THE CONSTITUTIONAL FUNCTION OF HUMAN RIGHTS

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1. Three Tendencies

Some convergent tendencies, leaving positive effects of modernisation especially in the post-Second World War era, are stirring up both international law as well as constitutional law; or, as used to be stated at the turn of the century, both the "internal" and the "external" laws of the state. They emerge from two important events in this century's history. With F.D Roosevelt's "Charter at Four Liberties" (freedom of speech, freedom of worship, freedom from fear and freedom from need), in 1941, and the staunch determination of the United States, which overcoming the formalism of continental jurists wanted a Statute which went down in history as the Nuremberg Tribunal against Nazi crimes, the foundation was laid for a new international legal system. The attempt to put the German Emperor William II to trial, on which W. Wilson disagreed with the European Allies, met obstacles dictated not only by politics but also by an outdated vision of the very nature of international law.

1.1. The First Tendency

The first tendency arises from the progressive spreading of international charters on universal human rights. The Genocide Convention and the Declaration of Human Rights, both in 1948, set the ball rolling, and were followed by an increasing number of instruments: the European Convention on Human Rights (1950), the European Social Charter (1965) and the Covenant on Civil and Political Rights (1966), until the declaration consequent to the Helsinki Agreement (1975), the Interamerican Convention on Human Rights (1969-1978) and the more recent African Charter on Human and People's Rights (1981-1986).

This tendency may be defined as being "destructive" of the old international legal order for at least three reasons. In the first place such instruments overthrow the traditional concept of international law as

the law which dealt exclusively with relations between States, allowing the emergence of citisens and peoples as subjects (previously timidly manifested during the post-First World War era due to the progressive recognition of the right of peoples to self-determination). Secondly the establishment of this tendency helps to overcome the taboo barring external interference in the internal affairs of individual states. Thirdly because this international "interference" for the protection of human rights may claim a more recent victory, dear to the old pacifist movements, which in the maintenance of peaceful relations sees the basic foundation of international law. The attempt by some schools of legal thought to maintain that the objective of peace (provided that this is scientifically correct) lies at the basis of these rights, is in conflict with the statement that military action is justified in the name and for the maintenance of human rights.

Monist concepts of international law, including the more modern ones, are not enough to theoretically justify such coercive interventions. One must probably go beyond a concept of international law constructed as an "ensemble" of relationships between internal legal systems, going mainly beyond the very boundaries of a law constructed between states. The concepts of classical international law (as developed between the peace of Westfalia and the First World War), which based the foundation of international law on the internal strength and on the "Government" of States, will be definitively overcome not only by going beyond the "Dualism" of Triepel and Anzilotti, but also beyond the "Monism" of Hans Kelsen (itself based on fragile bases, even on hypothetical norms, or as one would call it today, on "virtual reality"). They may be finally overthrown only if one reaps the new ideas offered by the emergence of authorities which are capable of "establishing" international law and taking measures, even coercive ones, to have it observed. But if this was the case, where would one end if not in a Kantian embryo of "universal government" (Bobbio 1984)? The impotence shown by the United Nations over the last few years should not make us overlook the significant advances that have been made when compared with the period following the First World War. Belief in the United Nations project primarily means accepting that it is far from being fully realised.

But can these authorities be justified through human rights? If the source of this legitimacy is not a preconceived power, can it be located in the universal rights themselves?

If this were the case, though proof of this is necessary, human rights could re-acquire that constitutive function which they had in Anglo-Saxon countries (Matteucci 1976) and which they were not capable of achieving in continental Europe, having been emarginated by the emergence of the

"volanté générale" as the basic norm of political society. From the French Revolution onwards, it was possible to build a solid public power around concepts such as "the sovereignty of the people", "the will of the general public" and the like, and legitimise the monopoly of force by the public authorities. But this was possible in the ambit of single, primarily national, states.

These categories instead appear inadequate in a wider dimension: it would be difficult to construct an international authority with a planetary dimension under the classical forms of democratic authority. Even the organisational set-up of the United Nations causes problems today, being based at the level of the Assembly on the principle of "one State one vote"; even greater problems would arise if one were to legitimate a coercive international power by reference to the usual democratic criterion of individual representation. A federal democratic authority may bring together, to use Tocqueville's words, "the well-being of a small people and the greatness of a nation" but it cannot construct the "happiness of nations".

Let us then repropose the question; can the rights born in modern States as freedoms from national power become the instruments for the construction of a supranational authority in international law?

