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# EDITORIAL:

# FINAL ISSUE OF THE MEDITERRANEAN JOURNAL OF HUMAN RIGHTS

KEVIN AQUILINA

The Mediterranean Journal of Human Rights has been in print since 1996. The Journal has been an initiative of the Faculty of Laws at the University of Malta which has attracted international readers from the very beginning. Recently the University of Malta has teamed up with the University of Enna to produce it.

The Faculty Board of Laws decided in one of its latest meetings to publish the last issue of the Mediterranean Journal of Human Rights during this current year and then discontinue its publication so as to move on to new pastures. This decision was motivated by various reasons, including the small number of subscriptions, the intensive effort involved in producing two issues per year, the lack of human resources to work on the Journal and the fact that the Journal did not have sufficient funds to enable it to continue running, without the Faculty of Laws having to make good for its upkeep from its own limited financial resources. The Faculty of Laws has decided to publish instead a Mediterranean Yearbook on Human Rights which will be issued only on an annual basis; thereby making it feasible for the Faculty to produce it in a timely fashion. I am aware that a new Editorial Board still needs to be appointed which will in turn advise the Faculty Board on the contents of the Yearbook. Hopefully by the end of 2014 everything will be in place to see the new Yearbook

launched in 2015. In the meantime, the Faculty Board of Laws had proposed to the University to establish a Human Rights Programme and it is with pleasure that I announce that the Human Rights Programme has been established and that the Programme is now looking into the matter of establishing the Yearbook.

It is my duty as Dean of the Faculty of Laws to thank all those persons who have made the Mediterranean Journal of Human Rights a success. Although it is not possible to mention all the persons who, in one way or another, have made this dream come true, I must single out for praise Dr David E. Zammit, the Journal's Executive Editor, who was responsible for the day to day running of the Journal and Mrs. Paula Muscat, the Journal's Administrative Secretary. I also wish to thank Professor Ian Refalo and Professor Salvo' Ando, the General Editors of the Journal as well as the members of the Editorial Board, reviewers and contributors.

The Faculty Board of Laws is very satisfied and proud at the academic standard that the Journal has kept over the years of its publication and I look forward eagerly to the new publication which the Faculty of Laws will be publishing in its stead – the Mediterranean Yearbook of Human Rights.

**Professor Kevin Aquilina**
Dean, Faculty of Laws
University of Malta
24th February 2014

# THE HUMAN RIGHTS IMPACT OF INTERPRETING WOMEN AND FEMALE CHILDREN REFUGEE CLAIMS THROUGH GENDER

MARY B. AYAD

European Union member States, particularly those in the Mediterranean, must contend with refugee and asylum claims that impact female refugees and asylum seekers. In order to give justice to human rights protection, the author argues that claims by women and female children refugees must be viewed through the lens of gender. Although this is a debated issue, arguments on the side of gender are not only stronger, but are more in line with human rights protection. The current situation in the Mediterranean region necessitates looking at refugee claims with a critical eye to 'culture', 'religion' and 'political opinion', as well as 'membership of particular group', of female refugees. These categories almost always impact women negatively and are used as a basis of persecution of women and female children. To turn a blind eye on issues related to gender persecution is to deny human rights wholesale. This issue must be faced by any State serious about its human rights agenda, particularly if it wishes to serve as an exemplary example to states which do use culture, religion, politics and group membership to persecute the female members of their respective societies. This is particularly relevant to the Mediterranean.

## 1. Introduction

The question of gender based claims is a debated issue in the area of Refugee Law.

There are currently two schools of thought regarding gender based claims.[1] According to one School, advocates attempt to make gender or women as a social group or to base persecution on gender alone, with claims that inscribing it on one of the Convention grounds is insufficient. The other school advocates expanding the definition of the Convention grounds and other human rights instruments to the particular concerns affecting female refugees. Although the author believes that both routes are valid ways to achieve sufficient human rights protection for women, the argument is put forth herein that the second school will be more effective because it is more likely to be accepted and upheld in the conservative practice of Refugee Law. Additionally, Mahmoud claims that the two schools are contradictory and cannot be combined, however the author argues that this is an inaccurate claim.[2] It is possible to institute reforms to current Refugee Law using two methods. Firstly by reinterpreting the Convention grounds to include issues faced particularly by refugee women, and secondly to consider gender based persecution as a ground as well. In fact, the author submits that the two schools have more common than they do differences. The final outcome of both would be the same; human rights protection for female claimants which would normally be lacking in the event of denying the very real gender based persecution that women and female children face. Re-interpreting the Convention grounds with a realistic vision to the valid concerns that female claimants face because they are female would yield the same outcome as that of decisions based on the consideration of persecution based on gender. It is only a fine line of semantics that distinguishes

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1 Mahmoud, N. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.)Pages 368-382.

2 N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996).

the two schools. This will be demonstrated by applying Refugee law and the Canadian guidelines to a hypothetical case found forthwith, as well as by citing examples of gender related persecution. Three of the 1951 Convention grounds lend themselves to particular relevance to gender based claims: political opinion (imputed), religious belief, and membership of a social group. There implications shall be analysed here as well.

## 2. The Facts of the Case

In order to apply the principles of the 1951 Convention and the Canadian Guidelines, it is important to apply them to a hypothetical case. The facts of the case are as follows: Xao Ming, a Chinese woman, at the age of nineteen was sold to Chen. Xao Ming lived in Fujan Province where it was a cultural custom to sell girls and women in marriage in exchange for large sums of money. Her parents took 18,000 RBM and promised her to a man named Chen when she became twenty one. Xao Ming had no say in any of this. Chen was known to be a violent and abusive man. After Xao Ming's parent's used up the money, she changed her mind. Chen threatened her that his uncle would arrest her. Chen's uncle in fact, was well-known to arrest people for his own personal reasons and gain. Xao Ming escaped from her parents home to protect them as well as herself. Chen vandalized their house when they refused to reveal her whereabouts. Chen eventually found her, so she fled to the United States. Chen continues to harass the family, and they must repeatedly hide.[3]

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[3] This case was given as an assignment, University of Malta Faculty of Laws, International Human Rights and Democratization in the Mediterranean Master's Course, for the Refugee Law Elective, by Anna Marie Gallagher. February, 2006, Malta.

## 3. Analysis of the case

When Xao Ming left Chen, persecution of not only Xao Ming, but her parent's began, at the hands of Chen himself, and with the threat of government persecution, in the hands of Chen's uncle who is a government official intent on upholding the cultural customs of his land.

Though she initially 'agreed', the prevailing cultural customs at the time where taken as a matter of fact and to disagree is not done. This is therefore a forced marriage, based on Xao Ming's gender, as a female, and on prevailing cultural customs, thus establishing a well-founded fear of persecution based on being a member of a social group in which the uniting factor is inherent, that of gender. The reasoning behind establishing forced marriage as a form of persecution based on gender is that it is females of traditionally patriarchal cultures that are forced into marriage, and not men. Additionally, this so called 'marriage', is not a marriage but a business transaction in which the female was sold as a good for funds to a third party. This type of business transaction is slavery. As she was also taken from her home to a place where she did not wish to be, this constitutes trafficking. Moreover, the nature of the relationship between this female and Chen is not a marriage but something akin to prostitution and due to the lack of consent on the girls' part, she is subjected to emotional, physical, and sexual violence and rape as well as domestic servitude and exploitation. This forced marriage violates a number of human rights and in this case, all of them are based on gender. If Xao Ming were a male, she would not be subjected to a single one of these atrocities and human rights violations.

Moreover, since these are the prevailing 'cultural customs', there is no availability of any form of government protection against these human rights violations. In fact, follows forthwith, the opposite is the case. It is difficult for gender based violence to be punished for a number of reasons:

> "First, gender based violence is so prevalent in most societies that it is accepted as natural or as part of the status quo. Second, since gender based violence is seen as commonplace it is quantitatively different from torture of men or from 'traditional human rights violations'. Third, gender based violence is inevitable and too prevalent to change. Fourth, often gender based violence is viewed as trivial, individual and a private matter. It is not 'political', and it is usually addressed after 'universal' rights (i.e. of concern to men) have been secured. Finally, within the separation of public and private spheres, gender violence is considered personal conflict not needing to be addressed at the human rights level."[4]

These reasons demonstrate the severe difficulty in achieving Human Rights protection for female refugees who face gender based persecution for going against the cultural norms of patriarchal societies, and are members of social groups who are persecuted for either imputed 'political' opinion; that is to say because they are perceived as having acted against the society precisely because of their gender.

In the hypothetical case, Chen's track record has well-established that he uses his government position for personal reasons, so why wouldn't he do the same with Xoa Ming? Hence, the local government does not protect against this cultural practice and the local government official will contribute to ensure that this forced marriage will take place. The well-founded fear of persecution is supported by the fact pattern in this case.

