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HUMAN RIGHTS**

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ABSTRACT

In the light of the recent United Nations Declaration on Human Rights Education and Training, the author returns to the dialectic between rights and duties in the theory and practice of human rights with the appearance of ‘horizontal’ obligations towards others, such as humankind and the planet. New attempts are being made to set human rights against ‘traditional values’, as in Russia, or in France, to have a ‘republican morality’ or even a ‘secular morality’ prevail over individual autonomy. It is more necessary than ever to articulate fundamental rights with collective values.

AUTHOR

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He recently published an handbook on great international texts of Human Rights published by la documentation Française along with a handbook on the system of UN treaties published by Pedone and a handbook of public international law (Dalloz).

It is a great pleasure for me to join the colleagues and friends of Professor Habib Slim who are paying deserved tribute to him for his contribution to the teaching and development of international law. Others will speak better than I can of his role in the development of the ‘concours Charles Rousseau’ moot court, which has forged close bonds among several generations of French-speaking international law scholars. But, in memory of one of our bygone conversations in Geneva, I would like to devote this modest contribution to education in human rights, in line with the recent work by the Advisory Committee of the Human Rights Council that led the General Assembly on 19 December 2011 to adopt without a vote resolution 66/137 on a United Nations Declaration on Human Rights Education and Training.

When the new Advisory Committee was mandated to draft the declaration, some thought it was an easy job, meant to avoid any polemics that might arise willy-nilly from the bold initiatives of the Sub-Commission on Human Rights. But even if educating the young may seem a subject on which there can be a broad consensus, in the contemporary world the aims and means of such education are far more complex to define and implement. One of the first difficulties to emerge is the place of values in education, be they religious, moral, patriotic or civil values. In other words, a crucial question that arises when seeking to define a right to human rights education as a fundamental right – both shaping and ensuring all human rights – is that of the dialectic between rights and values.

The debate is slanted from the outset, because the terms are not on the same plane. Human rights are now part of positive law, but behind rights there appears a metaphysical dimension, that is present from the beginning – whether moral, ethical or religious – and in any event it is meta-legal. In a way, to speak of a ‘dialogue among civilisations, religions and cultures’ as they do in the UN and UNESCO is to juxtapose not just different actors but above all radically different outlooks. This is plainly the case for a secular republic that must integrate multiple religions, but it is probably also true of the international community that must construct a universal civilisation.

This means there are at least two ways to approach the question. Either to begin with an a priori conception of society, of a ‘natural law’ or divine law that supposedly overhangs positive law in some way with its absolute, unsurpassable and non-negotiable values, or on the contrary to search for the guiding thread of positive law to ascertain how international human rights law can go beyond these contradictions. Are not cultural rights, as individual and collective rights, and especially the right to human rights education, the best means to reconcile identity and diversity?

1. THE VOCABULARY OF MORALITY: DUTIES, VALUES, ETC.

We shall take as the starting point for this reflection the recurring debate about duties. The question has arisen in very different contexts. There is a prominent historical tradition emphasising the duties of the individual, beginning with his duties towards God. In line with Pufendorf’s classic book, a distinction was made between duties towards God, the sovereign, the family, others and even towards oneself. Traces of this idealist conception can be found in the various religious traditions and in ‘Asian values’. The idea of offsetting the Declaration of Human Rights by a Declaration of Duties was brought up again by former heads of government and notably Helmut Schmidt. The paradox is that this moral tradition, which inspired a musician like Yehudi Menuhin, goes along with an autocratic discourse underscoring duties with respect to the sovereign at the risk of sacrificing individual freedom to collective discipline.

The language of ‘legal individualism’ – marked in administrative law by Marcel Waline and extended in the area of civil liberties by Jean Rivero – is all about asserting individual rights with respect to the state, within the rationale of ‘resistance to oppression’ asserted as early as the 1789 Declaration of the Rights of Man and the Citizen. The point is to limit the absolutism of rulers by checks and balances, to define negative obligations for the state so as to protect the individual, his personal freedom and the private sphere against state interference. But if claim rights are taken into account, there are as many positive obligations incumbent upon the state so as to comply with and uphold the rights proclaimed. This reading, tightly binding individual rights and state obligations, keeps strictly to the legal domain in which rights have duties as their counterparts.

