# Chapter 1
# From Law as a Means to Law as an End: About the Influence of International Human Rights Law on the Structure of International Law Rules

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## 1.1 Introduction

The conception of law as a means derives from the distinction between law and politics. Politics is here understood as related to community life, not as a way to govern or to use power. In the French language, we have two different words: *le* politique and *la* politique. The first one is about common good or common interest, whereas the second refers to the use of power, that is to say the world of politicians. The second definition will be excluded from this study.

To define politics is a way to define law and to understand how law becomes integrated into society. But *human rights law* in particular pushes us to rethink of the distinction between law and politics. Human rights law is not just about rights but also about a political project for society. This is true for States and also for the international legal order. For example, the Charter of the United Nations defines the purposes of the organisation. It is "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion".[1]

The purposes of an organisation such as the United Nations constitute a project for almost all the States of the world, and according to the above-quoted text of the Charter, the aim of the community life in the international legal order is the respect

[1] Article 1, para. 3, emphasis added; the preamble of the Agreement Establishing the World Trade Organization (WTO) provides that one of the objectives of the Parties to the agreement is "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment". The agreement here refers to social rights as a part of human rights and as the aim of the WTO.

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of human rights and fundamental freedoms. Then how is it possible to distinguish the legal rules that constitute a means from the legal rules that constitute a purpose, a project, or an aim? To do that, it is necessary to distinguish law from politics as regards human rights law (Sect. 1.2) and then to distinguish legal rules that are means from the ones that are ends (Sect. 1.3).

## 1.2 Law as a Means and Politics as an End as Regards Human Rights Law

It is necessary to define law in relation to politics, particularly as regards human rights law. Indeed, human rights are not only legal rules but a project too, a *political* project. To understand the nature of human rights and their influence on international law, we have to understand first the distinction between law and politics (Sect. 1.2.1). Second, we shall deal with the articulation between these two concepts (Sect. 1.2.2).

### *1.2.1 The Distinction Between Law and Politics*

The distinction between politics and law can be explained as a temporal distinction. Politics is about the future, about elaborating a project for the community, while law is about the present. As we can say, law is always formulated or written in the present tense—except perhaps in Spanish, in which language the future is used, like in the Ten Commandments. For example, we may read that "[e]veryone has the right to freedom of movement and residence within the borders of each state"[2] and not "everyone shall have the right to freedom of movement" even though rules are even valid for the future.

Therefore, politics as a project constitutes an end, a purpose. In this way, Julien Freund claims: "Le droit est l'ensemble des règles que la politique se donne pour utiliser avec plus d'efficacité la force au service du but du politique."[3] He adds: "le droit n' [est] jamais qu'[un] moyen et n'[a] donc pas de signification par [lui-même], mais uniquement par la fin ou le but que l'homme se propose d'atteindre par l'organisation politique."[4] It means that law is only a means serving the aim determined by politics. Law as a means is then not significant by itself; its meaning is the result of the aim proposed by politics for human beings to reach.

[2] Article 13, para. 1, Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, Resolution 217 (III).

[3] Freund (2004), p. 730.

[4] Freund (2004), p. 730.

Politics as a purpose needs to use means such as law. And to accomplish that purpose, it needs to use means. As Friedrich Hayek sustains: "the chief instrument of deliberate change in modern society is legislation."[5] As we say, one of the most important means at politics' disposal is the law. Indeed, how is it possible to implement a political project apart from adopting rules of law? For instance, a project might be rooting out slavery. One of the means used is the prohibition of slavery, that is to say the adoption of a rule prohibiting slavery. Both law and politics are then defined one by the other. Thus, Hans Kelsen claims about the means–end relation that something is an end only in relation to something else as a means.[6]

From that point of view, politics is always about what is collective, what is common to every part of a society, whereas law, and especially human rights law, offers individual answers.[7] For all these reasons, would there be a contradiction between the collective project and the individual rights? Indeed, the aims stated by the human rights, such as the right to life, the right to freedom of opinion and expression, or the right to work, are almost impossible to reach, particularly by States. Those ones would not be able to control everything everywhere even if they were totalitarian States.[8] Human rights, and perhaps social rights more than political ones, are unreachable.

