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Reflexions at the Margin of “Human Rights from a Philosophical Point of View” by Jeanne Hersch

Abstract: The aim of this article is to reflect upon Jeanne Hersch’s essay, *Les droits de l’homme d’un point de vue philosophique* (1990). This short essay constitutes a fundamental reference point on the nature and value of the concept of human rights. The starting point concerns an apparent consensus on the idea of “human rights”: formally everybody agrees on the existence of human rights and on the necessity of respecting them. Nevertheless, once the concept is further developed, doubts and inconsistencies arise. A possible explanation of this phenomenon is that the idea of human rights *per se* is universal, because it brings all human beings together; on the other hand, human beings live their lives within a particular context and this often changes the meaning and content given to human rights. What is shared by all people everywhere is the need to affirm one’s freedom, notwithstanding differences of meaning or content. An explanation of this principle may be found in the new idea of the categorization of rights proposed by Jeanne Hersch: these rights have been acknowledged and proclaimed in diverse historical moments, but the real difference among them is the *needs* they must satisfy.

The purpose of the present article is to attempt to combine Hersch’s reflections with the contemporary idea of constitutional fundamental rights and, in particular, with the significance of the right to life and the right to health.

Keywords: human rights, human dignity, Jeanne Hersch, Universal Declaration of Human Rights, right to health.

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1 Introduction: about Jeanne Hersch

Jeanne Hersch was born in Geneva in 1910 into a Jewish family of Polish origin on the mother’s side and Lithuanian on that of the father. She studied philosophy in Geneva.

Her doctoral thesis on the work of Henri Bergson (*Images in the Work of Bergson*, 1931) enabled her to come into contact with the famous philosopher, at that time already elderly and in poor health; he was quite impressed by the work of the young student.

Around 1933, Jeanne Hersch decided to pursue her studies in Heidelberg and in Freiburg, in spite of the law which prohibited students of Jewish origin from enrolling in German universities, in order to attend Heidegger's lectures, which can be seen – in a certain sense – as quite important for her development. However, not only did she never succumb to Heidegger's philosophy, but she expressed her feelings about his teaching in strongly critical terms: "The ideas that he laid out before us he did not submit to our free judgment, according to the liberal stance which should be that of the philosopher: he imposed them." (Henceforth all translations throughout this paper are mine.)¹

Her real teacher was Karl Jaspers, whose student she was in Heidelberg during the Thirties, along with Hannah Arendt. Such was her intellectual closeness with Jaspers that the great themes of his thought became the same for her.²

What is most significant here concerns the author's profound engagement with the study of human rights to which she certainly dedicated a great part of her life: from 1965 to 1996 she produced numerous articles, participated in many conferences, and collected documents on this theme.

The first occasion to reflect on a subject which, as can be said with all certainty, constitutes the guiding line of her philosophical thought, is the publication of *Idéologies et réalité* in 1956, an essay in which Hersch begins to speculate on the relationship between democracy and human rights.

Her intellectual engagement concerning the rights of man deepened during the Sixties and in particular from 1966 to 1968, when she was nominated director

1 R. De Monticelli points to these questions in her preface to her book on Jeanne Hersch, *Tempo e Musica* (Milano: Baldini Castoldi Dalai Editore, 2009), 12: "About his teaching Jeanne Hersch has written: 'The ideas that he laid out before us he did not submit to our free judgment, according to the liberal stance which should be that of the philosopher: he imposed them.' In his philosophy there is an incantatory aspect, a kind of magic formula which makes earthly spirits rise and invites us to welcome them [. . .] [his philosophy] elicits an emotional element, more or less magical, which may lead to irresponsibility." See the penetrating analysis of the relationship between Heidegger's thought and his praise of Nazism, available in Italian. (Stefania Tarantino, "Il dibattito su Heidegger: la posta in gioco" in *Oltre la persecuzione. Donne, memoria, ebraismo*, ed. R. Ascarelli (Roma: Carocci, 2004)).

2 The remembrance of the philosopher and of her work is evoked, with sensitivity and affection, by R. De Monticelli, *L'eterno presente di Jeanne Hersch*, (Roma) *Il Manifesto* (June 9, 2000), available at <http://soalinux.comune.firenze.it/cooperativadonne/allegati/mhersch.htm> (December 8, 2011).

of the philosophy division of UNESCO. During this time, on the occasion of the twentieth anniversary of the Universal Declaration of Human Rights by the UN, Hersch was preparing what would become a gigantic work, *Le droit d'être un homme. Anthologie mondiale de la liberté*.