Realizing all this, Xao Ming fled. The well-founded fear of persecution hitherto based on past persecution (Chen attacking her parents' house) and these existing persecutions can only attest to further and future persecution(s). The

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[4] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 374.

important Convention ground of the well-founded fear of persecution is thus established, and her family is also already being persecuted. A discussion of several Convention grounds on which the well-founded fear of persecution is based shall ensue.

## 4. Application of Refugee Law to Gender Based Claims 1951 Convention Grounds

According to the 1951 Convention, the grounds for refugee status refer to the legal term 'refugee' as the definition of a person who has a well-founded fear of persecution based on race, religion, nationality, political opinion and membership of a particular social group.

Using the case of Xao Ming to illustrate the applicability of current Refugee Law, particularly the 1951 Convention, to gender based claims, it is clear that she has fulfilled two of the Convention grounds; membership of a particular social group and political opinion. Indeed, arguments can also be made for her on the basis of religion.

## 5. Political Opinion

In order to understand more clearly why Xao Ming's case fulfils the Convention ground of political opinion it is necessary to provide a clearer understanding of what political opinion implies,

> "'Political opinion' should be understood in the broad sense, to incorporate within substantive limitation now developing generally in the field of human rights, any opinion on any matter in which the machinery of the State, government, and policy may be engaged. This would include the concept of a political act."[5]

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[5] The Refugee in International Law, Second Edition. Guy S. Goodwin-Gill. Oxford University Press, 1996. P. 49.

Her defiance of both her family and the prevailing 'cultural customs' which are also a form of political repression against women, can be broadly interpreted as a political act. Many so called 'cultural customs' are in reality political norms used to regulate a given society's mores, essentially to maintain a power dynamic giving men hegemony over women. Rules about the status of women in a society certainly have a political nature, as do the rules regarding a man's relationship with his 'wife'. In many instances what is termed a cultural tradition is a thinly veiled political position that privileges one group in a society against another, giving them hegemony. Calling it a cultural tradition rather than a political issue simply obscures the reality.

> "Whether challenging prevailing norms is classified in terms of religion, or in terms of political opinion, if measures taken up to enforce the prevailing norms amount to persecution, or if the prevailing norms themselves violate core international human rights standards, there will be a basis for a refugee claim."[6]

Thus, it is clearly established by the facts in Xao Ming's case that by challenging the prevailing norms of the Fujan province, she has faced and will face further persecution, both by those who seek to uphold and enforce the prevailing norms (Chen and his uncle) and by the norms themselves (forced marriage, which it can be argued, is a form of trafficking,[7] slavery, prostitution, domestic and sexual violence, rape and

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[6] *Ibid*

[7] See, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000, in M. Eriksson. Gender-Based Persecution - The Evolution of the Refugee Definition. (Examensarbete Med Pratik. 2003, P52) for the following definition: 'The recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent

exploitation.) Let us now move on to the second basis of Xao Ming's claim, membership of a particular social group.

> "A woman who opposes institutionalized discrimination of women, or who expresses views of independence from male social cultural dominance in her society, may be found to fear persecution for reasons of imputed political opinion (i.e. she is perceived by the established political and social structure as expressing politically antagonistic views.) Two considerations are of paramount importance when interpreting the notion of 'political opinion':
>
> 1) In a society where women are 'assigned' a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.
>
> 2) The political nature of oppression of women in the context of religious laws and ritualisation should be recognized."[8]

Thus, it can be argued that the selling of girls and women into forced marriage in the Fujan province is a political act against them simply because they happen to be female, and when these females protest by fleeing or rejecting forced

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of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. From UN/A/55/382, 2 November 2000, article 3a. The Protocol supplements the United Nations Convention against Transnational Organized Crime.'

[8] The Refugee in International Law, Second Edition. Guy S. Goodwin-Gill. Oxford University Press, 1996. P. 49.

marriage, they too are in turn making a political statement by their actions and acting in a 'subversive' political manner.

'Feminism' can be viewed in the context of political opinion. To flee from a forced marriage can be seen as a strong feminist stance, given also the social pressure in the Fujan province to conform to such a degrading custom.

> "A woman threatened because of her feminist views may be eligible for asylum due to persecution based on the ground of political opinion. The UNHCR and Canadian Immigration Board recognize women's opposition to oppressive laws and customs imposed on women as political statements."[9]

Another important aspect of political opinion has to do with the concept of imputed political opinion. This means the political opinion attributed to people, causing them to become the target of persecution for having an imputed political opinion. In many cases, these people do not have a political agenda, but are accused of having one. The concept of an imputed political opinion is relevant in Xao Ming's case. As someone fleeing a number of serious human rights abuses, she was imputed to have a political opinion in violation of the current regimes' agenda, and was punished accordingly. The fact that this is not a unique case and that in her province a number of other women suffer likewise only serves to strengthen her case. The fact also that her persecutor has relatives who are also a member of the regime is not coincidental. That Chen's uncle is a government official supporting Chen's human rights abuses of Xao Ming automatically puts her at odds with 'the government'.

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[9] See WWW.Hambastegi.org/reports/fact-sheet. html

## 6. Religious Belief

Continuing with this reasoning, one can also argue that her claim can be based in the Convention ground of religion; by acting against the social mores of her society and not marrying, she is defying the culture and traditions which are usually connected to religious belief.[10]

> "In many cases, in which the laws of the State are those of the official religion, rejecting cultural/ religious norms that discriminate against women may be seen as a political act. Thus actions that are not normally seen as 'political' in the West, such as dressing in an unapproved manner, make a statement that authorities interpret as defiantly political as challenging the fundamental tenants of the State and its power to control its citizens."[11]

When Xao Ming refused to be sold into a marriage, defying the prevailing 'cultural customs' of her country, she was also engaging in a political act. Persecution against her can be seen as a result of either her imputed political opinion or religious belief.

> "Persecution on the basis of religion, however, may be experienced differently by men and women. Less readily embraced, however, are the claims of women who face discriminatory treatment because of the prevalent religious code of their communities. Women who reject religiously imposed restrictions on their employment, mobility, and dress, have not been as widely recognized as Convention refugees. Either the harm they fear has been characterized as discriminatory and not persecutory, or, although characterized as

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[10] Ibid (P 409 in reference to the 1967 Protocol Relating to the Status of Refugees)

[11] From www.Gender-relatedrefugee-claims.org

> persecutory, has been found unrelated to a Convention refugee ground. Moreover, persecution of women who oppose the imposition of religious codes has also been recognized as persecution on the basis of political and/ or social group grounds. "[12]

## 7. Membership of a Particular Social Group

The Convention ground of membership of a particular social group is relevant to women and female children refugee claimants.

> "The Executive Committee of the UNHCR has recognized that women who have transgressed the social mores of their country may be considered such a group. Hathaway identifies gender based groups as a 'clear example' of a particular social group because their members share a common and immutable characteristic, that of their sex."[13]

This will be the starting point for Xao Ming's claim on the ground of being a member of a particular group, based on the prevailing custom of forced marriage in the Fujan province, this custom applies only to females. Xao Ming, as a Chinese girl and subsequently woman, is subjected to this degrading form of persecution based on her gender, and her biological sex.

> "This view was accepted in Canada in the case of Zekiye Incirciyan, a Turkish widow who was persecuted in her country because she did not live under the protection of a male relative. The particular social group was

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[12] N. Kelley. The Convention refugee definition and gender based persecution: A decade's progress. International Journal of Refugee Law. Vol.13.no 4. (Oxford University Press, Oxford, 2002). P.563

[13] From www.Gender-relatedrefugee-claims.org

> identified as 'single women living in a Moslem country without the protection of a male relative. The approach of that case has been accepted in other immigration and refugee board decisions in relation to women in Lebanon and Sri Lanka, and interestingly in view of the Nada case, Iran."[14]

Clearly, due to the widespread and prevailing degrading custom of forced and sometimes early marriage in the Fujan province, Xao Ming, a native of this region fits the criteria of membership in a particular social group, that of Chinese females, girls and women, who are subject to forced marriage. Additionally, not only is this forced marriage, but money was exchanged, thus, it now becomes slavery. In addition to the non-consensual nature of the transaction, a human being is being sold as a good in exchange for money. This is clearly slavery. That the type of transaction is a marriage that will involve domestic violence, as Chen is already known to be abusive and violent, and that will involve, non-consensual sex, Xao Ming will be subjected to domestic and sexual violence and rape. Given the non-consensual nature of the combination of forced marriage and slavery, she is thus forced into prostitution, selling her body to Chen, to pay for the money her parents received, and this can also be seen as a form as trafficking, as Xao Ming would be transported from one place, for the exchange of money for her person, to another location, from her family's home to Chen's, for reasons of exploitation. As a result of these human rights violations that Xao Ming would be subjected to, she is a member of the social group 'Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation'.