1.2. The Second Tendency

The years of the affirmation of Declarations of rights coincided with the operation of an equally healthy "destructive" tendency in constitutional law. Provisions such as those in article 10 (and partly in 11) of the Italian Constitution, and article 25 of the German Grundgesetz, allow the automatic reception of international norms in internal law (La Pergola 1961). Not only was international law no longer based on the foreign power of a State, not only was international law no longer separate from national law, but even constitutional law "opened" itself and "submitted" to the law of the international community (to the "law of nations" according to the original formulation of the First Subcommission of the Italian Legislative Assembly).

In this way, the principal contents of article 7 of the Constitution of the Spanish Republic and article 4 of the Constitution of the Republic of Weimar are being developed in an increasing number of states. National law in these unlucky republics opened itself to international law even though these states had not taken part in its creation.

1.3. The Third Tendency

But there is more: these tendencies both in international law and in

constitutional law are connected with an "opening up" towards legal systems which gradually develop in the conscience of society, or, according to bold opinions, even with "opening up" towards "natural law" itself. In article 2 of the Italian Constitution and articles 1 and 2 of the Bonn Constitution one finds an attempt to entrench human rights and liberties in a superior order (see the wider exposition in Barbera 1975). And how can not one connect these clauses, even though on a different plane, with the inclinations of the international society to develop a legal system based on the rights of individuals and peoples? In this sense a large contribution was given by the natural law doctrine of human rights (A. Cassese 1988, p. 10) but it is equally significant that article 12(2) of the Spanish Constitution attempts to anchor human rights with international law, even though defined as being limited to the treaties to which Spain has expressly adhered to.

The question which needs to be made is about the intersection of these three "destructive" tendencies: the affirmation of international treaties in defence of individuals and peoples; the opening of national law towards the law of nations; the opening of human rights, national and international, towards a superior order. Undoubtedly, there is a relationship between these tendencies since they are tied together by the affirmation of "pluralistic", "personalistic" and "communitarian" concepts (an obligatory reference here is to Maritain 1943). All three are linked - this is the point which I wish to underline - by the effort made at various levels to supercede the state's monopoly of law.

But can one go beyond this generic observation? Up to which degree can human rights penetrate the internal law of single States? And to what extent is internal law disposed to accept international customary law or does it encompass also the principles "recognised by civilised nations"?

These are questions for which an answer is not easily found. Above all, the answer will vary from one legal system to another (Haeberle 1983). It is however certain that one cannot attempt to interpret the new in the light of what these tendencies want to supercede (Cocozza 1994). It is therefore no longer possible for international doctrine to classify human rights protection in the classic categories of old international law (ranging from the maintenance of international order and peace between nations to the principle of the sovereignty of the State and non-interference in internal affairs). It is not otherwise possible for constitutional doctrines to limit the effect of international instruments of rights in the name of the self-sufficiency of the Constitutions of States and the sources upon which they are built.

The latter is a temptation present in Italian legal doctrine. But if a

country like Italy can as a whole be satisfied with the liberties in its Constitution, to the extent that constitutional commentators are worried that such pacts may contribute to remove the authority of the Italian Constitution, one cannot say the same for other parts of the world. And as Kant had said, if a principle does not have a "universal validity", to what extent is it coherent with the very foundations of law?

The effort of the recent jurisprudence of the Italian Constitutional Court, in its judgment n. 10 of 1993, where it affirmed, on the basis of international instruments (article 6 of the European Convention and article 14 of the Convention on Civil and Political Rights), the right of the accused to defend himself in his own language, is a reply to this need, felt to a greater extent by the judges of this Supreme Court rather than by a certain section of legal authors: to reconcile state law with the construction of a legal order which transcends it, to merge the reassuring force of the traditional categories of law (including individual rights) with the uncertain and laborious emergence of the new rights, the brightness of the certainty of law with the flickering light of human rights.

This century which is drawing to its end has been dominated by the "social question", the first century of the second millennium will be dominated by the "national affair" (Touraine 1992, p. 372), nurtured by factors of varied significance (not least the difficulties deriving from the "globalisation" of economic processes). Nationalism, integralism and tribalism, on a national and international scale, cause the re-emergence of totalitarian ghosts. The totalitarian logic is based on the primacy of the state with respect to society, of the community with respect to the individual, on the force of consensus, on the ideological transfiguration vis-à-vis the concrete individual (Arendt 1951). A logic contrary to that on which "human rights" are founded. The battles for human rights may therefore revive the politics of, "sa modernité au politique", without returning in inauspicious "récupérations idéologiques" (A. Nouss 1995, p. 93).

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