The formal and institutional occasion to assemble this work was precisely the anniversary of the 1948 Universal Declaration; the incentive for such an initiative by the Geneva philosopher were her reflections on the basis for human rights, which allowed her to take a very personal position on the debate over the universality or the purely Western matrix of human rights. It was precisely during this period at UNESCO that Hersch decided to conduct a project which, *a posteriori*, she herself defined as a *fascinating philosophic experiment*: the collection of documents of every type, in prose and poetry, songs, stories or literary works of any historic epoch, as long as they were written before 1948 and had human rights as a theme. She sent a request to all UN member States, and the answers she received astonished her: “I waited anxiously, not knowing if I would receive a few answers or nothing. Texts arrived from every corner of the earth, from every continent, from every epoch, between the third millennium BC and 1948 of all genres, from stone tablets to proverbs and songs, up to summaries of philosophical and legal treatises.”³

It was from the enthusiasm for the good outcome of her initiative and from the success of her dissertation defence on the universality of human rights that her work was born. It is a work of great proportions. Without any comment or glossary, it is an ample and clearly arranged collection composed of texts and documents of various historical value through which it is possible to experience, in diverse ways, the sense of humanity and its aspiration to freedom. The first and foremost aim that Hersch set out to accomplish was to refute one of the most common critiques of the system of human rights according to which the system is a product of Western culture and civilization, imposed upon the rest of the world as a new form of imperialism. And she succeeded.⁴

³ J. Hersch, *L'exigence absolue de la liberté. Textes sur les droits humains (1973–1995)*, (Genève: MetisPresses, 2008), 109.

⁴ It is important to remember that Jeanne Hersch was not the only one who wanted to demonstrate the idea of the universality of human rights by means of a research which would include the analysis of documents, even ancient ones, whose provenance was not necessarily Western. For example, some suggest that in the ancient codex of Hammurabi it is possible to discern a certain degree of guarantee of human rights in cases in which protection against mutilation and torture was contemplated. Unfortunately though, in those cases the limitation was set by the “elitist” tendency of the codex, according to which only aristocrats were beneficiaries of such a protection. Cfr. E. Pagels, “The roots and Origins of Human Rights”

Thanks to *Le droit d'être un homme*, a new period of philosophical investigation begins for Hersch: from 1973 to 1995 she writes numerous essays in which she develops her philosophy on human rights, their principles, and their concrete application more and more sharply.⁵

The essay, which will be analyzed in this paper, is meant to represent a concentration of the author's thought: it deals with a substantive and profound consideration not only on the foundations of human rights, but above all on its nature and on humanity in general.

2 Human rights from a philosophical point of view

2.1 Foundation and content

The brief essay "*Les droits de l'homme d'un point de vue philosophique*"⁶ is a concise and forceful, although quite complex, digression on the theme of human rights.

It opens by stating the fact that, at least theoretically, no one at the present time dares to deny the existence of human rights: "It seems that it would be sufficient, therefore, to take them for granted and to devote all efforts on the one hand to define them juridically, on the other hand to assure their realization by means of international rights in the entire world."⁷

As far as the principle of human dignity is concerned, there is a wide consensus about the importance of human rights and the absolute impossibility of renouncing them: at the same time, however, when one tries to delve deeper into the question, many disagreements come to the fore. The inquiry about the foun-

in *Human Dignity. The Internationalization of Human Rights*, ed. Alice Henkin (New York: Aspen Institute for Humanistic Studies, 1979), 1–8, 2. On Hammurabi's codex cfr. also Giovanni B. Lanfranchi, "Il 'Codice' di Hammurabi: promulgazione di norme o celebrazione del buon regno?," *Pólemos* 2 (2007): 133–148.

5 All these texts have been included in J. Hersch, *L'exigence absolue de la liberté. Textes sur le droits humains (1973–1995)*.

6 J. Hersch, *Les droits de l'homme d'un point de vue philosophique* (Genève-Paris: UNESCO, 1990); published in *La philosophie en Europe*, eds. R. Klibansky, D. Pears (Paris: Gallimard, 1993), 505–540; reprinted in J. Hersch, *L'exigence absolue de la liberté. Textes sur les droits humains (1973–1995)*, 103–125; reprinted in Italian the translation *I diritti umani da un punto di vista filosofico*, ed. F. De Vecchi (Milano: Bruno Mondadori, 2008) with an introduction by Roberta De Monticelli.

7 Hersch, *I diritti umani*, 59.

dation of human rights and, above all, about their content, and their actual effectiveness, leads to misunderstandings and even to totally opposite positions.⁸

The question which opens Hersch's philosophical digression concerns precisely this aspect: it is not possible to guarantee respect for human rights and to prevent their violation unless their foundation is understood from a philosophical point of view as well as from a juridical one.

