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ABSTRACT. Human rights, as legally understood, must be safeguarded. This presupposes a state of law. The safeguarding of human rights further presupposes an independent judiciary applying the law in a community with common values and aspirations. The foundation of human rights is an individualistic philosophy dependent on the respect for truth and the possibility for the individual to attain it. The respect for the dignity of the human person is the result of a long historical development from this starting point.

1.

The notion of human rights implies that there exist rights that may be attributed to every member of the species, and that these rights are related to the very quality of being human, without distinction between members of the species and not extending beyond them. Whether the religious origin for the special place reserved for human beings in the doctrine is recognized or not, that doctrine proclaims that every person possesses a dignity proper to itself and merits respect insofar as that person is a free moral agent who is simultaneously autonomous and responsible.

Indeed, if respect for human dignity conditions the juridical conception of human rights and if one seeks to guarantee this respect in such a way as to surpass what is merely desirable by establishing an effective political protection of that respect, then we must admit as a corollary to this foundational condition the existence of a legal system with the power of constraint. Within this system, respect for human rights imposes an obligation to respect the human person both upon every human being — concerning himself as well as other human beings — and upon all
authorities charged with protecting these rights. If such an obligation is not placed upon the authorities themselves, they run the risk of becoming tyrannical and arbitrary under the very pretext of protecting human rights. In order to avoid such an arbitrary state of affairs, it becomes necessary to limit the powers of every authority charged with protecting the respect owed to the dignity of persons, and for this it is necessary to presuppose a State of Law (Rechtsstaat) and the independence of judiciary power. For this reason, a doctrine of human rights which would be anything other than a simple moral or religious ideal requires a State of Law: the two are correlative notions.

2.

If respect for the dignity of the human person constitutes the basis for a juridical doctrine of human rights, this doctrine may equally well be considered a doctrine of human obligations in that each person has the obligation of respecting the person in himself and in others. In the same vein, the State which is charged with protecting these rights and with promulgating the respect for the corresponding obligations is itself obliged not only to refrain from bringing injury to this system of rights, but also to maintain order in a positive fashion. It is also obliged to create the conditions that would promote respect for all persons subject to its sovereignty.

Since the obligations to refrain from interference and to intervene in a positive fashion present, in their opposition, chances for conflict and hence for abuse, the simplest formulation of the doctrine of human rights requires, in the interests of limiting the arbitrariness of power, that there be instituted within the State a whole system of legal procedures for determining the situations and the methods which would legitimate any positive intervention by the State’s representatives.

3.

The respect for the dignity of the human person is considered
today as a general principle of law common to all civilized peoples. But this general agreement is only about the abstract notions implied; the vague and even confused character of these notions will become apparent when discussion involves particular applications rather than the principles themselves. Indeed, since the different human rights are not arranged in a hierarchy in the various declarations that enumerate them, the written texts themselves offer no solution for settling the innumerable conflicts which might occur as much between the diverse rights themselves as between these human rights and those of the State, natural communities or most diverse human groupings.

4. Everyone knows that legal texts, according to their precision or their vagueness, distribute differently the powers of the legislative and judicial branches of government. As the possibilities of interpretation increase whenever the texts themselves are vague and when the system cedes to a judge the right of resolving the conflicts that arise, the powers of those who must find the juridical solution to particular cases are correspondingly augmented. The powers of the Supreme Court of the United States are well known, and depend upon the vagueness of the constitution itself. The texts proclaiming the rights of man are hardly more precise, and cannot be applied without exacting from the existing tribunals an important effort of interpretation, as is evident from the decisions of the German Constitutional Court.\(^1\) The same thing applies to the European Court of Human Rights.

It becomes totally understandable in this context that the application of texts concerning human rights can be confided only to a tribunal that enjoys the confidence of those whose claims are to be adjudicated. For this reason, it becomes essential that in ad-

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dition to the diverse universal declarations, which have only a programmatic importance, regional pacts be enacted which not only proclaim the rights to be respected but also establish courts of justice whose judges are sworn to apply a more or less uniform ideology, common to the signatories of these pacts. But, it strikes one that the diverse states that have signed the Universal Declaration of the Rights of Man represent the most contradictory religious and ideological conceptions, so much so that Jacques Maritain was moved to write, in his introduction to the UNESCO texts, that these texts formulated only "analogically common principles of action." 2 One might just as well have said that their precise content was turned over to the judiciary. In signing the European Convention for the Safeguard of the Rights of Man and of his Fundamental Freedoms on the 4th of November, 1950, the Council of Europe produced an essential innovation by instituting at the same time a Commission and a Court for Human Rights. Indeed, it was not satisfied to initiate a program; it integrated that program into the positive law of the signatory states: an eloquent additional argument in favor of the claim that there is law only where there are judges competent to say what the law is in every particular situation. 3

On account of the divergent interpretations of the very idea of the human person and of the obligations imposed by respect for a person’s dignity it is not only utopian but downright dangerous to believe that there is only one truth on this matter, because this doctrine would authorize whoever holds the power to impose their views and to suppress every contrary opinion as an error the authorities deem intolerable. But, if on the basis of philosophical theory, differences of opinion are normal and inevitable, it becomes all the more important for the practical safeguard of the rights of man not only that they be proclaimed by some text, but

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also that institutions, rules of procedure, and persons animated by the same traditions and culture be charged with applying and protecting them.

