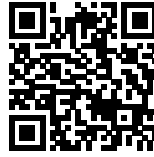




ON HUMAN RIGHTS

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First remark

Today, political correctness demands that we say in French *droits humains* [human rights] when we used to say *droits de l'homme* [rights of man]. This demand, which also occurs in other areas, is made because the French *homme*, like 'man' in English, does not distinguish between the human race and the male gender. German is better equipped, differentiating between *Mensch* and *Mann*. Latin distinguishes between *vir* and *homo*, Greek between *anēr* and *anthropos*, etc.

We could discuss the reasons for this. However, it is also important to note the introduction of another ambiguity. The adjective '*human*' in French has a value that corresponds to the usual meaning we now give to the term 'humanist' and, more generally, to the moral qualities of 'care' (a word which has recently been imported unchanged from English into French), 'compassion' or 'charity'.

The English language attributes this value to the word 'human', further ascribing to it a more specific term, 'humane'. German has introduced, along with *menschlich*, the words *human*, *humanitär*, and *Humanität* as terms of ethical evaluation.

In other words, human rights can be seen as rights basking in the aura of humanity, since this term, in its currently impoverished and rather ridiculous sense, has taken on the meaning of a 'love of mankind' or 'friendship' (in French, this is the meaning frequently ascribed to *philia*).

Now philanthropy — which was actually a secular displacement of the ostensibly all too Christian charity — is based upon a more or less hidden axiom of condescension: it is the act of the rich, cultivated and dominant, who feel benevolence, compassion and pity for the social misfortune of others. For all that, philanthropists have never sought to challenge the social order, except in minor ways.

Philanthropy contains an implicit negation of the respect for the unconditional dignity of all human beings, which appears at the beginning of the Universal Declaration of Human Rights of 1948 (hereafter referred to as 'Declaration') and is repeated further on. It can even be said to represent an interpretation of dignity that is conservative, selfish and gushing with sentimentality.

Without arguing against the use of the term 'human rights', it is necessary to draw attention to the extent of its ambivalence. For whatever the term used, human rights are marked by a certain degree of philanthropy mixed with a promise of 'social progress', which is always linked to a 'larger freedom'. In this sense, freedom prevails over social justice through the resonance, tone and emphasis of the text.

Moreover, the Declaration affirms that 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.' But what is proclaimed here and cannot be challenged should not be considered the 'highest aspiration.' One can and must think that freedom (of speech and belief) does not limit the aspirations of the common people [*hommes*].

It would not be wrong to say that the people can expect and want different things — engagements, collaborations, relations — things that are larger, infinitely larger and more, than freedoms. Being 'free from fear and want' is not the only reality of freedom; there are other stakes that lie beyond any human freedom. Spinoza, for example, who can hardly be accused of being inhuman or an enemy of freedom, considered 'freedom' to only exist as the freedom of the entire world (which he called 'nature or god').

The independence and autonomy of persons has a long way to go before it reaches its limits, if limits exist. Autonomy should be conceived in relation to the sense of existence, or more exactly, in relation to existence itself — of each, of all and of the world as sense.

Some will object, 'What do you expect from a declaration of rights? You're not considering the extent to which your words go beyond the predetermined sphere that constitutes a kind of minimum necessary to free humanity from oppression. You're departing the realm of right for philosophy, if not for dreams or speculation.'

My response is that it is indeed necessary to enter a philosophical register since the text of the Declaration — and the huge body of texts inspired by it and by the defence of 'human' rights — carry an implicit or latent ideology that should be brought to light. In fact, this is the price to be paid in order to avoid the self-righteous inanity of such 'rights'. The self-righteousness here is that of a 'humanism' of European origin, which one must always remember 'does not think the humanitas of man high enough', as Heidegger wrote.

Pascal, another European, said the same thing much earlier but in a different way: 'Man infinitely surpasses man'. Pascal was a Christian. Heidegger, on the contrary, believed that he could find the force of re-foundation in an anti-Christian direction. Today, all these references are written off, and human rights float more or less on the surface of the 'icy water of egotistical calculation'.

Second remark

The Declaration is based — as a declaration of rights, that is to say, as a juridical production or *jurisdictio* — on the following sentence:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

This is the third of seven '*considérants*' ('whereas') after which the text proceeds with the actual declaration. The French text reads:

Considérant qu'il est essentiel que les droits de l'homme soient protégés par un régime de droit pour que l'homme ne soit pas contraint, en suprême recours, à la révolte contre la tyrannie et l'oppression.

We will pass quickly over the complex and fragile character of a proposition that seeks to avoid a resort to rebellion. It is clear that this resort is seen as something 'compelled' and that this compulsion can engender 'tyranny and oppression.' In 1948, in a text drafted by a committee of nine members whose political and intellectual composition calls for lengthy analysis, tyranny and oppression focused on the fascisms that had just been defeated.

In a sense, the Declaration is part of the general movement that, somehow nebulously, fosters the condemnation of 'fascism' and what this word would, over a long period, ignominiously signify. However, any questioning of the underlying reasons for the rise of fascisms is relegated to the background, if not even further.

There is no examination, from the perspective of democracy and 20th century capitalism, of what could have facilitated or even caused the emergence of fascisms. There is, therefore, no opportunity to consider other possibilities of oppression — and consequently of rebellion — like those represented by the abominable figure of a Head of State or Leader flanked by party apparatus, police and mythology.

Here, again, some will protest. The preceding sentences will be criticised for being unacceptably suspicious of the virtuous words of the Declaration. I was careful above to write, 'in a sense', and to limit myself to pointing out the absence of examination, nothing more.

In all sincerity, I am not trying to construct a machinery of denunciation. Yet it is difficult to dispute that the question of 'humanism' has been continually refined or deepened, according to different views. This has occurred along the road from the defeat of fascism to the unbridled expansion of capitalism, which is undermining human rights in an increasingly obvious way.