Human rights "are not a natural given [. . .] they do not belong to the world of facts. No logic imposes them upon reason"⁹; furthermore, it is not a given that they contribute to peace keeping. On the contrary, the fight for human rights may lead to conflicts, to war. However, although it might not appear so at first sight, this is not tantamount to denying their existence.

Hersch confronts this type of paradox while dealing with the right to life¹⁰: this is commonly considered the first among all human rights, the strongest one from which all other rights derive; it constitutes their foundation, their end and their justification. However, an absolutely logical and linear argumentation shows that it is not so and that the right to life probably depends on all other rights. In fact, in his commitment to human rights, in his fight against their continuous violation, man often prefers death to life, which is the condition for the enjoyment of these very rights. Therefore, if read in this perspective, the right to life can hardly be included into the category of strictly considered human rights; instead, it appears to be an *antecedent*, a given in nature which allows for their fruition, the threshold that opens on to the universe of humanity, and from which rights also come to the fore. For Jeanne Hersch, however, as mentioned earlier, human rights are not taken for granted in nature.

Before further widening the extent of her statement, the author momentarily directs her inquiry towards the *human being*, the focal point of any discourse on human rights. This brief parenthesis turns out to be fundamental in its function of understanding the presently stated axiom that human rights are not such by nature.

Man is "a soul AND a body"¹¹: such dualism takes the two opposite poles which need to be reconciled into consideration. Rationality, choice, and responsibility

8 The bibliography is indeed quite extensive. For some recent and interesting readings on such a wide subject, see M. Flores, *Storia dei diritti umani* (Bologna: Il Mulino, 2008); A. M. Dershowitz, *Rights From Wrongs: A Secular Theory of The Origins Of Rights* (New York: Basic Books, 2004); C. Casonato, *Introduzione al biodiritto* (Torino: Giappichelli, 2009), 85, on the issue that there is a wide consensus even on the principle of human dignity which decreases proportionally as one attempts to give such a vague concept some content.

9 Hersch, *I diritti umani*, 60.

10 Hersch, *I diritti umani*, 90.

11 Hersch, *I diritti umani*, 61.

on the one side, strength, physicality, and instinct on the other. The result of the fusion of these two poles is what Hersch calls humanity: it is produced by the intersection of the two elements which connote the human being.

Because of his needs, man sets up concrete aims: “[...] he needs to live in order to ...”¹² From this perspective he lives his freedom through choices and objectives, in constant relationship with the world that surrounds him. It is precisely through the relationship between man and the world of nature and history that it is possible to understand what Jeanne Hersch means by *responsible freedom*. This concept imbues her entire meditation and gives life to the concept of *humanity* by creating a synthesis of strength, rationality, rights, and reality.

Each one of these elements, taken by itself, has nothing human to it; only because of their interaction does man feel the surge of an *exigency*, a vindication. Therefore, for the very fact of being a human being, he is entitled to the recognition of his human dignity, to the aspiration for a consciously chosen future: it is a particular form of “respect,” of “consideration,” which allows him to claim the realization of his own self and of his aspirations for the future for himself.

This is a very charged passage and one that is very relevant for her analysis: in one glance we perceive the emergence of the human being, his aspirations for the future, his will to fulfil himself and, above all, the vindication of his dignity. All this, however, is not sufficient; this is not just a simple individual claim or – if understood in a collective sense – a homogeneous one; it is the affirmation and the recognition of human dignity for everyone, to each person in equal measure and conforming to one’s own inclinations, predispositions and attitudes.

The basis for human rights is *responsible freedom* which, in order to put these rights into effect, requires an effort, which at times entails even going against nature, sometimes without purpose. To reach such an end absolute determination is necessary in order not to be overcome by the world of force, and to be able to continue fighting for the realization of and respect for the rights themselves.

Jeanne Hersch uses the example of Antigone to help the reader understand the concept of absolute exigency.

In the history of Western philosophy, the dramatic story of the Theban heroine has always represented the eternal contrast between the ethics of morality and the law; in this case the story is perfectly apt to demonstrate how the absolute, in which man finds his own realization, may sometime differ from the factual reality in which he finds himself. In fact, for Antigone the absolute exigency consisted in giving honorable burial to her brother Polynices, thus obeying the

12 Hersch, *I diritti umani*, 61.

gods' unwritten law; such an action was against King Creon's edict, according to which anyone who celebrated funeral rights would be condemned to death.