> **{Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence,**

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[14] *Ibid*

> **rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it.}**

Given the predominance of selling females into marriage in the Fujan Province and the severe negative consequences of those who attempt to flee, the number of females subjected to this situation would clearly form a social group. Given also the lack of protection and the help of government officials in enforcing this custom, these girls and women are either in danger of being forced into such an arrangement or are in the process of fleeing from it, so there is also the element of impending danger and escape. Those girls and women attempting to flee are subject to further persecution, thus, the group can be further expanded to include,

> 'those Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it.'
>
> "In April 1993, the Federal Court of Appeal held that women in China with more than one child who are faced with forced sterilization form a particular social group. The court said, 'all of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a woman's reproductive liberty is a basic right ranking high in our scale of values."[15]

One may apply similar reasoning to the case of Xao Ming. Her right, as all Chinese girls and women's right, all girls

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[15] *Ibid*

and women across the globe, to liberty in marriage, freedom from trafficking, prostitution, slavery, domestic and sexual violence, rape and exploitation are significantly important human rights. To be subjected to such degrading and in human treatment, and forms of torture, with persecution for non-compliance is abhorrent. The girls and women of Fujan province are thus united in this particular social group.

> "It is recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that woman asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 UN Refugee Convention."[16]

Thus, it has been established that going against social mores may create membership in a particular social group.

> "In Matter of Kasinga (1996), in this precedent setting gender based asylum case, the court ruled that female genital mutilation, which results in permanent disfiguration and poses a risk of serious potentially life threatening complications, can be the basis for the claim of persecution, young women who are members of the Tchambe-Kunsuntu tribe of Northern Togo, who have been subjected to FGM, as practiced by that tribe, and who oppose the practice as recognized as members of a 'particular social group' within the definition of the term 'refugee'."[17]

Several cases exist to illustrate this point further. CRDD M89-00057, Wills, Gauthier, February 16, 1989, where the Iranian claimant was found to be a member of the social group,

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[16] *Ibid*

[17] See, http://amnestyusa.org/womenasylum retrieved April 15, 2008

'a pro-shah family.' In CRDD M89-00971, Wolfe Hendricks, June 13, 1989, where the Refugee Division found the Peruvian claimant to be a member of a particular social group, her family. Also in CRDD M89-01098, A Sri Lankan refugee was found to be a young Tamil in a Tamil Family. Also in CRDD T89-02313, T89-02314, T89-02315, the claimant was found to be a member of the social group, 'targeted family'.[18] One may also argue based on the facts of Xao Ming that her family forms a 'targeted family', one that is targeted for persecution for political opinion and acts in going against social norms of forced marriage for hiding their daughter's whereabouts and because the man persecuting them, Chen, had the support of his uncle who was a government official.

A further implication of the concept of membership of a particular group is the fact that because of their membership, these people would be persecuted. This implies a number of things, first of all that being a member of a particular group means that as a result of their membership it almost automatically makes them subject to human rights violations Secondly, that their membership of the social group is something exploited by governments who either fail to protect them when others commit human rights abuses against them, or the governments themselves are actively persecuting them on the basis of their membership in that group. "it is argued that rape, female genital mutilation, and discrimination can all be linked to existing grounds, covered under the 'social group' ground or 'other serious violations of human rights' category outlined in the UNHCR Handbook (1991)."[19] In the discourse of gender based claims, it is important to emphasis that women,

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[18] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

[19] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.)

because of their gender as well as having an imputed political opinion imposed on them, constitute a particular social group. The concept of imputed political opinion cannot be separated from that of membership of a particular social group.

> "Some theorists hold that attempts to rework the 'social group' ground of the definition do not go far enough to encompass the exploitation and persecution based solely on gender, especially since it often takes place in a social and legal context that does not consider it to be criminal."[20]

## 8. Domestic violence and sexual violence

Another dimension to this case, in addition to the human rights violation of forced marriage, would be that if Xao Ming returns home and stays with Chen, a violent and abusive man, she would surely be subjected to domestic and sexual violence.

> "Sexual violence against women and girls usually occurs in situations in which women are forced into a relationship, a contract or an act in which they have no independent right to decide how to behave with men."[21]

> "Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the State is unwilling or unable to adequately protect

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[20] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.).

[21] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.). p.368.

> the concerned persons. In the refugee law context, such discrimination may amount to persecution."[22]

It has already been established in the facts of the case that Chen is an abusive and violent man, and his uncle, a government official is allowing and supporting his violence towards Xao Ming's family. If she lives with him she would most likely be subjected to domestic violence, and if she is taken to him against her will, most likely she will also be subjected to sexual violence and rape. In Xao Ming's society, Chen would be seen as her 'husband' so beating her would not raise any need for protection from that particular society.

> "Sexual assaults are acts of violence which reveal the subordination status of women in both public and private life. Women become more vulnerable to sexual violence because the law, the institutions responsible for implementing the law, and perhaps even the community often sanction these actions with impunity. Sexual discrimination in law and practice fosters indemnity and the stigma attached to rape often deters women from seeking justice."[23]

Women like Xao Ming, who flee from being sold (trafficked) into marriage,

> "can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection. These women

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[22] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

[23] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 368.

> face violence amounting to persecution because of their particular vulnerability as women in their societies and because they are so unprotected."[24]

This describes Xao Ming's situation based on the facts of the case if she were to return to her home.

## 9. Persecution

> "There is no doubt that rape and other forms of gender related violence, such as dowry related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical- and which have been used as forms of persecution, whether perpetuated by State or private actors."[25]

In the case of Xao Ming, being forced into marriage has implications beyond this initial human rights implication. It implies a life of domestic and sexual violence including rape, imprisonment, slavery, as well as trafficking. It encompasses a number of serious human rights violations. In the human rights discourse, rape has already been classified as torture.

> "Women face persecution and death for disobeying social customs in source countries. Some examples of this disobedience can be: choosing a husband in place of accepting an arranged marriage; undergoing an abortion where it is illegal; becoming politically active

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[24] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

[25] UNHCR Refugee Agency. Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. P.3

> in a women's movement. Woman are also abandoned or persecuted for being rape victims, bearing illegitimate children or marrying men of a different race."[26]

There are two types of persecution, which ultimately have the same end results. In one case it is either actively undertaken by the State, in the second case it is allowed by the State or the State does not take an active role to prevent it. Both of these aspects of persecution apply to our case. In the one, the prevailing social customs themselves are a form of persecution and the state does nothing to protect girls from them, in the second, the state can help enforce these customs and punish those who flee from them, as is the case with Chen and his uncle, a government official. Also, in terms of persecution, past persecution has already occurred and the promise of future persecution will certainly be fulfilled if she goes home. Additionally being sold into marriage and all that it entails is a form of persecution and trafficking.

> "Trafficking for the purpose of forced prostitution or sexual exploitation is seen as a form of persecution: Some trafficked women or minors may have a valid claim to refugee status under the 1951 Convention."[27]

It has been argued previously that forced marriage can be seen as a type of forced prostitution, sexual exploitation as well as slavery.

In terms of agents of persecution, it is important to note that,

> "there is scope within the refugee definition to recognize both State and non-State actors of persecution. While

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[26] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 371.

[27] *Ibid*

> persecution is most often perpetuated by the authorities of a country, serious discrimination or other offensive acts committed by the local authorities of a county, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection."[28]

In Xao Ming's case, just the existence of the social custom of forced marriage as a social norm is most likely enough to establish persecution, however, Chen's behavior re-enforces the claim, and the fact that his uncle, a government official, as well as other government officials do not do anything to protect girls from this tradition are proof that the State is not actively preventing forced marriage and most likely is engaging in a number of practices that encourage or assist this human rights violation in terms of its policy, particularly its defense of members of society who engage in the violation rather than those who are not protected from it.

The moral rules of a society may even take the form of national laws or customs and the infringement of these moral rules may lead to official retaliation or by punishment by the community, whether this is sanctioned by the authorities or not.[29]

In terms of the cited case example, not only is Chen's uncle doing nothing to protect her, he can be called in at the whim of Chen to actively persecute her, in favor of Chen, as this uncle is known to act for personal reasons in the past. The explanation of the ground of persecution has been clearly set out in this article as it pertains to gender based claims and its relevance to gender based claims has been established in this case.

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[28] *Ibid*

[29] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p.371.

## 10. Patriarchy

> "Women face discrimination based on sex and the subordinate position of their gender in most societies, including those in the West. Violence against women often takes the form of rape or indecent assault."[30]

This means that certain types of persecution occurs against women precisely because they are women.