But that takes nothing away from everyone's moral responsibility, which is a matter of feelings, as Jean Carbonnier pointed out in his concern about seeing human rights encroach on the private sphere by prescribing 'fraternity' and 'affection'. In other words, legal language leaves untouched the moral imperative of justice, charity and solidarity that impels everyone by virtue of a religious precept or humanist ideal. It might even be said that the emphasis placed on the environment and the future of the planet merely reinforces our collective responsibility towards future generations. We speak nowadays of sustainable development, responsible consumption, energy savings, and so on. The values of thrift, 'sobriety' and frugality, moderation and sharing strive to offset the excesses of selfishness on the individual scale and on the scale of dominant capitalism. The 2008 worldwide crisis revealed the limits of endless progress, favouring a speculative bubble at the expense of the real economy and human development, even if the contradiction between the economics of law and the law of the economy remains intact.

At this stage, one might be tempted to make a sharp distinction between the language of law (articulated around the pair of rights and obligations) and the language of morality (with values imposing duties). But law itself integrates the issue of duties, as shown by article 29(1) of the Universal Declaration of Human Rights. This is not the place to go back over the principled debates that marked the genesis of the 1948 Declaration, but it should be noted that the place of duties in the overall conception of human rights was given fresh impetus by the works entrusted to the Human Rights Sub-Commission in the 1980s, with the reports by Mrs Erica Daes that finally led to the Declaration of 9 December 1998 enshrining 'The Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'. Instead of setting duties with respect to the state against rights, as the promoters of the initiatives probably wanted, the Declaration turned the tables, emphasising that the first duty is to defend human rights. But in doing so, the Declaration on the defenders of human rights broadens the scope of the initial text by recalling that it addresses all 'organs of society'. The state is no longer alone in owing individual rights. Whereas in the classical vision of the rule of law – embodied by the anarchism of Anatole France or Alain's radical philosophy – the citizen's only duty is to obey the law, without liking it, the Universal Declaration creates a network of rights and responsibilities that extend beyond the head-to-head of the state and individual, involving all non-state actors, whether NGOs or transnational firms. If human rights concern the whole of civil society and no longer just the state as guarantor, then the boundary between legal requirement and voluntary undertaking, between hard law and soft law is called into question.

This fundamental issue, which first appeared on the international stage in 1948 and was given new impetus in 1998, has become topical again with the emergence of a series of new debates on the scope of values. This has long been the case in the regional framework. As early as 1948, the Inter-American Declaration of Human Rights, marked by Roman Catholic tradition, had emphasised duties and values. The African states in the 1981 African Charter on Human and Peoples' Rights, '[t]aking into consideration the virtues of their historical tradition and the values of African civilization' devoted a chapter to duties, which are detailed in articles 27–29.

On the European scale, the values implicit in the preamble to the European Convention on Human Rights that mentions 'a common heritage of political traditions, ideals, freedom and the rule of law' were made explicit in 2000 with the Nice Charter of Fundamental Rights that evokes 'a peaceful future based on common

values': 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity', but at the same time it places 'the preservation and [...] the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe'. At this stage, a technical question must be asked – What is the difference between these values and 'the rights, freedoms and principles' asserted in the Nice Charter – but also a political question – What is the difference between these European values and universal values? Particularly because in the draft Madrid Treaty and in the Lisbon Treaty, the list of values grows longer, with variants in the different chapters... This is a long way from the republican threesome of Liberty, Equality, Fraternity.