This is an extreme example which, however, makes it possible to understand the idea of the absolute to which Hersch refers: absolute exigency allows man to give concrete content to his own dignity and humanity from which human rights follow. Absolute exigency is something that goes beyond reality and laws, something dramatic or tragic, something whose price can be life itself.¹³

Jeanne Hersch sharply criticizes neutrality, which is often invoked in the establishment of human rights. This is the case whenever it is feared that, when dealing with absolute engagement or extreme choice, this may lead to the justification of all-inclusive positions and to the apology for the worst violence which humanity has known, both of which certainly have nothing to do with respect for human rights.

Human rights must not be confused with a general condition of collective well-being, with the simple means which allow individuals to live peacefully; they are far from being means of comfort.

One must not confuse Human Rights with the conditions of happiness or of collective well-being with those means which allow the efficient organization of the lives of individuals or of societies. They are not a technique for peace, comfort, equity or sharing. They are not used to limit the freedom of one so that it does not infringe upon the freedom of another. On the contrary, they are used to acknowledge the fact that when the question is 'to be a man', freedom, with its absolute, comes into play.¹⁴

2.2 Absoluteness and universality

The discussion about human rights is connected precisely to the above statement. Man, the titular owner of these rights, is a concrete person, belonging to a specific cultural context; he lives within a community in which and from which he absorbs cultural traditions, history, and elements that are characteristic of that particular collectivity. His humanity is *determined*, in one way or another, by the system of moral, political, social, economic, and intellectual values which

13 Antigone's tragedy, in Sophocles' version, is a recurring topos in the treatment of the universality of human rights: opposing Creon's edict, Antigone invokes a higher and universal right, i.e., the laws of the gods, which must be respected even if it is contrary to human laws. On this theme, although in critical terms but nevertheless still recognizing its recurrence, cfr. E. Pagels, "The Roots and Origins of Human Rights", 2.

14 Hersch, *I diritti umani*, 65.

characterize it; such a system is conditioned by the degree of development of his environment and, of course, by what has been transmitted to him by those surrounding him. However, the human being, titular owner of fundamental rights, is not an abstract idea at all, or the product of a conceptual elaboration which reduces him to homogeneity. He is a complex being, composed of unity and synthesis, diversity and differentiation at the same time. Humanity, the element that is common to all individuals, is the absolute exigency, the responsible freedom which drives and motivates man to fight for the affirmation and concretization of his own rights. However, considered in himself, man is a “here and now;” he adheres to or detaches himself from a given historical, social, and cultural context, which contributes to determining the content of his own humanity and dignity.¹⁵

According to Jeanne Hersch, absoluteness is the *root* of human rights, not their *content*, which can change according to those special and temporal factors that the single individual intends to give them.

The root of human rights is nothing but that absolute exigency which drove Antigone to violate Creon’s edict, “the possibility of an absolute decision.”¹⁶ The exigency of the affirmation of one’s own responsible freedom is a basic common fact. Therefore the drive towards the affirmation of one’s own freedom must find recognition on the part of the other subjects even though the specific content may be different from theirs. Consequently, man sees himself and those who surround him as an end: in an openly Kantian perspective, men see and recognize the dignity of each other that is realized in an absolute exigency for freedom. At the same time, this freedom appears as *absolute* in as much as it is common to all individuals, and *plural* because of the diversity of its contents.¹⁷

At this point in her meditation Hersch reconnects the exigency to illustrate the philosophical experiment that allows her to demonstrate the absoluteness of human rights to a preliminary assertion which makes it possible for the reader to understand her line of thought. This is not in any way an inquiry into the mere concept of human rights because in that case it would be impossible to demonstrate their absoluteness; it is not even an analysis about the need for rights which man has, since this need varies according to geographic, historical, and cultural

15 On the theme of the universality of Human Rights and their beneficiaries, as concrete men who “are” in a given time, space, and culture, cfr. also J. W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987), 3.

16 Hersch, *I diritti umani*, 68.

17 On this subject see also F. De Vecchi, “Introduzione. Il fondamento assoluto e plurale dei diritti umani”, in Hersch, *I diritti umani*, 43.

conditions. This philosophical inquiry concerns the necessity, perceived everywhere, of a particular recognition whose object is the very essence of man.