Yet politics is always about law. The legislator, isn't he a lawmaker? His duty is to adopt legal rules. And human rights remind us the duty, especially of States, to implement public policies in their legal order or in the international one. From that point of view, there is no contradiction between human rights and politics. On the contrary, human rights law needs politics, perhaps even more than the other bodies of law.[9] Then the development of human rights law leads to a rethink of the

[5] Hayek (1983a), p. 65.

[6] Kelsen (1991), p. 12.

[7] "L'éclosion des droits privés censés répondre à la fiction de l'état de nature de l'homme opère une disjonction entre leurs titulaires et le corps social dans son ensemble, entre les bénéficiaires de ces droits et leur expression civique. L'articulation entre appartenance et indépendance semble avoir vécu. C'est ce que résume lapidairement Marc Sadoun selon lequel l'État 'renonce au citoyen pour ne considérer que l'individu'", Bec (2007), p. 192; she quotes Sadoun (2000), p. 10.

[8] Hayek (1983b), p. 104: "It is evident that all these 'rights' are based on the interpretation of society as a deliberately made organization by which everybody is employed. They could not be made universal within a system of rules of just conduct based on the conception of individual responsibility, and so require that the whole society be converted into a single organization, that is, made totalitarian in the fullest sense of the word."

[9] "Dans le domaine de la protection sociale [...], l'intervention de l'État social tend à se réduire à une production de droits 'à la subsistance', 'au logement', 'à la santé', 'au travail', autant de droits distribués au nom de la référence que représentent dès lors les droits de l'homme et *en dehors de tout projet politique collectif*. Alors, la réponse de l'État ne peut être qu'une réponse juridique, prenant en charge les groupes cibles sur fond de délitement du projet collectif, intégrateur promotionnel antérieur. L'État octroie généreusement une série de droits qu'il a quelque difficulté à rendre effectifs", Bec (2007), p. 191, italics in the original.

articulation between law and politics. Law and politics complement each other so that human rights could be effective.

### *1.2.2 Law as a Means for Politics: About the Effectiveness of Law?*

There need to be two concepts so as to define one or the other as a means or as an end. In that conception, law is not totally autonomous as it is integrated in a concrete world. Rudolf von Ihering claims: "Purpose is the creator of the entire law; [. . .] there is no legal rule which does not owe its origin to a purpose, *i.e.*, to a practical motive."[10] One may object that law is often performative, as in the book of John Austin, *How to do things with words*.[11] For example, I can bet you something, by saying that I effectively bet you the thing. The most famous example is probably the one of marriage. If I am empowered, I marry you as I say "I marry you". In that case, law is effective as it is declared. But these situations are really far from human rights law (except perhaps for the right to property). Consequently, a purpose can't be accomplished only as it is desired or formulated. It needs a medium. We can conclude that law is a means for an end, usually defined or which *has to* be defined by politics.

Then the effectiveness of human rights needs to draw a political project. It may be noted that a lot of international texts that provide human rights have no binding force, such as the Universal Declaration of Human Rights.[12] This great influence of soft law in international human rights law is not a surprise. Indeed, these declarations establish a political project perhaps even more than legal rules. For instance, about the Charter of Fundamental Rights of the European Union, Florence Benoît-Rohmer wrote in 2003: "La Charte est ainsi venue *renforcer la politique de l'Union* qui tend aujourd'hui à faire de la reconnaissance des droits économiques et sociaux l'un de ses axes prioritaires."[13]

Furthermore, if bodies of law other than human rights law are always formulated in the present tense—at least in English and in French—human rights law constitutes sometimes an exception. While most human rights and fundamental freedoms are formulated in the present tense, some are not. For example, the right not to be a slave is sometimes formulated in the future tense. The Universal Declaration of Human Rights states that "[n]o one *shall be* held in slavery or servitude; slavery and the slave trade *shall be prohibited* in all their forms".[14] In the same way, the International Covenant on Civil and Political Rights provides that "[n]o one *shall*

[10] Von Ihering (1913), author's preface, p. liv.