However, it is not enough to say that female refugee issues can be dealt with under the body of pre-existing international human rights law for the simple reason that those laws outside of the 1951 Convention cannot offer refugee status or asylum and therefore are extremely limited means of protection for female refugees.

> "Violence against women is a manifestation of historically unequal power relations between men and women. Violence is part of a historical process and is not natural or born of biological determinism. The system of male dominance has historically had roots and its functions and manifestations change over time. The oppression of women is therefore a question of politics, requiring an analysis of the institutions of the State and society, the conditioning and socialization of individuals, and the nature of economic and social exploitation. The use of force against women is only one aspect of this phenomenon, which relies on intimidation and fear to subordinate women... there are patterns of patriarchal domination which are universal though this domination takes a number of different forms as a result of particular and different historical experiences."[31]

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[30] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

[31] Special Rapporteur on Violence against women, Preliminary Report, 1994 in, F.G. Jacobs and R.C.A. White. (2nd Ed.). The European Convention on Human Rights. (Clarendon Press, Oxford, 1996). P 943.

The problem of patriarchy is the reason that there exists gender based persecution imbedded in societies, cultures and institutions and in which governments turn a blind eye.

> "Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry, deaths, acid attacks and female circumcision. Such procedures and practices may justify gender based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms... forms of gender based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower levels of education, skills and work opportunities. Abuse against women is systematic and group based."[32]

It is political but because it is against women it isn't considered political. It reflects unjust power of male dominance.[33]

## 11. The inclusion of other Legal Instruments into the body of Refuges Law particularly in refugee status determination cases for gender based claims.

A number of other legal international human rights instruments in addition to the 1951 Convention can be invoked on behalf of refugee status determination claims particularly those pertaining to gender based claims. These instruments can and should become familiar to the general body of Refugee Law.

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[32] International Human Rights in Context. Amnesty International, rape and sexual abuse: women, torture and ill treatment of women in detention. 1992. P. 932.

[33] *Ibid* pg. 953-955.

> "In terms of those forms of harm that are gender specific: rape, female genital mutilation, forced abortion or sterilization, bride burning, forced marriage, domestic violence, international human rights instruments are invoked to determine acceptable standards. For example, all forms of harm listed above are considered to fall under Articles 3 and 5 of the Universal declaration of Human Rights as they violate the right to life, liberty and security of the person and violate the principle that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[34]

Gender based claims are important for a particular reason. They encompass a number of rights. Usually gender based claims are based on a combination of human rights violations: the right to life, protection from torture, inhuman, and degrading treatment, slavery and forced labor, personal liberty and security, freedom of thought, conscience and religion, right to expression, freedom of movement, freedom from discrimination. The case of Xao Ming, as well as the general pattern of most honor killings, forced marriages, bride burning, Female Mutilation, rape, and domestic violence include all of these human rights violations.

In Xao Ming case certain other legal instruments enshrining principles can be used in addition to the grounds found in the 1951 Convention as supplementary law to strengthen the basis of her refugee status.

The Convention against Torture can also be invoked. Torture is prohibited in all circumstances and rape is considered a form of torture. Any sexual relations occurring within a forced marriage, by default would be considered non-consensual sex and therefore be classified as rape. Due to the fact also that Chen's uncle is a public official who would enforce his nephew's

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[34] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p.379

marriage to Xao Ming and would punish any action on her part to the contrary, this would constitute cruel, inhuman and degrading treatment and punishment. This criteria would also apply to the forced marriage itself as cruel, inhuman and degrading treatment and punishment. The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment clearly sets can be another legal instrument in Xao Ming's case.

The Convention for the Elimination of All forms of Discrimination against Women (CEDAW), which prohibits discrimination against women can also form the basis for granting refugee status.[35] Article 2(f) of The CEDAW reads as follows,

> "State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women."[36] Article 2 (f) continues, "To take all appropriate measures, including legislation, to modify or abolish existing laws; regulations, customs, and practices which constitute discrimination against women."[37]

When cultural practices violate the dignity of human beings, especially based on gender, cannot be defended solely as cultural practice and must be seen as forms of persecution with a political agenda.

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[35] Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights. P.5.

[36] CEDAW Article 2(a) found in Blackstone's International Human Rights Documents. Fourth Edition. P.R. Ghandhi. Oxford University Press. 2004. P.96.

[37] *Ibid*

## 12. Legislation and Policy on Gender Based Claims

This section will be devoted to the policies of Nordic countries in regards to gender based claims and the Canadian guidelines.

> "The UNHCR Executive Committee, in Conclusion No. 39, acknowledged that States are free to adopt the interpretation that 'women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group within the meaning of article 1A(2) of the [1951 Convention]'. Further, Executive Committee Conclusion No. 73 recommends that States develop 'appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men'. Despite these developments, the 'particular social group' concept, and more specifically the notion of gender-based persecution, remain unsettled areas of refugee law. As noted during the Symposium, the interpretation of European Union (EU) countries regarding article 1A(2) of the 1951 Refugee Convention tends to be restrictive, as women having transgressed the social mores of their society may not be considered a 'particular social group'. In the past, no EU countries had guidelines on women refugee claimants fearing gender-based persecution."[38]

However, the Convention on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO) has been entered into in April 2011. Notwithstanding, this is still a relatively new area and precedent and case law need to

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[38] I. Daoust and K. Folkelius. UNHCR Symposium on Gender-Based Persecution. International Journal of Refugee Law. Vol. 8 No. 1/2. (Oxford University Press, Oxford, 1996, p 180-181).

be developed in the direction of international human rights principles.

## 13. The Canadian Guidelines

The Canadian Guidelines have four categories of importance. Women who fear persecution on the same grounds as men, women who fear persecution on the basis of kinship, women who fear persecution resulting from discrimination on grounds of gender acts or acts of violence by the hands of the state or acts that the state is unwilling to protect them from, women who fear persecution as a consequence of failing to conform to gender-discriminating religious or customary laws or practices in their country of origin.[39] The last three apply and will be considered for Xao Ming's case.

> "The fourth group of women (in the guidelines) are those who fear persecution because in their country of origin they have transgressed religious or customary laws and practices that discriminate against women. The guidelines cite such social traditions or cultural norms as choosing their own husbands instead of accepting an arranged marriage, wearing makeup, having hair showing, or wearing a certain type of clothing. Such women may be considered as a gender-defined social group."

As has been established in the previous paragraphs, Xao Ming is a member of 'Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by

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[39] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

attempts to flee it.' Clearly, the basis of the persecution is her gender, for Xao Ming would not be subjected to these cultural customs in Fujan if she were a male. Indeed, gender plays a role in refugee creation.[40]

Additionally, the person

> "must have a genuine fear of harm sufficient to constitute persecution should she be returned home, her gender must be the reason for the feared harm, and she must have no reasonable expectation that her home country can protect her."[41]

Xao Ming has no protection. Her well-founded fear has already been confirmed by a number of facts. Chen is violent and abusive and has already harmed her parent's home and forced them to flee from his on-going persecution. His uncle is a member of the government and is enforcing this custom and the persecution of Xao Ming's family has no legal or political protection to prevent it or end it. If Xao Ming returns home, her life would clearly be in danger of persecution as well as punishment for fleeing.

## 14. The European Union

The European Union must be included as well because a number of Nordic States are also members. The European Council has issued an instrument called the Directive 2004/83/EC which explicitly recognizes the persecution of non-state actors and gender based persecution in Article 9, paras. 2 (a)

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[40] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 370.

[41] Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated1996. Juan Guillen.

and (f) (gender based persecution).[42] In light of what we have learned about the role of non-state actors in gender persecution, this is a step in the right direction. This recognizes the State responsibility in persecuting non-state actors and in the case of the State abrogating its responsibility, allows for female claimants to seek refugee status based on both the persecution of non-state actors and gender based persecution. This means that domestic violence, sexual violence, forced marriage, bride burning and other 'cultural' customs should no longer not be accounted for, but should be recognized as grounds for gender based claims, according to the directive.

## 15. The Netherlands

> "When the Netherlands ratified the Refugee Convention, the treaty automatically became incorporated into domestic law."[43]

> "The Aliens Act is the principle piece of domestic legislation that regulates refugee and asylum status in the Netherlands. Although the Aliens Act does not explicitly recognize gender-based violence as a potential ground for persecution, the accompanying Aliens Act Implementation Guidelines (Vreemdelingencirculaire) advocate a 'gender-inclusive approach to asylum."[44]

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42 Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_guidelines. Php#Norway pg. 4-9.

43 See, Australian Lawyers for Human Rights Refugee Law Kit 2004, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_guidelines. Php#Norway pg. 4-9.