In other words, it is possible to argue that Jeanne Hersch considers the absolute as the exigency to be *acknowledged* by other people: “this is what makes effective the condition of transcendence by binding it and completing it through the respect for the absolute.”¹⁸

2.3 Three types of rights

Hersch’s philosophical reflection goes to the very heart of the Universal Declaration. It should be emphasized that for Jeanne Hersch the rights proclaimed in the Declaration do not have juridical force since they are halfway between law and ethics. Therefore, the author wishes to dwell not so much on the juridical effectiveness of human rights as on their ethical strength, which is the requirement of their juridical valence. They are the expression of the freedom of each man, a value which demands, as mentioned earlier, respect and, above all, the realization of his potential.¹⁹

Re-reading the first two articles of the Declaration²⁰ provides Jeanne Hersch with the opportunity to deal with the *pessimism* inherent in a document expressing both the tension, and the aspirations from which the whole of humanity should benefit in order to protect all individuals from the negation and violation of rights that is perpetuated by the same subjects who are the beneficiaries of such rights.

18 De Vecchi, “Introduzione,” 45. The description is quite interesting because in this way Jeanne Hersch comes close to the thought of Louis Massignon in his *L’ospitalità di Abramo. All’origine di ebraismo, cristianesimo e islam* (Milano: Medusa Edizioni, 2002) and of Pier Cesare Bori in his *Per un consenso etico tra culture. Tesi sulla lettura secolare delle Scritture ebraico-cristiane* (Genova-Milano: Marietti, 1991); see also P. C. Bori, *Universalismo come pluralità delle vie* (Genova-Milano: Marietti, 2004).

19 On this point see de Vecchi, “Introduzione,” 36.

20 As well known, the first two articles state the following: Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The Declaration is pessimistic because the *nature* of human beings seems to go into the opposite direction for two reasons: first, because man is mortal, therefore the fear for the end of his existence leads him to a defensive attachment to everything concerning his life. Second, as already mentioned, there is a possible conflict between the absolute and life. The natural pull given by the so-called “law of the strongest” constantly places man in contrast with the absolute whose realization he seeks. But such a contrast may sometimes lead to the negation of rights.

However, there is no resignation; the spirit of the Declaration is to promote freedom, to demonstrate daily and concretely that human rights allow man to realize his potential, for they call for the inter-subjective recognition of his dignity. This is a social, political, and historical task whose aim is to improve human conditions and to achieve equality in order to multiply “the occasions for responsible freedom.”²¹

Such occasions depend on three kinds of “factors,” *constraint, need, formation*, which, according to Jeanne Hersch, lead back to three types of rights.

The first category concerns basic civil and political rights. They are the most easily obtainable because they condemn force and physical constraint. Their negation or violation makes it utterly impossible for man to exercise his responsible freedom. This is quite evident.

The second family of economic and social rights is related to the *need* factor. In order to live and to survive, man, by nature, must satisfy certain needs. The purpose of economic and social rights is to diminish such needs; their fulfilment, which is indispensable to life, involves a considerable expenditure of effort and energy. The guarantee of such rights allows man to exercise his own responsible freedom more easily. In a certain sense, needs are constraints, even if they differ from the first type. These needs cannot possibly be completely eliminated because it is a property of human nature to have to answer to such sort of exigencies daily. The Declaration insists that such needs be placed at a sufficient *distance* so that man can overcome their pressure in order to concentrate more on the realization of his own freedom. Economic and social rights are undeniably linked to the specific environment in which man lives in an indissoluble way. For this reason, they are *less demandable* than civil and political rights, hence the well-known problem connected to the possibility of realizing social rights. Although it is now out of the question to renounce the proclamation of their protection, it is much more difficult to guarantee that they be respected because of the diverse factors which condition their realization.

21 Hersch, *I diritti umani*, 76.

Finally, there are *cultural rights*, which fulfil man's need for formation; they are more directly linked to the actual exercise of responsible freedom.²²

Jeanne Hersch criticizes the position of those who do not take such a category into due account; on the contrary, they place it at the same levels as all other rights. But it is precisely because of cultural rights that man can become free and responsible; he can develop himself in relation to other human beings and thus acknowledge his own dignity and that of others. Cultural rights allow us to give value to different concepts and different meanings of individual dignity. The perspective is the same as that of the rights of the individual, since the Declaration does not claim that culture should be placed above the subject. Actually, knowledge is just an instrument which allows access to one's own freedom; by doing so, it can multiply the occasions for realization on an individual level and, through this dimension, also on a collective level.²³ The demand for rights and the conditions that are necessary for their actualization require particular attention: the conditions of their acknowledgment have increased,²⁴ but it is necessary to be cautious in order to avoid possible misunderstandings. The longer the list of rights, the harder their actualization appears because of the variables which change the content of the rights as well as the disparities that necessarily characterize the multiplicity of human situations. Therefore it is indispensable to take those actions that are aimed at the diversification and concretization of rights according to the context in which they are set; however, the negative side of the coin is constituted by the fact that the more rights multiply, the harder it is to guarantee them, and the less frequent the demand for them becomes. Just as the light that passes through a prism is refracted in an infinite variety of colours and shades, so happens for the absolute of human rights: once it comes into contact with the perpetually relative conditions of human life, for it becomes differentiated in relation to the possible situations in which it happens to exist. "Freedom, the foundation of Human Rights, is absolute exigency and, at the same time, it is relative to a given situation."²⁵ In addition, as far as the typologies of rights are concerned, it should be noted that the importance of economic, social, and cultural rights is often undervalued; civil and political rights are often prioritized

