European Union, a charter.

One fundamental problem is the risk of a reciprocal lack of awareness, of compartmentalization, of divergences, of inconsistencies and even of instruments cancelling each other out. Application of the instruments may entail both endeavouring to find a common requirement, so that the States do not find themselves confronted by contradictory obligations, and putting the decision 'into context' with an increase in importance of the corrosive logic of the balancing of interests. Conversely – and examples are to be seen in the case-law of the European Court of Human Rights, notably in the V. and T. v. the United Kingdom judgement of 16 December 1999 – one instrument may provide an impetus for another, synergy may be achieved and the *soft law* used in the *hard law*.

More fundamentally, at least so far as the instruments are concerned, human rights have undoubtedly never previously known such a development and progression. Is that a sign of

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strength or of weakness? Health or impotence? Does not the affirmation of rights serve, as Rivero has argued, as 'an unconscious alibi for the lack of effective solutions to the real problems'?[12] Is there not a risk that the fact that human rights are becoming commonplace will lead to their 'Babelization', their dilution even? Furthermore, from the standpoint of the litigant, profusion may also lead to confusion, even indifference. That is why today, when I think of the work under way on the charter of fundamental rights of the European Union, I am struck by the gulf between the official line – we must have a charter because public opinion demands it – and the silence of the media. Lastly, as I see every day, no matter how numerous they are, the texts remain less than perfect – and even silent – when confronted with reality. This reminds me of Ricoeur's remark concerning 'ces normes qui deviennent à leur tour muettes face à des cas de conscience indécidables.'[13]

4.2. Guaranteeing rights

In the 'constellation' of parallel methods of supervision,[14] a large number of distinctions may be drawn: according to *objective* (prevention, punishment, education, conciliation), *type* (judicial or non-judicial), *subject-matter* (individual cases, general situations) and *form* (judgement, individual or collective complaints, reports, visits).

A more specific question emerges from these distinctions. Can a right, which cannot be asserted before a court, be described as 'fundamental'? The ability to assert human rights before the court is the primary prerequisite for their effectiveness. It must be possible for them to be the subject matter of a remedy before the courts – the national courts, of course, but also the international court acting as an independent third party – and to form the basis of the decisions delivered by the courts. As we have seen, that is the role and purpose of the European Court of Human Rights.

There is perhaps a final question. We are living in an age where everything must be a 'right' and everyone a 'judge'. What, ultimately, is the meaning of this 'strange need'? As has been said, human rights 'are advanced by law but are not exhausted by law'. Not all human aspirations or issues of social justice can be translated into the language of the law. On the other hand, however, Rawls and Habermas remind us also that rights and fundamental rights may also be conceived 'as a frame defining a social context favourable to justice'. Finally, we must also learn to live not without law, but after it. The example offered by the Truth and Reconciliation Commission in South Africa warrants more detailed examination.

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