44 See, Women's Anti-Discrimination Committee Examines Netherland's Policies on Prostitution, Domestic Violence, Human Trafficking, Committee on Elimination of Discrimination against Women, 767th and 768 meetings, General Assembly, WOM/1601/Rev.1 (24 January 2007), available at http://un.org.News/Press/docs/2007/wom1601.docs, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines.

"The government also issued a Work Instruction on the subject: Immigration and Naturalization Service (IND), Work Instruction no. 148: Women in the asylum procedure (1997) (UNHCR translation reprinted in Thomas Spiijkerboer, Gender and Refugee Status Annex (Ashgate 2000): 'Neither the 1951 Convention nor the Dutch Aliens Act makes an explicit distinction according to gender (man/woman). In order to guarantee that these rules effectively do justice to the asylum applications of both men and women, this work instruction formulates a number of premises. Therefore, this work instruction does not contain a policy change, but is meant to draw attention to specific aspects of the asylum applications of women asylum-seekers relative to their gender and which may be important in assessing whether or not the grant of refugee status or a resident permit is warranted.' Prior to issuance of the Work instruction, the Dutch Refugee Council issued the following policy directive in 1984: It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection."[45]

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Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_guidelines. Php#Norway pg. 4-9.

[45] See, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_ guidelines.Php#Norway pg. 4-9.

## 16. Norway

> "Norway has adopted the interpretation proposed in Executive Committee Conclusion No. 39."[46]

> "The legal foundation of Norway's immigration and refugee protection system is the Act concerning the Entry of Foreign Nationals into the Kingdom of Norway and Their Presence in the Realm (Immigration Act (1988, last amended 2002). The Norwegian Ministry of Justice issued guidelines for claims based on gender-based persecution in 1998. In Norway, the 1998 Ministry of Justice guidelines introduced recognition of non-State agents, and the possibility of gender constituting a Convention ground for the granting of refugee status. They also introduced the principle of giving asylum applicants the benefit of the doubt."[47]

A 2000 report by an NGO (The European Council on Refugees and Exiles) specifies

> 'Guidelines effective from 15 January 1998 specifically mention gender related persecution, exemplified as situations where women, through their actions, omissions or statements, violate written or unwritten social rules that affect women particularly, regarding dressing, right to employment, etc. When the punishment for violating such rules can be seen as persecution in

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[46] I. Daoust and K. Folkelius. UNHCR Symposium on Gender-Based Persecution. International Journal of Refugee Law. Vol. 8 No. 1/2. (Oxford University Press, Oxford, 1996, p 180-181).

[47] See, H. Crawley and T. Lester, Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe 26, EPAU/2004/05 (UNHCR 2004) and T.B. Holth, Implementation of a Gender Perspective in Norwegian Refugee Law 40 (2000), in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

> accordance with the Geneva Convention, asylum should be granted... There is no special procedure or special accommodation for female asylum seekers."[48]

Norway announced in February 2007 that (presumably more extensive) gender-based persecution guidelines will accompany an upcoming draft Alien's Act."[49]

## 17. Sweden

> "Immigration and refugee determination in Sweden are regulated by the Swedish Aliens Act. A new Aliens Act entered into force on 31 March 2006, replacing the 1989 Aliens Act. According to the Swedish Government's Human Rights Webpage, the new law replaces the former administrative appeals system with a new system for appeals and procedures in immigration cases... The Act explicitly includes gender as a particular social group within the definition. The Swedish Migration Board (Migrationsverket) issued guidelines on gender-based persecution upon instruction of the Swedish government in March 2001."[50]

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[48] See, European Council on Refugees and Exiles, Norway, European Asylum systems: legal and social conditions for asylum seekers and refugees in Western Europe (2000), in Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs. uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

[49] See, UNHCR Press Release, UNHCR welcomes Norweigian steps to strengthen refugee protection, 9 February 2007, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

[50] See, Sweden: Swedish Migration Board, Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection, 28 March 2001 in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http:// cgrs.uchastings. edu/law/gender_guidelines.Php#Norway pg. 4-9.

## 18. Arguments against Gender Based Claims

Three main types of arguments against gender based claims have been proposed. These arguments are invalid and easily refuted. Several weak and refutable arguments exist against gender based claims. They include arguments limiting gender based claims on the grounds that the definition of a social group should be restricted to exclude gender, arguments limiting gender based claims based on arguments for cultural relativism, and arguments against gender based claims using the so called floodgate' reasoning. All of these arguments are flawed and shall be rebutted here.

(1) Limitations on the type of social group

One argument attempts to claim that persecution based on membership in a social group in which the group has to do with gender or abuse is not valid. The weakness that lies in this argument is that there are cases by analogy of people who are members of groups based on other violations and who suffer persecution for such. There is no reason why gender or abuse should be made invalid criteria for defining certain groups.

> "Abused women unprotected by their country of origin were not a particular social group. The panel reasoned that the existence of persecution alone should not define a particular social group. The guidelines however, suggest that abused women can form a particular social group based on the fact of their abuse. The view that a particular social group can in part be defined by its abuse gained support in the Cheung case, in which the Federal Court of Appeal held women in China facing coerced sterilization as a result of the one-child policy could form a particular social group."[51]

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[51] UNHCR Refugee Agency. Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. P.3

Thus, the persecution of Xao Ming, in this case based on her being a

> 'Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it',

though in part is based on gender and in part on abuse, has a basis for being a particular social group. However, the previously cited case law has demonstrated that membership of a particular social group, whether based on abuse, going against social mores, or something as small as a family, has basis and is grounded in a broad interpretation of the 1951 Convention.

We will see in subsequent paragraphs clear refutations for these arguments.

> "In the refugee context it is still unclear how far the ambit of 'social group' can be stretched in domestic abuse cases. Nor is it clear how rigorous the test will be for determining a lack of State protection and the supporting evidence that will be required."[52]

The UNHCR definition of a social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one that is innate, unchangeable, or which is otherwise fundamental to identify conscience or the exercise of one's rights.[53]

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[52] *Ibid*

[53] UNHCR definition of Social Group found in UNHCR The UN Refugee Agency. Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. P. 3.

(2) Limitation of cultural relativism

Essentially, governments are seen as responsible for maintaining human rights standards particularly when cultural values go against them. Moreover, what is deemed a 'cultural value' may at times be political oppression. "Cultural relativism is often cited as a reason for ignoring the claims of gender persecution."[54] There are arguments that governments are not responsible for the cultural norms of their societies when those norms violate human rights.[55] These claims, in light of internationally accepted Human Rights instruments, such as the CEDAW, have little foundation. (Article 5(a) of the CEDAW obliges State parties to

> "take all appropriate measures (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary to all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[56]

Clearly the forced marriage of girls and women like Xao Ming are severe violations of human rights that cannot be rationalized away as 'cultural norms.' According to Chairman Mawani, of the Canadian Immigration and Refugee Board,

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[54] Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights.

[55] See, Gender Asylum Reflects Mistaken Priorities. By Dan Stein. 1996 Human Rights Brief a publication of the Center for Human and Humanitarian Law at Washington College Law, American University. Retrieved February, 2007.

[56] Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights.

[57] *Ibid*

> "This is not simply a matter of imposing western standards on other countries. It is a matter of respecting internationally accepted human rights standards."[57]

## (3) Limitations of the Floodgate argument

The third major argument, the so called 'floodgate' argument is as follows.

> "An inclusion of gender-persecution would open a 'floodgate' swamping those countries with applicants. This fear has little foundation for a number of reasons. The floodgate argument is based on the assumption that the category of woman as a specific group is too large and ambiguous and by opening up this category and accepting refugees on this basis, millions more will present themselves, as violence against women is endemic and universal. However, there is nothing in the concept of refugee or in the Convention definition that allows for the exclusion of a claim on the basis that it is a persecution shared with large numbers of others. Each claim must be assessed separately. In the United States, 'social group' must be given a broad and liberal interpretation in order to protect groups who do not necessarily have political, religious, or racial ties at the root of the persecution. The existence of large numbers of persecuted women does not and cannot disqualify a woman from being a claimant. Just as gendered violence is endemic and universal, the existence of political violence is also endemic the world over, yet the fear of large numbers of possible political refugees does not preclude the recognition of their plight. Women are many times constrained socially and economically and hindered from reaching opportunities to make a claim. Lastly, accepting gender persecution on grounds for asylum does not imply that all such applicants would be granted asylum."[58]

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[58] *Ibid*

The idea that because gender claims allow for women, and women are half the population and face large-scale oppression, abuse and persecution, they should not have protection, is incongruous. "approximately two-thirds of the global refugee population are female, yet the majority of refugee claimants are male."[59] Half the world's population are men, and men face serious political persecution. Should their human rights then be denied, because there are so many of them? Of course not. Had Xao Ming a different judge, perhaps he would have argued that her cultural customs should be respected, that her husband is just mean, and can do what he wants with his wife, as domestic violence is an accepted cultural practice, and that if we give Xao Ming asylum, we would have to give every Chinese, and possibly almost every other female on earth asylum, as the statistics for rape, domestic and sexual violence, all based on gender, the world over, are simply staggering. Fortunately, such a judge is not the one arguing Xao Ming's case and her refugee claim is well established in this article.