22 Hersch, *I diritti umani*, 79.

23 On the necessity of acknowledging cultural rights in order to protect different interpretations of dignity, cfr. also G. Gozzi, "La Dichiarazione Universale dei Diritti Umani sessant'anni dopo. Le 'promesse mancate' dei diritti umani" in *Diritti umani e cooperazione internazionale allo sviluppo. Ideologie, illusioni e resistenze*, ed. G. Gozzi, A. Furia (Bologna: Il Mulino, 2010), 18.

24 The author refers to many well-known pacts and international declarations.

25 Hersch, *I diritti umani*, 89.

simply by virtue of their being more in demand. Actually, as Jeanne Hersch argues, given their particular *relativity*, which constitutes the core of the theory of human rights, it is impossible to ignore the value of the spatial and temporal context in which such rights are realized. The diversity of needs changes the content of rights. Consequently, it is possible to argue that economic, social, and cultural rights are even antecedent – at least as propaedeutic factors – to the affirmation of civil and political rights. Such rights would not even be demanded if man, being unable to satisfy his own primary needs, did not perceive their necessity. The context into which the subject is included, the space where he stands in relation to others, where his individual dimension is connected to the collectivity, is utterly indispensable and it enables his freedom.

In this sense, it is worth remembering that the close relationship between the rights of the second and third type on one hand and the rights of the first type on the other, and in particular the inseparability of the latter from the former is a theory supported, among others, by Karl Marx. He argued that most political and civil rights are meaningless unless the individual lives in an economic and cultural context that allows him their fruition.²⁶ In her closing argument the author briefly deals with some rights, in particular the right to life and its “derivative,” the right to health. The reflection on the right to life shows its especially strong value, as well as its very peculiar position in relation to other human rights, so much so that the right to life resides outside of the cluster that includes the others. In her philosophical speculation Jeanne Hersch goes so far as to place it on the threshold between rights and nature, as a preliminary condition to exercising responsible freedom. Such an affirmation also justifies the conclusion mentioned above; the absolute in which human rights are rooted, can be placed on the same level as life itself since, when faced with the loss of his freedom, man can actually decide to lose his life. Here stands the connection with the tragic dimension of the aspiration towards freedom. The story of Antigone is its most forceful example.

The right to health is a derivative of the right to life; it could however be linked, as is traditionally done, to the second typology of rights whose unifying factor is recognized in the answer to needs. The proclamation of the condition of a healthy life for all men appears vague and poorly motivated: it will have to be supplied with content according to the context to which it applies. It will in itself remain, however, a mere goal to be achieved, since, “for human beings,

²⁶ Cfr. C. Edward Wyzanski, “The Philosophical Background of the Doctrines of Human Rights” in *Human Dignity. The internationalization of Human Rights*, 9–13, 12, which refers to a passage from *The Sacred Family* by Karl Marx [1845].

perfectly healthy life conditions are unthinkable” even in the most advanced civilization.²⁷

However, such an approach does not at all exclude the request for the guarantee of a minimum content of the right to health, understood as the essential core which can be denied under no circumstances, and which resists compromise in case of a conflict between rights, and cannot be reduced in any way. This is the channel through which the right to health, like all other social rights, is released from the reins of the scarcity of resources, albeit in a limited measure.

