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THE PROLIFERATION OF RIGHTS

I. The background

During the last ten to fifteen years, individual rights have dominated the public discourse in Europe, both at the supranational and at the national level. Since the end of the Cold War a new global “rights talk” has been stirred up and has quickly spread all over the continent, involving judges, political institutions, public administration and, of course, international bureaucracies.

Human rights are becoming the distinguishing feature of contemporary democracies in the 21st century to the extent they display a powerful legitimizing effect and provide a new ideal for contemporary democracies in the era of the end of ideologies.

The “rights music” resounds in all international organizations as well as in constitutional institutions. In particular, in the European context the “rights talk” is part and parcel of the restless judicial dialogue among the European Court of Human Rights, the European Court of Justice and the national judges.

New institutions have even been set up with the aim of promoting human rights, like, for example, the Fundamental Rights Agency of the European Union (2007).

New institutions have been created as well as new categories of rights. The focus of my research is on the variety of “new rights” which are emerging within the activity of old and new institutions.

This gives rise to a plethora of questions. I have elected to focus on some of them starting with an inquiry about the types of rights that more often occupy the agenda of the human rights institutions.

Historically speaking, several generations of rights have emerged. Legal analyses have singled out different layers of rights: the first generation mainly encompasses civil and political rights, whereas most of the documents written after the Second World War have also been concerned with social and economic rights.

Nowadays the number of rights is dramatically increasing and all sort of “new rights” are applied by judges and political institutions, whether or not they are listed in a written “bill of rights”. Even a quick glance at case-law reveals that in Europe (and possibly also on the international stage) an approach that privileges the open-ended interpretation of human rights clauses prevails.

As a result of this broad interpretation of human rights two major trends can be singled out:

- First, a significant *expansion in the number* of human rights. To mention just a few of these: the right to a clean environment, rights related to bioethical issues such as the right to die, the right to be sick or the right to refuse medical treatment, the right not to be born; and the right to security, as some courts have declared after 9/11. The list could be further expanded to include, for example, the rights of animals and so on and so forth.

- Second, a more detailed *specification of rights* for different classes of individuals: the rights of children, the rights of disabled people, the rights of the mentally ill, cultural rights of minority groups, the rights of immigrant people, the rights of LGTB. Human rights used to be addressed to all human beings, regardless of the person’s color, gender, or social and personal life conditions. Now they tend to be strictly tailored on the needs of each group [and the number of groups is constantly proliferating]. We could describe this second trend tentatively as a movement from *universally grounded rights* to *group-based rights*.

In other words, some major developments are occurring in human rights law, concerning both “what” are our rights and “who” enjoys those rights.

Most of these changes have been welcomed open arms by opinion makers, people in general, political parties and indeed the judiciary. Human rights are meant to improve the quality of life. So, it is a common implicit assumption that the wider the number of rights, the better off our society. And yet, it is not always the case.

As Prof. Weiler has pointed out in a recent remarkable paper, the insistence on human rights does not necessarily result in a warmer and more caring society. As he says, the purpose of human rights has always been to put *the individual at the center*, but unfortunately, the result is a society of *self-centered individuals*.

Paradoxical as it may sound, the doubt arises that human rights can be respected without respecting human beings, or at least without really caring about them.

Human rights are not the “panacea” to all contemporary problems and the expansion of rights might have some relevant downsides.

One of these downsides is of course the well known argument that every right has its “counter-right”, so that every new right has its own costs (the most common example is the dialectic ‘right to abortion-right to life’). Another major effect is a sort of inflation of rights. There is the looming risk that too many new *iura* become harmful to the old basic rights. Like monetary inflation: the greater the money supply, the lower the value. The focus might be on minor issues, and no energy is left over for gross violations of human rights.

There is more to it, though: actually, against this backdrop, a rich variety of questions arise.

II. Research questions

1. The first step is a descriptive one. How and why have so many new rights been singled out in recent years? What are the legal and cultural matrixes of this development? Many national constitutions provide (or are interpreted as providing) an open-ended clause of protection of fundamental rights, like for example the Italian and the German constitutions. More generally, many of the new rights are derived from a broad interpretation of privacy – considered as a right to individual autonomy or self determination – and non discrimination clauses. Most of the new rights related to bioethical issues are rooted in the right to self-determination, whereas most of the new rights related to multicultural issues are treated in the pursuit of non-discrimination. This is the general trend in Europe at least.