[11] Austin (1982).

[12] Adopted by the United Nations General Assembly on 10 December 1948.

[13] Benoît-Rohmer (2003), pp. 171–172, emphasis added.

[14] Article 4, emphasis added.

*be* held in slavery; slavery and the slave-trade in all their forms *shall be prohibited*".[15] We shall notice that the International Covenant on Civil and Political Rights is not part of soft law but is an international treaty, binding on all States Parties. One might conclude that the prohibition of slavery in the Covenant is part of soft law because it is formulated in the future tense, but it would be a little exaggerated. That may reflect instead the fact that human rights are also, perhaps above all, a project for the future, that is to say a political project. Then it becomes difficult to distinguish politics from law within the context of human rights.

Besides, human rights need a political project, i.e. public policies, and legal rules to become effective. Politics and law are then inseparably linked. Accordingly, Jacques Commaille stated: "l'évaluation des politiques publiques est susceptible d'apparaître indissociable d'une évaluation législative, la recherche de l'efficacité du droit étant liée à celle de l'efficacité des politiques concernées."[16] It means that to assess a public policy, it is necessary to assess the efficiency of law. Indeed, establishing a political project is a matter of politics, then this project needs law to be carried out, and finally legal rules require public policies to be effective. Indeed, Julien Freund sustains: "[l']obligation juridique est hétéronome: elle suppose une autre volonté que celle du juriste. D'ailleurs, une norme ne se définit pas conceptuellement par la volonté, puisqu'elle est règle et non pas fin. La contrainte est donc nécessairement extérieure au droit et ne peut lui venir que du pouvoir politique qui dispose de la force et de la décision. Autrement dit, le droit positif n'est pas générateur de lui-même, il suppose un législateur qui n'est pas le juriste, mais le politique."[17]

As a consequence, we may say that politics needs law as a means, but in the context of human rights, law and politics are tightly interrelated, and it becomes really difficult to distinguish what is the concern of politics or of law.

## 1.3 Law as a Means and an End: About the Articulation Between Positive Law and Natural Law

Human rights are about legal rules *and* about a political project. It means that at the same time they are an ideal to be achieved—as a project—and have authority to be effective—as legal rules. Nevertheless, human rights and human rights law are two different notions. And if human rights constitute obviously a political project, human rights law is a set of legal rules. It is then necessary first to question the articulation between positive law and natural law, into the context of international human rights law, and to describe how the rules of international human rights law

[15] Article 8, para. 1, International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI), emphasis added.

[16] Commaille (2003), p. 480.

[17] Freund (2004), p. 728.

have become an end (Sect. 1.3.1). Second, we shall turn to the question of how rules as a result have developed in other bodies of international general law (Sect. 1.3.2).

### *1.3.1 Human Rights Law Rules as an End*

International human rights law is growing so that the *rules* became the aim to reach. It means that the objective of human rights law has become the adoption of the rule itself even more than its effectiveness—the effectiveness, even though it is very important, only asserts itself at a second phase. For example, the preamble of the Convention against torture provides: "considering that [. . .] *recognition of* the equal and inalienable *rights* of all members of the human family is the foundation of freedom, justice and peace in the world".[18] The same sentence appears in the preamble of the International Covenant on Civil and Political Rights.[19] Of course, there is also a reference to the effectiveness of these rights, even though it is in an indirect way. The covenant states: "considering the obligation of States [. . .] to promote universal respect for, and *observance* of, human rights and freedoms".[20]