Actually, for all typologies of rights there is always a base, constituted by their essential content,²⁸ their *Wesensgehalt*, which always has preceptive order and effectiveness *erga omnes*. Consequently, to have to reduce the discourse of human rights to their mere classification becomes limiting, since it does not help to better understand the meaning and the content of the rights themselves.²⁹

27 Hersch, *I diritti umani*, 92.

28 The theory of “minimal content” is often used by courts of law and constitutional Tribunals whenever questions of balance of interests come into play. An example worth remembering concerning the right to health is offered by the Italian Constitutional Court, decision no. 509/2000 whose decision reads: “The right to health treatments necessary for the protection of health is ‘guaranteed to every person as a right that is constitutionally conditioned by the implementation that the legislator gives by means of the balance of interest that is safeguarded by that right with the other constitutionally protected interests.’ Among other things, such a balance must keep the objective limits which the legislator faces in relation to financial and organizational resources at his disposal in mind, while maintaining, at any rate, that ‘irreducible core to the right to health protected by the Constitution as an inviolable domain of human dignity.’ The provision imposes the prevention of the creation of situations without appropriate oversight which may prevent the implementation of that right.” In the quoted decree, the Court takes up a principle expressed in the previous decision no. 309/1999 once again, still referring to the inviolable right to health: “In the legislator’s balance, the obligations of public finances cannot assume such a preponderant burden as to compromise the irreducible core of the right to health that is protected by the Constitution as an inviolable domain of human dignity.” It is certainly to this domain that the right of citizens in economic conditions of poverty or indigence, according to art. 32 of the Constitution prescribing that they receive free care, belongs. It is important to remember that the “minimal” or “essential” content of these rights is a deeply rooted notion within the entire constitutional doctrine, especially the German one (at least in view of what is contemplated in art 19.2 of the Grundgesetz: “In no case can a fundamental right be undermined in its essential content”: on this subject cfr. the famous and by now classic reflection by P. Häberle, *Le libertà fondamentali nello Stato costituzionale* [1983] (Roma: Carocci, 2005), 146.

29 On this issue cfr. R. Bin, “Diritti e fraintendimenti: il nodo della rappresentanza” in *Scritti in onore di G. Berti I* (Napoli: Jovene, 2005), 345–374, available at <http://www.robortobin.it/ARTICOLI/Dirfrall.htm> (December 8, 2011).

Jeanne Hersch distinguishes between three different typologies of rights; she does not want to set up a catalogue, but simply to emphasize the different factors to which man reacts in the exercise of his own responsible freedom. The classification of the categories of rights, when reduced to a mere listing in relation to the political or historical moment of their juridical acknowledgment by a court order, turns out to be a sterile intellectual exercise which does not enable any concrete guarantee or the enjoyment and fruition of the rights themselves.

The essay closes with a wish which should be quoted in its entirety:

[. . .] how to remain silent when sometimes it seems that the deepest root of Human Rights which says “You must” or which says “No, at any price,” and which should be at the core of all teachings of the Rights of men, risks becoming atrophied? Without that root, the Rights come to lose their meaning. It is necessary to tend to it, to nourish it, to stimulate it, although still preserving in oneself and in others, the measure of an embodiment always imperfect and in progress, to be realized in many ways and in particular with the help of those juridical instruments inspired by the Universal Declaration.³⁰

3 On the content of the declaration and on the values declared therein

One of the critiques that are often made about human rights, as they are stated in the Universal Declaration, concerns precisely their limited binding force.

Although the 1948 Universal Declaration of Human Rights represents the culmination of the long road travelled by man for the affirmation, proclamation, and recognition of human rights, the document is often seen as lacking effective juridical force. We have already seen how Jeanne Hersch responds to this critique in a philosophical key by pointing to their ethical strength and moral significance.

According to some, the lack of clarity of human rights leads to the difficulty of their enforcement. From a juridical point of view, it can be argued that the rights of the Declaration are purposely expressed in broad terms and without specific content: in this way, it is even possible to define their range according to the different context at work. In cases where the guarantees supplied by regulations are greater, the measures contemplated in the Declaration may contribute to

30 Hersch, *I diritti umani*, 201.

strengthen them; or they can function as interpretative help in order to extend the implementation of rights that have already been recognized.³¹

All the rights proclaimed in the Declaration actually have their common roots in the principle of human dignity; in the perspective of the egalitarian drive promoted by the Declaration, it is possible to see an opportunity to progressively adapt certain protection standards to the context in question. The function of the Declaration is to at least fight the violation of the minimum content of rights, of that *Wesensgehalt* which is applied horizontally, that is, in relations among single individuals, not in the relationship between individual and State.³²

If human rights are considered as the demand for the respect of a minimum content, it is possible to deal with their variable standards. This aspect shows precisely their strength and reaffirms their universal character. In other words, human rights have the same weight and the same value, although included in different contexts, because the content granted to them constantly changes and adapts itself to the demands of the situation in which it operates.³³ Such a concept answers the critique of excessive vagueness in the proclamation of the catalogue of human rights in the Declaration.