But the debate concerns the United Nations just as much. Russia emphasises 'traditional values', not only within the Council of Europe but also in the context of the Human Rights Council by entrusting a study to the Advisory Committee through resolution 16/3. Whereas the Advisory Committee's preliminary study very cleverly emphasises values related to human rights, and especially, equality between men and women, in order to set aside discriminatory traditions (A/HRC/AC/9/2 of June 2012), the Council raised the question afresh with resolution 21/3, sponsored by all the like-minded (Angola, Belarus, China, Cuba, Ecuador, Russia, Malaysia, Myanmar, Pakistan, North Korea, Sri Lanka, Syria, Venezuela, Vietnam, etc.) and passed by 25 to 15 with 7 abstentions, reflecting a pronounced ideological divide.

A quick reading of the text provides some insight. The preamble may seem classical enough, emphasising the major references such as the 1948 Universal Declaration, or the 1993 Vienna Declaration and Programme of Action and underscoring the universality of human rights, before seeking 'how a better understanding and appreciation of traditional values of dignity, freedom and responsibility can contribute to the promotion and protection of human rights'. The resolution reflects a twofold connection with human rights education since it 'Recalls the important role of family, community, society and educational institutions in upholding and transmitting these values, which contributes to promoting respect for human rights and increasing their acceptance at the grass roots' (2) and 'Notes that traditional values, especially those shared by all humanity, can be practically applied in the promotion and protection of human rights and upholding human dignity, in particular in the process of human rights education' (4).

But political ulterior motive is no less obvious with the manifest intention of lighting a backfire to counter the gradual spread of human rights in the name of values rooted in religious traditions and national histories. In a way, the careful balance established by paragraph 5 of the first part of the Vienna Declaration seems to be upset: 'While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' Following the logic of the Russian initiative, it is traditional values that tend to prevail over universal rights. More than this, the increasingly common reference to 'universally recognized human rights' in the context of the Universal Periodic Review is no more than another way of statically limiting individual rights in the name of collective values. Can a new synthesis be attempted twenty years after the rights/duties dialectic?

2. THE PLACE OF VALUES IN THE DEFINITION OF HUMAN RIGHTS

Already in its Preamble, the United Nations Charter reaffirms ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...’. From ‘worth’ to ‘values’ is but a short step.

The 1948 Declaration goes even further in considering that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and defining itself as ‘a common standard of achievement for all peoples and all nations’. René Cassin wanted the moral dimension of the Declaration to be better affirmed and to appear at the outset, contrary to a more technical view of things advocated by John Humphrey who was keen to stick to legal terminology so as to facilitate the implementation of the Declaration and make it more readily binding and a basis for legal action. René Cassin had to give up on a vast idealistic introduction and settle instead for scattered items here and there. With article 1, the Declaration affirms after long discussions that human beings ‘are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’. But is not talk of ‘human family’, ‘conscience’ or ‘spirit of brotherhood’ an evocation of transcendence that unites all humanity? Those who criticise the Declaration for its colourless positivism or its straitened individualism have read it too fleetingly, if at all.

Similarly, the final articles of the Declaration go well beyond straightforward utilitarianism and espouse a ‘personalist’ outlook, inscribing individual development within society. So it is that ‘Everyone has duties to the community in which alone the free and full development of his personality is possible’ (art. 29(1)). Without getting into the Marxist opposition between formal freedoms and actual rights or the distinction Georges Burdeau makes between abstract citizen and ‘situated man’, the authors of the Declaration set aside any ‘Robinson Crusoe story’ of man alone on a desert island. Nothing specifies the contours of the ‘community’, but it can be thought that it is just as much the family and the ‘basic community’, reflected by the idea of ‘neighbourliness’ as it is the developing ‘international community’, by way of the national community and all other ties woven among human beings. One might even think of duties towards the planet itself, through traditional bonds or new bonds between humans and their environment, with humans no longer being thought of as ‘masters of nature’ but as its stewards.