5.

In considering human rights there is no objective criterion for clearly distinguishing limits where the rights of one person infringe upon those of another. The classical distinction between liberal and socialist conceptions of the rights of persons, i.e., between the "passive" obligation to abstain from intervention and the "active" obligation to intervene in the social order in such a way as to procure the effective means of developing one's personhood, is not a distinction of kind, but only of degree.

Indeed, the most elementary of human rights, the right to life, already implies the constitution of an army and of a police force for the protection of the public order, and therefore, by reason of this necessity, the obligation for the state to procure all the means necessary to fulfill its role as guardian. Quite naturally every new obligation imposed upon the state in the name of respect for persons can only augment its charge, and, in consequence, the obligations it imposes upon all those depending upon its sovereignty. By increasing in this way the role and power of the State, one considerably increases the risk of abuse, and establishes conditions that promote the proliferation of a bureaucracy, which becomes all the less controllable the more it impinges upon an increasing number of domains.

The only remedy against the dangers for human freedom of an expanding bureaucracy is to increase decentralization. If the doctrine of the separation or balance of powers presented a first attempt to combat royal absolutism, which was more limited than the power of the modern state, only the various techniques of decentralization of power will enable us to avoid the abuses of a tentacular state.
Within this perspective, it becomes indispensable, if we are to avoid arbitrariness in state power, to give adequate attention to the development of an independent judiciary. The independent judiciary, on the lookout for abuses and misappropriation of power, will give an extensive interpretation to the principle of equality before the law, preventing every unjustified act of discrimination, every arbitrary use of power. The respect for this principle of equality by every person in authority would have the effect of preventing an arbitrary limitation on the freedom of some citizens for the benefit of others.

Applying the formal principle of justice that demands equal treatment of situations that are essentially the same, the Courts will, to the degree that they control the constitutionality of the statutes, see to it that the distinctions established by law itself be neither arbitrary nor unreasonable, but are justified by the ends pursued, in conformity with the nature of things.

If it is true that no objective and impersonal criterion exists for determining with precision the boundary that separates the reasonable from the unreasonable, that boundary is nevertheless not purely subjective; for it depends upon the conceptions and reactions of the community. Only in a sufficiently homogeneous community, where a sufficient consensus of opinion exists on what is reasonable and unreasonable, can a democratic system of law function satisfactorily. In the absence of such a consensus on the essential questions posed to the community, the system of law and the organisms charged with applying it will lack the necessary authority to impose themselves otherwise than by force. That, moreover, is why the existence of an international judicial order smacks of utopianism as long as there is no international community that is

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sufficiently homogeneous in its cultural and moral makeup. It is for this reason, likewise, that a system of positive law that would protect human rights internationally must function to begin with on a regional level, between partners who are in agreement on the essential values to be safeguarded.

This conception of human rights leads, in the best hypothesis, to accepting a decentralization of the powers and authority among entities that are more or less homogeneous, and accompanied, within a federal framework by a pluralism and a mutual tolerance of political systems with diverse ideologies. Such is the reasonable conclusion about the construction of a system of law that would be both international and legitimate, that is, whose authority would be founded on something other than force.

7.

The full determination and safeguarding of human rights presuppose a system of positive law, with rules and judges. The proliferation of rules will inevitably produce a growing possibility of conflicts. In order to avoid these conflicts to whatever extent possible, and to solve them whenever they do arise, there must be a complex set of legislative rules that would make one's rights more precise by setting them in proper hierarchical order. This same condition necessitates a growing intervention of the state in the affairs of particular citizens and the institution of a bureaucracy to play the role of guide, guardian, and arbiter. It becomes immediately visible what sorts of abuses may occur in this process, and what must be done, as a consequence, to submit the legislative, executive, and administrative functions of government to the control of the judiciary. The role of the judiciary is to oversee the way in which the diverse powers of government are exercised within the framework of a set of values and principles supported by a sufficient consensus of the community.