Consequently it seems possible to abandon the classification of rights into families whenever this classification becomes instrumental to their own guarantee. A reduction into categories may be useful for the historical reconstruction of the acknowledgement of the rights themselves; it may also turn out to be a valid help to understand of the purpose for which every right has been set up. However, it risks becoming “dangerous” if it is actually used to establish the necessity of a differentiation in the protection of the content of the rights.

In simpler terms, even if proclaimed more recently than negative liberties, social rights could actually be considered the base, the foundation, and not only the platform on which they are set and rest, but also and above all as a prerequisite of their very existence. For example, the right to health, commonly included among economic and social rights, shows characteristics of a peculiar vagueness, which, consequently, makes its subjective right even more difficult.³⁴ Therefore, it is easy to understand why Hersch considers it a derivative of the

31 Cfr. F. Pocar, “La Dichiarazione Universale dei Diritti dell’Uomo cinquant’anni dopo,” *Corriere giuridico* 2 (1999): 137–138, 137.

32 See J. W. Nickel, *Making Sense of Human Rights*, 51.

33 On this topic see J. W. Nickel, *Making Sense of Human Rights*, 51.

34 About the difficult implementation of justice on the right to health, because of its vagueness see B. Toebes, “Towards an Improved Understanding of the International Human Right to Health,” *Human Rights Quarterly* 21 (1999): 661.

right to life which, in turn, holds a uniquely peculiar position in the totality of human rights.

At times it appears that the right to health, like other social rights, suffers because of the particular caution that goes along with its recognition. At a constitutional and especially an international level, the deeper the fear of imposing expenditure restrictions on subjects responsible for obligations derived from the right to health, the greater the withdrawal behind indeterminate expressions which may not imply particularly onerous commitments. Necessarily the result is the difficulty of finding suitable ways to guarantee the protection of the right, in case of violation.

This is the reason for which it seems suitable to share the severe critique of the classification of rights, seen as a sterile way “to reason in the abstract, through models.”³⁵ Such a position fits Jeanne Hersch’s thesis because the differentiation among the typologies of rights presented in “*Les Droits humains d’un point de vue philosophique*” does not result in a hierarchical reconstruction of the classification of rights. On the contrary, the designation of the three typologies is instrumental in demonstrating the extent to which the guarantee of all human rights answers man’s fundamental needs.

To say that negative liberties have no cost, thus differentiating them from social rights which for this reason are more difficult to realize and harder to guarantee, means to excessively simplify the discourse on fundamental rights. Negative liberties certainly do not come without costs, nor can one say that to guarantee the so-called “positive” rights necessarily implies a cost at any level.³⁶ The approach must be more flexible and free from such a rigid classification.³⁷

In order to give true meaning to human rights, the solution is firstly to recognize their ethical force, their moral value, even before any juridical issue. Second, it is necessary to evaluate the variability of their standards, the mutability of their content according to the context and the beneficiary, because of the different value given, at different times, to the dignity of the single individual. As a result, to retrieve the ethical dimension allows man to re-appropriate his own rights in order to realize his own responsible freedom in the best possible way.

35 R. Bin, “Diritti e fraintendimenti,” available at <http://www.robertobin.it/ARTICOLI/Dirfrall.htm> (December 8, 2011).

36 “From the categories of human rights thus identified, it is evident that Jeanne Hersch also those human rights considered positive, namely, social, economic, and cultural rights includes in the class of human rights, in addition to ‘negative’ rights.” F. De Vecchi, *La libertà incarnata. Filosofia, etica e diritti umani secondo Jeanne Hersch* (Milano: Bruno Mondadori, 2008), 243.

37 For a critique of the economic sustainability of rights or its impossibility see W. Nickel, *Making Sense of Human Rights*, 120 ff.

In a final analysis, the hope of the Universal Declaration is that the greatest possible number of human beings may rise to the highest level of humanity in an equal manner.

This does not mean flattening all human beings to the same level of expected equality, which would deny the essence of human nature. Rather, it means to raise equality, to give it consistency and relevance, so that equality among human beings may be the significant element of their diversity.

As Hersch strongly emphasizes, the conditions of each man at the beginning, the potential of humanity, and men's *responsible freedom* are equal among them. Responsible freedom is only a beginning: each man will give it a content according to his own tendencies and inclinations, and according to the particular historical and cultural moment in which he lives.

In conclusion, Jeanne Hersch's essay remains a relevant work. When one comes to the end, one has the wish to start all over again, more slowly in order to savour each word of her profound reflections on the spirit of human rights. These reflections were written by a philosopher who empirically verified the viability of her thesis, a scholar who applied the concreteness of her thought to reality. This work deserves an in depth study, in the hope that Jeanne Hersch's simple words and their rich content may become more and more diffused and better known.