It is a road that passes through the other collapse of so-called 'socialisms' and, today, through the various tensions in religious and/or communitarian movements. 'Humanism' is strictly coeval with mercantile civilization, techno-scientific development and democracy. 'Human rights' are not absolutely pristine, as their prehistory in Roman law [droit] after a certain period already shows. They derive from Roman legal culture, transported first out of Roman civil religion and then out of Christianity to fertilise the spirit of modern law [droit] and especially so-called 'natural' law [droit].

Now, it is here that we must consider the other clause of this 'whereas'. The French version provides a striking statement: Human rights must be protected by the rule of law [*régime de droit*]. The English distinguishes rights and law, the Italian distinguishes *diritti* and *norme giuridiche*, whereas other languages (e.g. Greek or German) repeat, like the French, the same term. Perhaps the Latin translation best clarifies the distinction in stating that: *hominum jura civitatis forma quae justa est tegi* (human rights must be covered by a just civil form).

This is much more than a linguistic curiosity. Repeating a single term (droit) or distinguishing two terms (rights and law), indicates the same difficulty: do rights [droits] exist that have not been established by law [droit]? Here the Declaration declares its own necessity: it is not just a formulation, words solemnly declared.

The Declaration is the legal institution of the rights it declares. If we leave aside the well-known American and French antecedents that paved the way, prior to the Declaration only factual rights and not legal rights [*droits de droit*] existed. At most, some of these rights pre-existed as rights of certain States, the United Kingdom, the USA and France in particular. But what are 'factual' rights or national rights with regard to international law? These two distinct questions are in part intertwined.

These questions share a concern about the foundation of a right in general. The idea of 'human rights' brings to light the extraordinary difficulty of founding right, if not the impossibility of such a foundation. We have sought to dismiss the idea of 'natural rights', which represents an internal contradiction because their non-positive (in the legal sense) character prevents legal enforcement and sanction.

Yet we have invoked a 'minimum norm' (Rawls) which is necessary for the constitution of a just State or of the State under the rule of 'law' [Etat de 'droit'] as it is popularly called today. This is no less lacking in foundations, in the fullest sense of the word, than 'natural' rights.

Hannah Arendt also showed how the national appropriation of 'human rights' gave rise to categories of persons without rights (refugees, displaced and stateless persons). It follows from these analyses that forms of non-right have not stopped imposing their iron law within positive rights, with the help of economic, technical, and political chaos.

Undoubtedly, the 'right to have rights', as Arendt formulated it, is plain to see: we can recognise neither the quality of the human being, nor, perhaps, that of the existent in general, without the involvement of this right. However, this again says nothing about the nature of this singular 'right' or about the possibility of its recognition, which should be universal and prior — if not superior — to any determined legal institution.

It is well known that the powerlessness of international law [*droit*] — of what passes under this name — or perhaps the basic impossibility of such a law [*droit*] (yet called for, desired and proclaimed by philosophical humanism for more than two centuries and formally declared in the 20th Century) impedes its effective implementation.

But as Hegel says, what is well known is not known at all. What remains here unknown is nothing other than the absence of foundation of right in general. This absence is not temporary or contingent: it is

constitutive, I would even say that it is 'constituent' of right.

Indeed, right can only exist or be guaranteed by a divine authority, whatever that may be. In such a case, it is not a question of right, if something worthy of this name requires the continuing possibility of recovery, transformation and re-creation in the various practical circumstances — technical, political, cultural and spiritual — to which it must respond.

Both the history of legislated rights of the Roman type as well as the customary rights of the Anglo-Saxon type clearly show that an essential plasticity of right exists within the fixity that the law, no less essentially, requires.

Both the interminable ascent to the 'basic norm' in a pyramid of norms (Kelsen) and the recourse to an ultimate power to decide the exception (Schmitt), the right to exceed right, converge towards a passage to the limit.

Right can only be exposed to such a passage; it is by nature the institution of what cannot be instituted, in other words of justice in the non-legal sense of the word. And it is not by seeking a categorical legal imperative that we can hope to found such a justice since the universal can be found neither here nor in a Kantian imperative, where it is reduced to the representation of 'nature' as a 'type' or nondeterministic model of morality.

In a sense, which itself passes on to the limit of sense, justice consists in rendering justice. This is not 'to render the justice', which assumes a determined or instituted justice. This is rendering to someone or something the justice that this person or thing — event, work, any form of existent — deserves.⁶ But what does each X deserve? Each X deserves an infinite recognition of its singularity. In other words, the justice that must be rendered to X is a justice whose nature and extent or non-naturalness and incommensurability only X can determine.

This justice must be effectively rendered, given back, returned to any X. This justice must be recognised for every X. Justice must be done to X and yet it is not it — whatever it is, tree or man [*homme*] — that can produce its due and present it as 'justice' or as 'right'. This justice rests on the unfoundable certainty that it is just that that exists. On the certainty, therefore, that it is just that the world exists even though nothing can justify its existence.

Unjustifiable justice, far from founding any kind of rights — as extensive as these may be — opens up instead an infinite perspective that exceeds all possibility of right. From this infinity and to this infinity, all things and every singularity proceed and return.

This perspective must remain present beyond the horizon of right; for without an appeal or a sign towards it, right can only fall back into its inevitable fragility, whether of impotence, arbitrariness, relativity or rigidity. The greatest merit of 'human rights' is to bring out all these difficulties and all of these exigencies. The aim of these two simple remarks was, within their narrow limits, to draw attention to this.

Translated from the French by [Gilbert Leung](#).

The [photo](#) shows, "The Fair" by Vladimir Egorovich Makovsky, painted in 1885.