Even where the result is effective (for example, the absence of slavery), the formulation of the interdiction is still considered necessary. "It is a matter of policy." But it may be considered that law is not about principles; it is not about *moral* principles. Law is about the behaviour of its subjects. By placing the rule at the centre, it thus becomes its own end. The rule exists for itself, and the political project only amounts to a project about law, that is to say a project about the establishing of rules. For example, the recognition of violations of human rights becomes as important as—and sometimes even more important than—the absence of violation of human rights. Also, the recognition of former genocides is now a great issue, for instance in Europe,[21] as important as the absence of genocide itself. The political project is then no longer about the concrete community life; it becomes something exclusively abstract. Politics and law as a couple remind us that both are concrete; they are about real life (event if they are ideals), not only about ideas. On the opposite, even political ideals have authority to be effective.

Consequently, in the context of human rights law, the problem is how to define the end of human rights. What defines the aims of these rules? As we have said, the relation from a means to an end is a relation between two different things. If human

[18] Preamble (1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984, Resolution 39/46, emphasis added.

[19] Preamble (1), International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI).

[20] Preamble (4), International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI), emphasis added.

[21] The recognition of the Armenian genocide is now a great issue linked to Turkey's potential adhesion to the European Union.

rights are considered as the aim of human rights law, it implies that there is something extern that comes into human rights law. Then law has no longer an autonomous foundation but a heteronomous one. It means that the foundation of human rights law is not a political project, it is not the rule itself, it can only be rules that are extern, and this is the definition of natural law.[22] Natural law is always thought of as a *lex ferenda*, the law as it ought to be. By then, human rights law is a means to an end, which is no longer the effectiveness of the rule, that is to say its accomplishment, but the searched end is the adoption in *positive* law of natural rights. It means that the aim of international human rights law is only to convert natural law into positive law. Then law is no more a social concept; it is only a moral one.

That function of human rights expresses a special conception of human rights as preceding any public policy. Human rights become thus a preliminary condition for politics. But the shift from law to politics of human rights cannot be accomplished without establishing a collective project, a project for the community.[23] This balance between politics and law, between what is collective and what is individual, is essential to fulfil some ambitious project, such as the effectiveness of human rights.

### *1.3.2 Rules of Other Bodies of International General Law as a Result*

That use of legal rules as the means *and* the end can also be observed in other bodies of international law. These rules are often formulated directly as results and no longer as a means. In general, the law tends to suggest *procedures*, *techniques*, some kind of *algorithms* that are applied and lead to a result that is not contained in the rule itself. The result is discovered by applying the rule, not vice versa. For example, if I have to determine a boundary, a land border, I look for the legal rule applicable, then I apply it, and only at the end am I able to know the concrete boundary. But international rules are more and more formulated as results to reach and not only as procedures or techniques.

Theses references to a result and not only to a technique seem like obligations of conduct. Indeed, there is a distinction in law between obligation of result and obligation of conduct (or obligation of means). Most legal obligations are obligations of result, but there are more and more obligations of conduct. For instance,

[22] Alain Sériaux defines natural law as "un droit objectif, universel et passablement immuable, auquel toute législation humaine doit se conformer si elle veut être juste", Sériaux (2003), p. 508.

[23] "L'absence de dimension politique et collective ampute [*les droits sociaux*] du pouvoir qui leur était attribué. Ce ne sont pas des droits qui, en compensant les inégalités, en réduisant les écarts, attribuent du pouvoir à ceux qui en manquent; ce sont des droits qui visent le maintien d'un seuil de survie et qui, à ce titre, méritent le qualificatif de 'droits gestionnaires'", Bec (2007), p. 194.

