

‘A Right to the Effective Access to Rights’: a Pleonasm?

Summary

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Rights – whether substantive or procedural – are a mirage for some groups because administrative and practical obstacles turn the Rule of Law into a chimaera. In this paper, I argue for the recognition of a right to the effective access to rights, as a core element of the Rule of Law. Tackling this issue is crucially important. Indeed, if the principle of equality before the law and fundamental rights have been widely recognised as part of the Rule of Law, one conundrum remains: many people do not have access to the rights they are entitled to because of practical and administrative barriers. Some sporadic measures and laws have been taken to alleviate these problems, in a limited way however. On this basis, I argue that beyond the “right to have rights”, as masterfully theorised by Hannah Arendt concerning post-war stateless persons, the Fundamental rights become an empty promise and the Rule of Law is not worthy of its name if they do not encompass a general right to the effective access to rights deriving from substantive and procedural rights. In short, the right to have effective access to rights is not a pleonasm.

I. Introduction

Access to the law’s protection is one of the core elements of the Rule of Law, which implies substantial as well as epistemic access. Among the features of the substantial access to the law’s protection is the equal enforcement of the laws or equality before the law:¹ the law should be applied in a non-discriminatory way, in the sense of substantial equality.² Fundamental rights constitute an additional feature of the Rule of Law:³ they place the individual at the centre and aim to provide a counter-majoritarian barrier to ‘the tyranny of the majority’.⁴

Despite the fact that the principle of equality before the law and fundamental rights have been widely recognised and implemented at EU and national levels, it is being increasingly

¹ Lord Bingham, ‘The Rule of Law’, (2007) 66 *The Cambridge Law Journal* 1, 69. See also: Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final; UN Secretary-General, The Rule of Law and transitional justice in conflict and post-conflict societies – Report, 23 August 2004, S/2004/616.

² S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011).

³ See references in footnote 1.

⁴ D. Kagiarios, ‘When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights’, in P. Kapotas and V. Tzevelekos (eds.), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, 2019) 283-310. On the relationship between the Rule of Law and human rights, see the following critical approach: R. Peerenboom, ‘Human Rights and Rule of Law: What’s the Relationship’ (2005) 36 *Geo. J. Int’l L.* 809.

documented that many people do not have access to the rights they are entitled to because of practical and administrative barriers. Usually, these barriers are encountered by vulnerable people standing at the intersection of several minority groups⁵: single mothers, Roma, migrants, poor, homosexuals, people with disabilities, homeless people, beggars, sex workers, non-white people etc. The ‘non-take-up’ issues in the field of social benefits constitutes a telling example of the issue of effectiveness of rights; in 2004 it was estimated that there was between 40% to 80% of non-take-up in OECD countries and recent studies have shown that it remains very high.⁶ The causes of non-take-up are diverse, *inter alia* the lack of information, transparency, institutional barriers, the complexity of the procedures, discrimination and stigma.⁷ The situation of migrants is also peculiar: in addition to irregular migrants encountering many obstacles to the effectiveness of their rights,⁸ legal migrants struggle to effectively access their rights to work, to education etc. because of the lack of recognition of their qualifications, lack of non-obligatory language courses or scarce information about the host society and the intricacies of its administration.⁹ Even EU citizens and their family members, including workers, who would like to exercise their freedom of movement in another EU country encounter important barriers to accessing the rights they are entitled to because of excessive documentation requirements, as well as scarce and confusing information.¹⁰ In the criminal field, as regards minor offences in particular, poor people who are remanded in custody for non-payment of a fine struggle to have access to their right to a fair trial because

⁵ S. Atrey, ‘The Intersectional Case of Poverty in Discrimination law’ (2018) 18(3) *Hum Rights Law Rev* 411; S. Hannett, ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’ (2003) 23 *Oxf J Leg Stud* 65.

⁶ V. Hernanz, F. Malherbet and M. Pellizzari, *Take-up of Welfare Benefits in OECD countries: a review of the evidence*, OECD Social, Employment and Migration Working papers no. 17. See more recent studies on the subject: M. Fuchs et al., ‘Falling through the social safety net? Analysing non-take-up of minimum income benefit and monetary social assistance in Austria’ (2020) *Soc Policy Adm.* 54, 827–843; P.-M. Daigneault and Christian Macé, ‘Program Awareness, Administrative Burden, and Non-Take-Up of Québec’s Supplement to the Work Premium’ (2020) 43 *International Journal of Public Administration* 6, 527-539; S. Chareyron and P. Domingues, ‘Take-up of Social Assistance Benefits: the Case of the French Homeless’ (2018) 64 *Review of Income and Wealth Series 1*; M. Harnisch, ‘Non-Take-Up of Means-Tested Social Benefits in Germany’, *DIW Discussion Papers* (2020) No. 1793.