Article 29(2) reflects this collective requirement by placing legal limits on human rights, first in the name of the rights of others ‘for the purpose of securing due recognition and respect of the rights and freedoms of others’ but also to satisfy ‘the just requirements of morality, public order and the general welfare in a democratic society’. While the reference to the rule of law in a democratic society tempers the exercise of human rights, forming the matrix of all systems of limitation or dispensation, the democratic requirement goes further, as suggested by article 28: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ Does this not imply that while the recognition of human rights is ‘the foundation of freedom, justice and peace in the world’, like the preamble says, effective individual rights also depend on an ‘international order’ worthy of the name? In this twofold affirmation we can see a vicious circle spinning idly but it is just as much the anticipation of an ‘international rule of law’ or a ‘common legal space of the rule of law’, to use the terminology that was to emerge in the

1990s in the extension of the Kantian utopia that underpins the United Nations Charter, tying together universal democracy and cosmopolitanism.

This is far removed from the Hobbesian contract of Leviathan, in which the individual alienated his freedom to safeguard his security. If there is a social contract, it is not between rulers and ruled, through some sort of truce in a permanent civil war, as with the Magna Carta of 1215 or the French Charter of 1815, but with the joint custodians of sovereignty. Legitimacy is not government by fiat, the *fait accompli* that founds a dynasty or the throw of the dice that brings some group to power; it is adhesion to common values. As article 16 of the 1789 Declaration said, 'A society in which the observance of the law is not assured, or the separation of powers defined, has no constitution at all.' The very definition of the formal constitutional state, now inseparable from the material constitutional state, is found in the rule of law. The Preamble to the 1948 Declaration says as much when it underscores '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'. Through formal legality, it is the dialectic of rights and values that underpins the legitimacy of power.

In concrete terms, article 26 on the right to education emphasises 'the strengthening of respect for human rights and fundamental freedoms' and 'understanding, tolerance and friendship among all nations, racial or religious groups'. Here again the promotion of human rights seems inseparable from consideration of values, because there can be no 'full development of the human personality' without this search for universal friendship, composed of respect for one another and mutual responsibility.

Although limitations of laws must be provided for by law for a legitimate purpose and placed under the control of the courts which oversee strict proportionality, we are a long way from 'state morality'. As is known, 'moral order' is not necessarily the best guardian of 'morality' and as Blaise Pascal said, 'whoever wants to act like an angel, acts like a beast'. There is no collective morality without individual freedom, in other words without freedom of conscience and even conscientious objection. Religious freedom is first the freedom to belong or not belong, 'the freedom to change religion or conviction' as Abdelfattah Amor reminded us, as special rapporteur on the freedom of religion in the light of article 18 of the Universal Declaration.

3. THE PLACE OF HUMAN RIGHTS IN TEACHING MORALITY

A debate was introduced in France around the idea of 'secular morality' more than a hundred years after the 1905 statute on the separation of church and state which has been encapsulated in article 1 of the 1958 Constitution: 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.' (<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>) The last addition is not the least, secularism being a principle of neutrality required of the state in observance of individual freedom and religious pluralism, putting an end to a war of religions that had lasted too long.

Should secular morality, the morality of the ‘hussards de la République’ as its schoolteachers were called, be set against family tradition or religious morality, in the face of communitarian temptations and identitarian closure? Or should it be recalled, as Edgar Faure used to say with what is now outmoded eloquence, when he was Minister of Education, ‘la France a une seule jeunesse, elle doit avoir une seule école’ (France’s young people are one and the same, its schools must be one and the same). Without going into details here about a Franco-French debate that led to the issuing of a ‘Charter of Secularism’ in all state-sector schools, questions must be raised about the Minister of Education seemingly failing to address the subject of human rights education. Does human rights education have nothing to do with morality and ‘secular morality’ nothing to do with human rights? The question goes beyond the ‘exception française’ and deserves to be reflected upon more generally on the basis of universal values.