Another example of a floodgate argument against gender based claims this time in the context of Zimbabwe is as follows:

> "domestic violence occurs in all societies and if 'unprotected Zimbabwean women or girls subject to wife abuse' formed a particular social group, then so would 'unprotected African women and girls and, by extension, all unprotected women and girls subject to abuse. The implications of a policy suggesting that any abused woman could find refugee in Canada is staggering."[60]

The problem with this kind of argument is that it negates the entire human rights discourse which values the life and quality of life of the individual in the face of human rights

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[59] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 372

[60] *Ibid*

violations. For example, a primary argument for the ban on torture in all circumstances has to do with precisely this particular issue of the quality of life of the individual who is tortured. The ban on torture states unequivocally that torture under all circumstances is wrong. The reasoning behind this is that in no way should an individual human being's quality of life be compromised to justify a State policy that claims to be acting on behalf of a large number of people. This same argument may be applied against the Zimbabwean judge. Just because a large number of human beings suffer the same human rights violation does not in any way make the violation less serious, nor does it erase the responsibility of States to protect each individual human being and their human rights who would be subjected to the violation. It is almost as if this judge is saying, "well, because everyone is doing it, then it must be ok." This type of morally decadent reasoning is meaningless in the human rights discourse.

Another counter argument against the floodgate argument is as follows:

> "although the majority of displaced people are female, statistics show that they make up only one third of asylum seekers in the west, and that proportionately fewer are granted refugee status than men."[61]

## 19. Conclusion

Other than forced marriage and all of its implications, there are also scenarios that lend themselves to gender based claims following the previous lines of reasoning found in this article. For example, honor killings of females who are

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[61] N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 368.

either accused of violating social norms regarding premarital relations, or who choose to change their religion or marry a member of a different religion would also be able to be classified as members of particular social groups. In the case of women who are accused of impropriety, and are subject to honor killings based on these accusations they would be a social group. The same would apply to women who have changed their religion or married men of a different religion in certain societies. They would be considered members of a particular group, i.e., women who changed their religion or women who married out of their religion and are subject to honor killing for doing so. The fact that they would indeed be subjected to honor killings indicates that as a result of being members of these particular social groups, they would also face persecution which is precisely basis for the 1951 Convention. Their so called 'impropriety' and/or marriages to outsiders or religion changes constitute their memberships of particular social groups which are composed of women under the same circumstances. Further, which when considered together with the persecution that they would face, therefore constitute a valid refugee status claim based on gender.

Expanding the Convention grounds to include gender based human rights violations against women is a necessary and effective means to offer female refugees protection and asylum. The creation of a new ground; that of persecution based on gender alone is still seen as too broad and because of the limits of patriarchy will take a long time in achieving. However, expanding the current Convention grounds would provide for the needs of refugee women and girls.

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# NATIONAL INSTITUTIONS' MANDATE OF HUMAN RIGHTS PROTECTION: HOW EFFECTIVE IS THE NATIONAL HUMAN RIGHTS COMMISSION IN PROTECTING RIGHTS IN NIGERIA?

CHARLES OLUFEMI ADEKOYA

This paper examines the mandate of national institutions for the protection of human rights and assesses the effectiveness of the Nigerian National Human Rights Commission in this task, since human rights are meaningful at the national level. The paper posits that a major legal reform in 2010 which strengthens and guarantees the Commission's independence, is sufficient to reposition the Commission and enable it effectively protect rights and be responsive to victims of rights violations in Nigeria. In view of its assessment, this paper concludes that the Commission can be classified as an effective institution and that the time to effectively protect human rights in Nigeria has come. The paper however raises concern about the challenges of inadequate funding and of insufficient investigating officers among others, which can damage the Commissions' credibility and also limits its capacity to fulfill its mandate. The paper instructs Government to adequately fund the Commission in order not to make a mockery of its legal reforms and calls into question, its motives in establishing such a vital institution without adequate funding. The paper notes the need for the Commission to improve its accessibility to Nigerians, as seven offices are insufficient to serve a population of over 151 million. The paper also instructs the Commission to step up its monitoring mandate and to ensure the effective implementation of international human rights instruments which Nigeria is a party to, as some Nigerian laws are still not in conformity with international standards.

## 1. Introduction

Several countries have established national human rights institutions (NHRIs) to exercise specific functions directly related to the promotion and protection of human rights. In Nigeria, the National Human Rights Commission (hereinafter called 'the Commission') was established in 1995,[1] by the regime of the late military junta Gen. Sanni Abacha, for similar purpose. Although, Nigeria transited from military regime to civil rule in 1999, the situation of human rights abuses, 14 years after, remain prevalent.[2] It may be particularly shocking to realize, for instance, that an estimated 2,500 detainees are said to be unlawfully killed by the police every year.[3]

Worse still, the impunity that accompanies human rights violations and other abuses in Nigeria are simply alarming and disturbing, as the authorities in most cases do not hold perpetrators accountable,[4] and rights remain unprotected, in a manner that undermines human rights and the rule of law. In the midst of these, this paper seeks to examine the effectiveness of the Commission in performing its mandate

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1 See The National Human Rights Commission Decree No. 22 of 1995 now National Human Rights Commission Act, Cap. N46, Laws of the Federation of Nigeria, 2004 as amended by the National Human Rights Commission (Amendment) Act, 2010.

2 Cases of unlawful killings, torture by the police and other security agents, forced evictions and illegal demolition of properties, and detention of journalists/human rights defenders, etc are common. See Amnesty International, Annual Report 2013: The State of the World's Human Rights – Nigeria. Available at: <http://www.amnesty.org/en/region/nigeria/report-2013> last accessed 14 October 2013.

3 The information was credited to the Chairman, Governing Council of National Human Rights Commission. See Amnesty International, Annual Report 2013.

4 See Chidi Anselm Odinkalu, "Changing Roles of Civil Society in Promoting Safety and Security in Nigeria," in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), *Crime and Policing in Nigeria: Challenges and Options*, CLEEN, Lagos p. 23.

of human rights protection, against the standards set for national human rights institutions, towards the objective of determining how effectively are human rights protected in Nigeria.

This paper is divided into six parts, Part II examines the background and nature of national human rights institutions; Part III discusses the Establishment of the National Human Rights Commission; Part IV assesses the effectiveness of National Human Rights Commission; Part V considers the question whether it is time for true protection and accountability for human rights violations in Nigeria?; while Part VI captures the conclusion and recommendations.

## 2. Background and nature of national human rights institutions

The establishment of NHRIs in several countries of the world has been due in part to the fulfillment of governments' responsibility with respect to the various human rights treaties they are parties to, based on this legal obligation,[5] and as the duty bearers of rights, it is the primary duty of the government to guarantee the implementation and enforcement of rights within its borders.[6] This obligation can be traced to the United Nations Charter, Universal Declaration of Human Rights, and binding norms and values set out in the international law of human rights.[7] The concept of rights creates obligations deriving from the international

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[5] See United Nations, National Human Rights Institutions - Handbook on the Establishment and Strengthening of National Institutions for Promotion and Protection of Human Rights, Professional Training Series No. 4 (New York and Geneva, 1995) p. 3.

[6] See Jean-Bernard Marie, "National Systems for the Protection of Human Rights", in Janusz Symonides (ed) (2003), *Human Rights: International Protection, Monitoring, Enforcement,* Ashgate UNESCO Publishing, p. 257.

[7] See OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, United Nations, New York and Geneva, 2004 pp. 14-15.

human rights law by reference to the duties to respect, protect and fulfil.[8] The duty to protect requires the duty bearer to take measures that prevent third parties from abusing rights. It is therefore the duty of governments to protect human rights at the national level.

Some of the practical steps that governments have taken to protect rights within their borders are the enactment of appropriate legislation, making human rights justiciable and strengthening of democratic institutions,[9] among others. However, existence of laws alone, to protect some set of rights is not sufficient if there is no provision in the law for institutions clothed with necessary legal powers to ensure that the protected class of rights are effectively realized.[10] This formed the establishment of NHRIs, dedicated to the promotion and protection of human rights. The first national human rights commission was set up in Saskatchewan, Canada, in 1947.[11] Thereafter, several countries have established similar institutions, with countries assigning varying mandates to them and for this reason; they are referred to as NHRIs.[12] There has been tremendous increase in the number of internationally accredited NHRIs, as there were 103 as of 11 February, 2013.[13]

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8 The duty to respect requires the duty bearer not to breach directly or indirectly the enjoyment of any human right. Duty to fulfil requires the duty bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights. See OHCHR, *op. cit.* pp. 14-15.