social rights are, for the time being, obligations of conduct because they need the implementation of public policies to be fulfilled. This development of obligation of conduct in international general law is a way to insist on the desired result, i.e. justice or equity. Then the means is no longer significant; only the result matters, that is to say the equitable result.[24] For instance, the Vienna Convention on the Law of Treaties states that separability of treaty provisions is possible, if the "continued performance of the remainder of the treaty would not be *unjust*".[25] In the same way, the Montego Bay Convention lays down several rules for the maritime delimitation, as the territorial sea, by referring to a technique of delimitation that conduces to an equitable result.[26] Thus, article 83 provides, about the delimitation of the continental shelf between States with opposite or adjacent coasts: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law [. . .] *in order to achieve an equitable solution*."[27] This led the International Court of Justice (ICJ) to state in the *Cameroon/Nigeria* case: "delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity *is not a method of delimitation, but solely an aim* that should be borne in mind in effecting the delimitation."[28] Even if the ICJ claims that achieving an equitable result is very different from delimiting in equity, it is difficult to see in practical terms where the difference is. In both cases, what was looked for was the result, and a fair one.

But these kinds of rules, even if they are mandatory, do not look like legal rules. Besides, the Statute of the ICJ states that the Court's "function is to decide in accordance with international law" but "shall not prejudice the power of the Court to decide a case *ex aequoet bono*, if the parties agree thereto". It means that on one hand there is law and on the other hand there is equity. And we shall assume that equity is not law but justice. Thus, by formulating rules as results, legal rules change automatically into moral rules.

Consequently, by not proposing anymore a way to settle a dispute, but only by proposing a *final* value—perhaps a moral value—these rules generate misunderstandings and a worrying increase of conflicts, each side considering itself legitimate in its own interest. Indeed, what I want is always fair or legitimate to me. And if there is not a means proposed to determine how to comply with the law, if there is no process defined in a legal rule, it becomes much more difficult to find a legal

[24] About equity in international law, see Degan (1999), pp. 89–100.

[25] Article 44, para. 3, c, Vienna Convention on the Law of Treaties, 23 May 1969, emphasis added.

[26] Articles 59, 69, 70, 74, and 83, United Nations Convention on the Law of the Sea, 10 December 1982.

[27] Article 83, para. 1, United Nations Convention on the Law of the Sea, 10 December 1982, emphasis added.

[28] ICJ, Judgement, 10 October 2002, The Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v. Nigeria, Equatorial Guinea intervening, para. 294, emphasis added.

settlement to a dispute. If law suggests only a moral outcome, then an agreement will be hard to find. Therefore, this kind of rules leads to an increase of conflicts. So the law no longer exercises its function—which is to offer a method of disagreement resolution—but it creates the conflict, even though the conflict goes to court. To create disputes is not to avoid a conflict; it is creating conflicts instead of preventing them. It should be added that law intervenes not only *after* a conflict but in every relation between its subjects. Then its function is also and above all to avoid the change of different opinions into conflicts. But the fact is that by the adoption of legal rules, which only refers to a result—as the Montego Bay Convention—it may be observed an increase of maritime delimitation disputes and proceedings.

In the same way, it may be observed an increase of human rights law cases. Indeed, any body of international law, and perhaps of any kind of law, can be linked to human rights law. Any case can give rise to a conflict on human rights. And theses cases are particularly difficult to resolve because human rights themselves are somehow opposed to one another. For instance, freedom is in opposition to equality; the right to own property is in opposition to the right to enjoy the benefits of scientific progress.[29] Furthermore, as human rights are always linked to a value, the consequences are the same as in the other bodies of international law: my interest seems always legitimate to me. Then it becomes much more difficult to find a settlement in a dispute that involves human rights. The consequence is an explosion of human rights law cases and also of the cases of every body of international law.

## 1.4 Conclusion

In conclusion, we may say that by the impulsion of international human rights law there is a development of international rules as results to reach. This fact implies consequences not only on international rules but also on the articulation between politics and law. As there is no longer a purpose for the rules, these ones could block politics in its proposal for a collective future. Even in States' orders, by the influence of human rights law, politics suggests less and less collective vision or collective project. Finally, it is not really a surprise because human rights are perhaps also a political project, an ideal to reach and not only enforceable rights.

[29] Article 15, para. 1, b, International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI).

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