The fundamental principle preliminary to the Universal Declaration should be recalled that ‘every individual and every organ of society [...] shall strive by teaching and education to promote respect for these rights and freedoms’. The classical distinction between education which is for schools – whether state or private – and teaching that is for the family to do, is thus erased. It is not only a question of instruction or formal teaching but of moral and civic upbringing. Moreover, everyone in turn becomes actor and subject of high quality education for all, which extends beyond the initial learning stage or basic education, and is aimed at ‘life-long learning’. This is the direction taken by the work of the UN and UNESCO, and also of regional organisations such as the Council of Europe on the question of human rights education and citizenship education. To use the catchphrase of the 2011 Declaration, ‘education about human rights, education through human rights, education for human rights’.

The debate as to principle nationally and universally brings together three terms: education, morality and religion.

Education about human rights is at the heart of the teaching of republican morality. One need only look out a copy of *Livre de morale des écoles primaires et des cours d’adultes*, of the golden age of the Third Republic, published in 1895 – but recently reprinted – with an epigraph citing Léon Bourgeois, the future Nobel Peace Prize winner: ‘Universal suffrage required universal instruction; but this is as nothing unless enriched by moral and civic education’.

Emphasis is placed first, through short instructive lessons, on duties to the family, school, country, ‘duties to oneself’, including – in a rather strange order – duties towards animals and duties towards others – that include ‘duties to the employer’. The section on ‘duties to God’ is shorter, probably for reasons of scruples and caution, referring only to conscience and a vague deism. The book provides a simple definition: ‘the purpose of true morality is the practice of duties’. Oddly enough, plenty of things are skipped, probably in accordance with the age of the pupils, but nothing is said of political history and the republican regime, although it had only recently been established in the aftermath of the Moral Order, apart from an underlying

theme contrasting ‘school nowadays and the school of yesteryear. To whom do we owe this advance?’ But patriotism had the prime share with eight out of 62 lessons versus just one for religious duties. In this context ‘obedience to the law’ and the ‘sovereignty of law in a free country’, national service and ‘women’s patriotism’ or fiscal duty were all evoked. Not paying taxes is stealing from the state, ‘it is therefore acting as a bad citizen and a dishonest person’. The list closes with ‘mandatory schooling’ and voting, suggesting that rights are also often duties. The entire book underscores the close connection between freedom and responsibility, the will to forge enlightened, free and responsible citizens.

In this perspective inherited from the all-conquering Third Republic, it does not seem difficult to include duties in human rights education. This would be to go back to the inspiration of the Universal Declaration, moving from local to global, from neighbourliness to universal fraternity, taking in sustainable development with the collective responsibility towards ‘future generations’.

But should this common morality leave aside all religious dimensions? This takes us back to the tension inherent in the right to education, which aims to reconcile the role of the state and the freedom of families, not to speak of the consideration of what children themselves want since the Convention on the Rights of the Child. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights highlights the right of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions’. To do so, the Convention provides for the free choice of ‘schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State’. There remain to be defined the limits inherent in the principle of public policy with respect to sectarian undertakings or commercial scams, but also forms of indoctrination, ‘brain washing’, re-education and propaganda. How can the boundary be defined between public and private, freedom and subservience, statism and communitarianism, whether religious or identitarian. Behind the institutional challenge, that of ‘one public service’, even if a decentralised one, should we not come back to the interpretation of human rights by judging the tree by its fruit? Do cultural rights develop a fenced-in identity and a closed society, a straitjacket for the individual, or an open, pluralistic and tolerant society? School cannot be about having children march to the sound of the drum; it must be about learning about freedom.

So the question should probably be turned around and asked about the place of human rights in the different religious traditions and no longer the place of religion in human rights philosophy. A remarkable effort was made by the UNESCO in 1968, through Jeanne Hersch, to find the cultural roots of human rights in all civilisations: the idea of moral universality around dignity, freedom and responsibility. That is the sense of the summary in the recent United Nations Declaration on Human Rights Education and Training that aims to encompass ‘the diversity of civilizations, religions, cultures and traditions of different countries, as it is reflected in the universality of human rights’ (art. 5(3)).