9 See United Nations, National Human Rights Institutions – Handbook, *op. cit.* p. 3.

10 *Ibid.*

11 See in X, *National Human Rights Institutions: An overview of the Asia Pacific Region*, 7 Int'l J. on Minority & Group Rts. 207 (2000) p. 209.

12 See United Nations, National Human Rights Institutions – Handbook, *op. cit.* p. 4.

13 See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), Chart of the Status of National Institutions, p. 1. Available at: <www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf> last accessed 17 October 2013.

The term "national institution" has come to be used for legal entities or bodies specifically established by a government for the promotion and protection of human rights, which are administrative bodies, but they must not be judicial or law making bodies, although they may exercise quasi-judicial functions.[14] The core functions of national institutions generally revolves around the promotion and protection of human rights, but they may be granted other specific mandates, such as advising government on law and policy as it relates to human rights, investigative function[15] and redressing human rights violations.[16] Some institutions may focus generally on the collective body of rights while some may have a narrow mandate[17] relating to special vulnerable groups.[18]

Thus, it is not essential that the term "national institution" must be part of the name of a country's body[19] charged with the mandate for the promotion and protection of human

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[14] See United Nations, National Human Rights Institutions - Handbook , *op. cit.* p. 6.

[15] *Ibid* at p. 7.

[16] See the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993 in para 36.

[17] he Commission for Protection against Discrimination of the Republic of Bulgaria, for example, has a mandate restricted to the prevention and protection against discrimination and to promote equality of opportunity and not a wide mandate covering the promotion and protection of all human rights. See ICC Sub-Committee on Accreditation Report – Oct 2011, p. 8. Available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20%28with%20annexes%29.pdf> last accessed 17 October, 2013.

[18] See United Nations, National Human Rights Institutions – Handbook, *op. cit.* p. 7.

[19] See for example, the Egypt National Council for Human Rights, the Ombudsman of the Republic of Bulgaria and the Ombudsman of the Republic of Macedonia. See ICC Sub-Committee on Accreditation Report – Oct 2011, pp. 7, 9 and 13.

rights, as modern Ombudsmen are now given the function of human rights protection.[20]

The legal framework for national institutions can be traced to the United Nations Charter,[21] Universal Declaration of Human Rights,[22] and binding norms and values set out in the international law of human rights,[23] the World Conference on Human Rights,[24] which reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights,[25] and the Principles Relating to the Status of National Institutions (the "Paris Principles"),[26] against which the effectiveness and credibility of national institutions are measured.

Office of the United Nations High Commissioner for Human Rights (OHCHR), through the National Institutions and Regional Mechanisms Section (NIRMS), plays a supportive role in the establishment and strengthening of NHRIs and

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[20] For example, the Ombudsman of the Republic of Bulgaria and the Ombudsman of the Republic of Macedonia are vested with human rights function. See ICC Sub-Committee on Accreditation Report – Oct 2011, pp. 7 and 9.. See United Nations, National Human Rights Institutions – Handbook, *op. cit.* p. 7.

[21] To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. See Preamble to the Charter of the United Nations.

[22] Where Member States have pledged themselves to promote and observe human rights and fundamental freedoms. See Preamble to the UDHR. Available at: <http://www.un.org/en/documents/udhr/> last assed 17 October, 2013.

[23] See OHCHR, *op. cit.* pp. 14-15.

[24] See The World Conference on Human Rights held in Vienna, 14 – 25, June 1993

[25] See the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993 para 36.

[26] Which were the recommendations of the first International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris from 7 to 9 October 1991, first adopted by the United Nations Commission on Human Rights in resolution 1992/54 of 3 March 1992 and endorsed by the United Nations General Assembly in its resolution 48/134 of 20 December 1993.

also collaborates with them on human rights protection issues. There is an International Coordinating Committee of NHRIs for the Promotion and Protection of Human Rights (ICC) established by NHRIs,[27] for the purpose of coordinating the activities of national institutions.

NHRIs also pass through an accreditation process, carried out by the Sub-Committee on Accreditation (SCA) of the ICC. The SCA is composed of NHRIs representative from each region of Africa, Americas, Asia-Pacific and Europe. The SCA has the mandate to consider and review applications for accreditation, reaccreditation and special or other reviews received by the National Institutions and Regional Mechanisms Section (NIRMS) of the OHCHR in its capacity as the ICC Secretariat.[28]

The Sub-Committee recommends to the ICC, the type of accreditation to be accorded a national institution and there are three layers of accreditation, "A", "B" and "C". National institutions that have fully complied with the Paris Principles are conferred with the "A" accreditation status and this grants them the right to vote and participate in the international and regional work and meetings of national institutions, and in the Human Rights Council sessions. They can also hold office in the Bureau of ICC or its sub-committees. Those that have not fully complied with the Paris Principles or have not provided sufficient information to enable the Sub-Committee determine whether they have complied with the Principles or not, are recommended for the "B" status accreditation, which is a non-voting member and can only participate in NHRIs work and meetings as observers, but with no voting right and neither

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[27] This was established at the International Conference held in Tunis in 1993. See Office of the High Commissioner for Human Rights, "OHCHR and NHRIs". Available at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> last accessed 17 October 2013.

[28] See Office of the High Commissioner for Human Rights, "OHCHR and NHRIs". Available at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> last accessed 17 October 2013.

can they hold officer with the Bureau or its sub-committees. Those that have not complied with the Paris Principles are recommended for the "C" status accreditation, which means they are not members and such institutions have no right or privileges whatsoever.[29]

## 3. Establishment of the National Human Rights Commission

Following the United Nations General Assembly Resolution No. 48 / 134 of 20 December 1993 which encourages Member States to establish national institutions for the promotion and protection of human rights,[30] the Commission was established in 1995 through the National Human Rights Commission Decree No. 22 of 1995, now National Human Rights Commission Act, 2004 (hereinafter called the "Principal Act")[31] as amended by the National Human Rights Commission (Amendment) Act, 2010 (hereinafter called "the 2010 Act"). The Commission has been accredited five times since its establishment and was granted the status of A(R) (accreditation with reservation)[32] in 1999, for both 2000 and October 2006, it was granted "A" status, while in October 2007 it received the "B" status, and

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29 See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation (SCA). Available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> last accessed 17 October 2013.

30 See para 3.

31 Cap. N46, Laws of the Federation of Nigeria, 2004.

32 This category of accreditation was formerly granted where insufficient documentation was submitted to confer A status. This classification is no longer in use but is maintained for NHRIs accredited with the status before April 2008. See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), Chart of the Status of National Institutions, p. 1. Available at: <www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf> last accessed 17 October 2013.

in May 2011 it bagged the "A" status, which it holds till date.[33] The Commission will however be due for another round of accreditation review in 2016,[34] as all NHRIs holding an "A" status are subject to re-accreditation on a five year cyclical basis.[35]

The 'A' status, which the Commission currently holds means that it fully complies with the Paris Principles but this status is not sacrosanct, as the Commission can lose it during a review period, if there is no continued compliance with the Paris Principles.[36] The Commission's 'A' status indicates that it satisfies the international benchmarks for NHRIs but since human rights are most meaningful and more relevant at the national level, the effectiveness of the Commission will be measured to determine whether it is actually up to the task of human rights protection in Nigeria.

## 4. Assessment of National Human Rights Commission's Effectiveness

The effectiveness of NHRIs is usually assessed to determine if it is efficient and up to the task of human rights protection. The issues which are normally considered in this regard are, whether a national institution is given adequate powers to be able to effectively perform its duties, how truly independent and how accessible it is to the people, whether it cooperates with the United Nations, its agencies, regional institutions and other national institutions, on the promotion and protection

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[33] *Ibid* at p. 3.

[34] See ICC Sub-Committee on Accreditation, Calendar for Sub-Committee Sessions 2013-2017 (updated May 2013).

[35] See Art. 15, Excerpt from the ICC Statute relevant to the accreditation process, in Compilation of the Rules and Working Methods of the SCA. Those with 'B' status are equally subject to review every five years. See, Report and Recommendations of the Session of the Sub-Committee on Accreditation (Geneva, 26-30 March 2009), at para 2.6.