⁷ Administrative costs involving long periods spent queuing, filling forms, and obligations to report detailed information and provide extensive documentation to the welfare agencies appear to play an important role in non-take-up. While stigma plays a role, the literature seems divided on the magnitude of its impact. See M. Fuchs et al., *op. cit.* See also H. Kayser & J. R. Frick, ‘Take it or leave it:(non-) take-up behavior of social assistance in Germany’ (2000) 121 *Journal of Applied Social Science Studies* 1, 27–58; J. Stube and K. Kronebusch, ‘Stigma and other determinants of participation in TANF and Medicaid’ (2004) 23 *Journal of Policy Analysis and Management* 3, 509–530; B. Baumberg, The stigma of claiming benefits: A quantitative study (2016) 45 *Journal of Social Policy* 2, 181–199; O. Hümbelin, ‘Non-Take-Up of Social Assistance: Regional Differences and the Role of Social Norms’ (2019) 45 *Swiss Journal of Sociology* 1, 7–33 (claiming that stigma plays an important role) and see also K. Bruckmeier and W. Jürgen, ‘A new targeting-a new take-up? Non-take-up of social assistance in Germany after social policy reforms’ (2010) *IAB Discussion Paper* No. 10/2011; J. Currie, *The take up of social benefits*, (National Bureau of Economic Research, 2004) (claiming that stigma plays a limited role).

⁸ R. Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights* (Strasbourg, Council of Europe Pub., 2005).

⁹ T. Huddleston, *Time for Europe to get migrant integration right* (Council of Europe Commissioner for Human Rights, 2016). See also S. Ganty, *L’intégration des citoyens européens et des ressortissants de pays tiers en droit de l’Union européenne. Critique d’une intégration choisie* (Larcier, Collect. Droit de l’Union européenne, 2021 (forthcoming)).

¹⁰ M. Ballesteros et al., *Obstacles to the right of free movement and residence for EU citizens and their families - Comparative Analysis, study for the Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs*, 2016; European Court of Auditors, ‘Free Movement of Workers – the fundamental freedom ensured but better targeting of EU funds would aid worker mobility’, (2018) *Special Report* N°6. See also: C. O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53 *CML Rev.*, 937-977.

of many material obstacles they encounter and despite the procedural guarantees already recognised.¹¹ During the COVID-19 pandemic and despite the fact that some support measures have been taken by public authorities to support socioeconomically disadvantaged people, the Special Rapporteur on Human Rights and Extreme Poverty has also reported the existence of such administrative and practical obstacles to benefiting from these schemes.¹²

In this context, several measures – ‘effectiveness related measures’ – have been recognised and implemented sporadically to palliate this lack of effectiveness and make the rights and entitlements effective.

In this, paper, I argue for the recognition of a *right to the effective access to rights*, as part of fundamental rights and the Rule of Law. It is not enough to recognise the ‘right to have rights’ which was masterfully theorised by Hannah Arendt for post-war stateless persons,¹³ but also, whether a person is a member of the policy or not i.e. has the right to have rights, effective access to the rights need to be acknowledged, too (II).

The right to the effective access to rights implies to give the subject of rights the external conditions to exercise her rights/ become a political subject and this is a question at the core of the Rule of Law, which I associate with external legal capabilities. It requires equality *within* the law, going beyond equality *before the law*, which is a prerequisite (III).

What contours the right to the effective access to rights takes? Although it is impossible to give an exhaustive list of what measures such a right call for, we can already find some traces in European laws (i.e. EU law and Council of Europe law). Although it can contain some procedural elements, it should be distinguished from procedural rights as such and access to justice, since the right to the effective access to rights implies to give an effective access to these rights. The concept of access justice as developed by Micklitz in private law is very close to the right to the effective access to rights and helps to distinguish it from access *to* justice (IV).

I conclude by arguing that without the recognition of the right to the effective access to right the Rule of law is not worthy of its name and fundamental rights become an empty shell (V).

¹¹ See in particular the literature about incarceration of poor people in case of non-payment of a fine: M. Nagrecha, ‘The Limits of Fairer Fines: Lessons From Germany’ (Criminal Justice Policy Program, Harvard Law School, 2020); This question has been much more documented and researched in the United States: N. L. Sobol, ‘Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons’ (2016) 75 *Md L Rev* 486; L. I. Appleman, ‘Nickel and Dime Into Incarceration: Cash-Register Justice in the Criminal System’ (2016) 57 *B C L Rev* 1483; T. Atkinson, ‘A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons’ (2016) 51 *Harv C R -C L L Rev* 189; Note, ‘Fining the Indigent’ (1971) 71 *Colum L Rev* 1281; C. D. Hampson, ‘The New American Debtors’ Prisons’ (2016) 44 *Am J Crim L* 1; Th. B. Harvey, ‘Jailing the Poor’ (2017) 42 *Hum Rts* 16; A. Marsh, E. Gerrick, ‘Why Motive Matters: Designing effective Policy responses to Modern Debtors’ Prisons’ (2015) 34 *Yale L & Pol’y Rev* 93. In many instances, practical and administrative obstacles to access one’s rights overlap with the violation of the rights themselves such as in the case of beggars and homeless people in Hungary: S. Viszló, *Hungarian absurdity: Homeless people in handcuffs vs. human rights* (The Hungarian Helsinki Committee 2019); L. Faragó et al., ‘Criminalization as a justification for violence against the homeless in Hungary’ (2021), *The Journal of Social Psychology*, at 14-15.

¹² Special Rapporteur on Extreme Poverty and Human Rights, *Looking back to look ahead: A rights-based approach to social protection in the post-COVID-19 economic recovery* (United Nations, 2020) para. 20.

¹³ Hannah Arendt, “‘The Rights of Man’: What Are They?”, 3 *Modern Review* 1 (1949) 24-37. See also S. Benhabib, *Exile, Statelessness, and Migration. Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton, Princeton University Press, 2018).