This attempt at acculturation of human rights goes along with the conclusion of the study by the Advisory Committee (A.HRC/22/71) warning of the risk of seeing traditional values hijacked to justify discrimination against or subordination of minority or marginalised groups, especially from a sex-specific perspective: ‘Care

must be taken to ensure that international human rights standards remain paramount when developing a programme of human rights education. The use of traditional values that may be more familiar to individuals and communities should be a tool for introducing and promoting the acceptability and implementation of international human rights standards; those traditional values must never, however, be presented as a substitute for international standards, given the generally subjective and unclear framing of values when compared with human rights.’ (72)

Thus, beyond the opposition between ‘religious morality’ and ‘civic morality’, should we not invoke *La morale humaine*, as in the title of a book by A. Loisy published in 1928. After a chapter on the homeland comes a chapter on humanity, announcing a universal morality: ‘Universal humanity cannot be understood without a common culture’, Loisy writes. On another plane, should Machiavelli not be dismissed and it be considered instead that the virtues of individuals count for states too. In a posthumous book on *La morale internationale*, published in 1944, Nicolas Politis searches, beyond law, for the basic principles of a decent international society such as loyalty, moderation, justice, mutual respect or solidarity.

Human rights shall be this common language of humanity hailed by Boutros-Ghali at the 1993 Vienna World Conference. In the face of values and unwritten laws that spring from the conscience, from divine law or natural law, that are inspired but subjective, unmoving but contradictory, human rights are indeed human rights and probably all too human. But positive law at least has the merit of providing freedoms and guarantees, bounds and guard rails against secular or religious absolutism, legal certainty that is at the heart of the rule of law. In this sense, the Declaration makes a connection between material sources, especially moral and religious values and effective guarantees, by codifying them and by including them in a dynamic interpretation of ‘the advancement of human rights’.

This interpretation remains open-ended and that is where the interest lies in extending the scope of obligations pertaining to human rights. Here again, positive law has long since gone beyond pure individualism and the Robinson Crusoe myth. It has taken account of the horizontal obligations on groups and individuals by aiming at human rights violations by third parties, especially with respect to non-discrimination. Likewise, obligations incumbent on the state have been diversified, with the threesome developed by Asbjorn Eide to respect, protect and fulfil. To protect, that is, to ensure respect by third parties, meaning that the moral duties of individuals or voluntary commitments of legal entities may be converted into legal obligations.

With regard to individual responsibility, the Advisory Committee’s study is particularly nuanced: ‘Thus, although it should be emphasized that human rights are inalienable and inherent in the human person, and are not conditional upon “responsible behaviour”, individuals may be regarded as having a responsibility to promote respect for human rights, and not to cause human rights violations against other individuals.’ (30)

Alongside the paramount responsibility of the state, emphasis is increasingly placed on the responsibility of non-state actors, and especially firms or organs of civil society. Here is the fundamental problem at the heart of the Global Compact launched at Davos by Kofi Annan and the conceptual framework defined by John Ruggie as the Secretary General's special representative for business and human rights. Should, indeed, can multinational business be moral, ethical, civic-minded? Or is it, like the state for Nietzsche, a 'cold monster'? Short of finding the utopia of 'mutuality', should international cooperation be given new meaning? Can voluntary undertakings based on principles and values (corporate 'culture' or its leader's ethics) replace legal obligations, going alongside requirements of transparency and accountability? In English it is easy to slip from 'duty' to 'responsibility', but there is a sharp distinction between 'responsibility' and 'responsibilities'. For us, through 'societal responsibility', should we envisage moral responsibility or legal responsibility? In this context, to speak of values or social ethics and not of rights and obligations would be to give up the substance for the shadow, to transform hard law requirements into mere possibilities, resting on the good will of different actors.

The state must find its proper place in the philosophical debate about liberalism: if law cannot mobilise fine sentiments, then the state must see to it that rights are made effective by encouraging initiative, autonomy, and also individual responsibility and solidarity. It is not a matter of contrasting the welfare state and paternalism, but in business even less than elsewhere, morality cannot substitute for law.