The first step would be to provide an account of the major developments in the use of rights comparing the European practice with some major developments in the international context and possibly with the US Supreme Court case law. My purpose is not to give a complete list of human rights but to insist on some cases that better represent the present stage in human rights law.

2. Who believes in new rights? Who pushes for new rights?

Most of the new rights are developed by courts and judges, at least in the European countries. The judiciary is becoming a very powerful branch even in 'civil law countries' especially when "rights oriented" cases are at issue. Despite its increasing authority, the judiciary has a major weak spot : which is the control of the agenda. Generally speaking, courts can "only" decide cases and issues brought before them by the parties. Moreover Courts cannot decide "extra petitem". They are just required to answer the questions that somebody else asks them. Who are these "somebodies" who invite the Courts and other international organizations to recognize new rights or new facets of old rights? (M. B. Dembour). Is the language of rights just a new strategy for lawyers to bring cases before the courts? What is the role of the academy and scholars in the proliferation of new rights? Is there any relation between the new trend towards group-based rights and the activity of pressure groups, lobbies, and NGOs as "advocates" of human rights? Has their activity been displaced away from the Congress hall towards the Courtrooms?

3. Are rights always the right answer?

Many of the "new rights" are shaped by judges or international bodies when they are faced with new social, political and legal problems.

For example, new technologies bring about new opportunities but also new challenges. In most cases, legal systems react to the new challenges inventing new individual rights. Data protection rights and rights related to biomedicine are examples of "rights shaped answers". Do all new dramatic changes in our societies really require to be addressed by means of *new rights*? Or do they simply require *new policies* or new legislative measures, instead? Are "new rights" always the right answer?

4. What are the institutional consequences of this trend? Let us take an example from current affairs in the USA: the hotly debated reform of the health care system. It might be dealt with in terms of "a new policy" regarding health insurance or in terms of the "right to health". Speaking about a new health policy or speaking about the right to health would make a sizable difference. Let us take another example from European current affairs: immigration. It might be dealt with in term of "immigration policy" or in terms of "rights of immigrant people". This makes a big difference, because one of the main

purposes of rights is to remove some issues from the political bargaining process. When a new social and legal problem is treated as a matter of rights:

- first, it is immediately “upgraded” to the constitutional or even to the international level;
- second, it is taken off the political agenda and placed in the hands of the judicial branch or international bodies;
- finally it takes on a flavor of universality and mandatory character: once a new right has been introduced it very unlikely to be repealed or even questioned. Policies can be debated, whereas rights claim to be uncontroversial.

5. What are the essential features of human rights? How can we define a human right? What is the difference between human or constitutional rights and (maybe commendable) interests?

Doctrines such as legal positivism or originalism would simply answer this question looking at the documents: rights are listed and enumerated in formal written documents, so that there is no need to ask the question “what is a human right”. These approaches simply refer to written rights. But contemporary society changes are *de facto* creating all sorts of new rights and we need criteria to single out veritable rights, in the proper sense of the word. Sometimes the universe of rights encompasses trivial issues and thus diminishing the importance and the gravity of human rights as a category. We need to select the number of rights at least for the sake of rights.

This set of questions might imply:

- an historical inquiry: how and why some human rights have been included in the list of some constitutions, in the universal declaration of human rights and other treaties for example? What lesson can we learn from these past examples? (Mary Glendon, Michel Villey, Micheline R. Isahy, etc)
- a methodological inquiry, in the wake – for example – of Dershowitz’s proposal to derive rights *from experience*. It might be promising to follow and to discuss his methodological approach of deriving rights from experience, or if you want, rights from wrongs: when experience shows that major wrongs have been done to many people, that it is surely a good reason to state a new right.

6. My final step aims at looking for alternatives. My hunch is that our legal language needs to dim the rhetoric of rights and possibly be enriched with different concepts. We speak of “rights” but sometimes we refer to “needs” or “desires”, instead. Is it always appropriate to address and articulate human or social needs and desires through rights? Rights derive from *jura*, and *jura* refer to the control that the owner has on his own properties. In other words, having a right implies the possibility of claiming the goods promised by that right. But when we speak about the right to health, right to have a child, the right to work, and to some extent also the right to life, can we really promise those goods or are we selling illusions? Wisely enough the founding fathers of the United States did not speak of the right to happiness, but they rather spoke about the right to *the pursuit* of happiness. Some recent works have refreshed old concepts and introduced new ones, like, for example, virtues, needs, capabilities, responsibilities, human agency. The purpose of this last step is to discuss these alternatives and to consider if and when they might be more appropriate than rights.

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