Such a consensus will be the result of a long educational process, like that produced in a community whose members possess both a common past and common aspirations and values that are an-
chored in the same religious or ideological tradition. To the extent that the safeguarding of human rights is best realized within a national community which has the power of self-determination, capable of defending its autonomy and independence, there seems to be a natural transition from a doctrine of the rights of man to a doctrine of the rights of communities. Respect for the dignity of the human person leads to respect for the national entities of which the person is a member. To what degree does the defense of these entities, the defense of the homeland, justify limitations on the rights of the individual? We have here a new source of possible conflicts, which are all the more serious since it is impossible to delimit once and for all the rights of the individual as opposed to those of his community.

8.

In primitive societies in which the community is limited to a tribe with a common past and attached to a single real or imaginary ancestor, with a common religion and traditions, and with the rights and obligations of each person marked out by custom, there is no general conception of human rights. But the situation is different where various communities having their own tradition and religion coexist within the framework of a more extended state. In this context the problem of human rights arises for individuals considered independently and apart from their communities; such is the problem of tolerance, of protection for national or religious minorities, which disassociates the concept of an individual’s dignity from his integration in a family, tribe, nation, religion, or ideological grouping.

The transition from a theory of man integrated into the community to the notion of a human person having his dignity and meriting respect solely through his being that person has been long and difficult. To trace the full vicissitudes of the individual’s emancipation would constitute a moving history, with both advances and setbacks. But such is not my aim.
9.

Individualism and the doctrine of human rights, which is its most striking manifestation, is a concept of the middle-class, which, having arisen during the Renaissance, imposed itself upon the Western mind in the seventeenth and, with greater emphasis, in the eighteenth centuries. For centuries before that, religious and political authorities — they were often the same — hardly tolerated any sort of opposition. The assumption was that only those in power knew the truth, so there was little likelihood for the individual to be accorded any right to autonomy, or to the freedom of thought and speech.

Under such circumstances, for any disagreement to be heard it could not make its appearance as the expression of individual opinion, but only as that of an uncontested authority. It is in this manner that, within a community founded on obedience to divine commandments, the phenomenon of prophecy arose; the prophet, being the spokesman of God, could take a position in opposition to the institutionalized power of the king and priests.

Quite naturally, prophecy could cloak itself with divine authority only in a religious community that accepted the authority of the actual divinity invoked. To go beyond a community’s set of values it is necessary to posit values that are universally admitted; one such is truth, which takes precedence over any contrary opinion. According to this scheme, the objectivity of truth itself, even if extolled only by a single individual, ought to impose itself upon everyone by virtue of the faculty of reason that is common to all men, and which permits the truth to triumph over commonplace opinion. In the West, it was the great merit of philosophy to have erected truth and reason into privileged instruments for the emancipation of thought. This emancipation of the individual is associated mostly with the name of Socrates, whose revolutionary attitudes were underscored, in history, by his death sentence for the crime of corrupting youth and undermining the authority of parents.

The attendant struggle for the right to possess the truth as it is
conceived by the individual has known other famous victims: Giordano Bruno, Galileo and Spinoza. It is also well-known that this same struggle against authority culminated, in the West, in a reversal of values, in a system of liberal individualism which at times is tempered by the recognition of a universal order, but which at others approached outright anarchy and the denial of legitimacy to any authority whatsoever.

10.

But if the notion of truth played a considerable role in the emancipation of the human individual by opposing the power of tradition and authority, when it is employed in the name of the established authorities, the same notion may be used to legitimate the action of an enlightened despot, an individual who would not hesitate to impose by force a truth founded upon reason that goes counter to the community’s prejudices.

In this way, having ultimate recourse to truth, which is emancipating when invoked by the individual who has only the force of argument to support his position, becomes suppressive, even terrorist, when political ideas are imposed by force of arms.

Between Socrates and Plato there was only a single generation. But that was sufficient to change the ideal of the philosopher as emancipator of the individual, wielding only dialectic and irony to this effect, into the ideal of the philosopher-king who hoped to govern the City and impose the truth by the combined methods of brainwashing and concentration camps.

How is one to reconcile the safeguarding of human rights and the political pluralism this doctrine presupposes with the pretensions of truth to universality? One way, obviously, is by making it impossible for any thesis to be considered true, in the sense of excluding all possible contradiction, which needs buttressing by political force.

It has been the glory of philosophy indeed to have avoided on principle the establishment of consent through violence, and to have limited itself to seeking whatever consent it has achieved
through appeals to reason and the force of arguments alone. Historically, the protection of human rights began by the protection of and respect for philosophical activity.

From the right of the individual to truth and to autonomy, as proclaimed by ancient philosophy, to the respect for his dignity and freedom, and to all the other legal rights for which this respect is the necessary condition, there has been a long and arduous path: it is the path of progress traced by the Western mind.
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