[36] See Art. 18 Excerpt from the ICC Statute relevant to the accreditation process, in Compilation of the Rules and Working Methods of the SCA.

of human rights, whether it is operationally efficient, in terms of personnel, review and evaluation, working methods and adequate resources, and financial accountability - both financially and legally.[37] The Commission will therefore be assessed on these bases as follows:

### *4.1. Mandate*

A national institution must not only have competence to promote and protect human rights but must equally be given a mandate in respect of the same which is specified in a legislative text and has national coverage.[38] Consequently, the Commission's mandate which covers the entire country, is set out under section 5 (a)-(j) of the Principal Act, but which section 6 of the 2010 Act has amended by substituting paragraphs (a), (d), (e), (g) and (h) with new paragraphs (a), (d), (e), (g) and (h). Also, section 6(b) of the 2010 Act introduced new paragraphs, "(j)" – "(r)" which were inserted immediately after paragraph (i) of section 5 of the Principal Act, while section 6(c) of the 2010 Act renumbered the existing paragraph (j) of section 5 of the Principal Act as paragraph (s). The Commission, according to section 6 of the 2010 Act, which substituted a new subsection 5(a) for the existing 5(a) of the Principal Act, the Commission now has a broad mandate to deal with all matters relating to the promotion and protection of human rights guaranteed by the Constitution and other documents, international and regional instruments on human rights to which Nigeria is a party.[39]

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[37] See United Nations, National Human Rights Institutions – Handbook, *op. cit.* p. 10.

[38] See The Paris Principles, paras 1 and 2; International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation (SCA) *op. cit.*

[39] These are listed by the Act as, the United Nations Charter and the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on the

Under the amended section 5 of the Principal Act, the Commission also has mandate to monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendations to the government for the prosecution, etc, assist victims of human rights violations and seek appropriate redress and remedies on their behalf (see paragraphs (b) and (c)); undertake studies on matters pertaining to human rights and assist the Federal, State and Local Governments where it considers appropriate to do so in the formulation of appropriate policies on the guarantee of human rights (see the new paragraph (d). In the old paragraph (d), this study was limited to the Federal Government, but States and Local Governments are now included); publish and submit, from time to time, to the President, National Assembly, Judiciary, State and Local Governments, reports on the state of human rights promotion and protection in Nigeria (see the new paragraph (e). In the old paragraph (e), the Commission is to publish regular reports on the state of human rights protection in Nigeria but not required to submit such reports to the President, National Assembly, Judiciary, State and Local Governments, as required by the new amendment), etc.

The new paragraphs, "(j)" – "(r)" introduced into section 5 of the Principal Act by section 6(b) by the 2010 Act, gave the Commission competence to receive and investigate complaints concerning violations of human rights and make appropriate determination as may be deemed necessary; examine any existing legislation, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining whether they are consistent with human rights norms; prepare and publish

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Elimination of all Forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights. Under the section 5(a) of the Principal Act, the international instruments were not listed as done in the 2010 Act in the new 5(a).

its own rules or procedure; on its own initiative or when so requested by the Federal, State or Local Government report on actions that should be taken by the Federal, State or Local Government to comply with the provisions of any relevant international human rights instruments; refer any matter of human rights violation requiring prosecution to the Attorney-General of the Federal or of a State; act as a conciliator between parties to a complaint and where it considers it appropriate, with the leave of the court hearing the proceedings and subject to any condition imposed by the court, intervene in any proceeding that involves human rights issue, etc (see existing paragraph (j) which has been renamed as (s)).

The broad mandate given to the Commission is in accordance with the requirement of the Paris Principles, which requires that a national institution shall be given as broad a mandate as possible.[40] It is however important to state that expansive powers, such as those given to the Commission do not necessarily ensure its effective functioning. This has to be measured against other factors that relates to its practical operations, in relation to its mandate.[41]

### *4.2 Independence*

The Paris Principles makes the independence of a national institution in all its ramifications a fundamental one, with the requirement that it must be guaranteed by law. This is borne out of the reason that at a national institution which is not independent or autonomous can be compromised. Hence, it cannot effectively carry out its functions as there are bound to be interference in its affairs, ranging from appointment of members to performance of its mandate.[42]

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[40] See para 2 of the Principles under Competence and responsibilities.

[41] See X, *National Human Rights Institutions:, op. cit.* at p. 219.

[42] See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation (SCA) *op cit.*

Thus, all unholy alliances between a national institution and government must be severed and unnecessary appendages, clogs and fetters on members or its operations removed.

The 2010 Act appears to breathe an air of independence on the Commission, judging from its many laudable provisions which are geared towards granting independence to it on all fronts. In a manner that seeks to grant true independence to the Commission in the performance of its duties, the new section 6 (3) of the Principal Act substituted for the old section 6 by section 7 of the 2010 Act provides that the Commission shall not be subjected to the direction or control of any other authority or person. This is to ensure that the Commission has powers to freely consider any question falling within its competence without any referral to a higher authority.[43]

The Commission's independence further received a boost by other provisions of the 2010 Act, for instance, the provision of existing section 17 of the Principal Act which provides that the Attorney-General of the Federation may give directives to the Council of the Commission with regard to the exercise of its functions has been abolished by the new section 17 inserted in the Principal Act. Also, the provision of the existing section 18 of the Principal Act has been substituted for a new section 23 which provides that the Commission may make such regulations as it deems to be necessary or expedient for giving full effect to the provisions of the Act. The new provision has removed the power of the Attorney-General of the Federation to make regulations concerning the Commission. (See section 20 of the 2010 Act).

The 2010 Act further provides for protection of members of Commission, although it did not totally grant them immunity from liability for acts taken in performance of their official duties. A The new section 18 inserted in the Principal Act by section 15 of the 2010 Act, makes provisions

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[43] See the Paris Principles, para 3(a) under Composition and guarantees of independence and pluralism.

of the Public Officers Protection Act applicable to members of the Commission's Council, the Executive Secretary, officer or employee, and no suit shall lie or be instituted against them for acts done in execution of the Act or any other law or enactment, unless it is commenced within 3 months next after the act neglected or default complained of, and in the case of a continuation of damage or injury, within the next 6 months after the ceasing thereof. By virtue of subsection (3), no suit shall be commenced against any member of the Commission before the expiration of a period of one month after written notice of intention to commence the suit have been served upon the Commission by the intending plaintiff or his agent.

The above provision is further reinforced by an indemnity clause, in a bid to ensure that members of the Commission carry out their work without any fear of litigation or prosecution. The new section 21 inserted in the Principal Act by section 18 of the 2010 Act, provides that a member of Council, the Executive Secretary, any officer or employee of the Commission shall be indemnified out of the assets of the Commission against any proceedings, whether civil or criminal, in which judgment is given in favour of another or in which he is acquitted, if any such proceeding is brought against him in his capacity as a member of the Council, the Executive Secretary, any officer or employee of the Commission provided such persons acted in good faith.

These provisions relating to legal protection and indemnity are in compliance with the ICC Sub-Committee on Accreditation, General Observations,[44] where it strongly recommended that national law should protect national institutions' members from legal liability for actions taken in performance of official duties, and this is a right step in the right direction.

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[44] See Sub-Committee on Accreditation, General Observations (as updated March 2009) para 2.5.

The 2010 Act has failed to provide for a selection process for the Commission's governing council as noted by the ICC Sub-Committee on Accreditation in its report. The Sub-Committee on Accreditation further noted that there is need for a clear, transparent and participatory selection process that promotes the independence of, and the confidence in the senior leadership of a national human rights institution.[45] It is therefore important that the Commission's enabling law be amended to take care of the recommendation so that members of the governing council and executive officers of the Commission will enjoy security of tenure of office and not be dismissed at will as done by past governments and the current government of Good luck Jonathan.[46] It is clear that under the Principal Act, the Commission could not function effectively as government control was suffocating and executive officers were not given freehand to operate.

The ICC has in its General Observations on membership tenure, advised that tenure of members of the governing council, staff and principal members must be specific and guaranteed in order to ensure a stable mandate for members

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[45] See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation Report – May 2011 Where the SCA referred to the Paris Principles para B.1: and General Observation para 2.2, p. 18.

[46] In 2006 the active Alhaji Bukhari Bello, Executive Secretary of the Commission, who was also the Chairperson of the Co-ordinating Committee of African National Human Rights Institutions at the time, was dismissed four years before the expiry of his term, for what was widely believed to be the result of his comments in defence of human rights and for his critical approach to the human rights policy of the federal government. In 2007, the governing council of the Commission was also dissolved before their term ended, while in 2009 the Executive Secretary of the Commission, Mrs. Kehinde Ajoni was also butted out of office ahead of the expiration of her term of office in 2011. See Amnesty International, "Nigerian president signs landmark human rights bill". Available at: <http://www.amnesty.org/en/news-and-updates/nigerian-president-signs-landmark-human-rights-bill-2011-03-29> last accessed 27 October, 2013.

compensation payable in relation to any violation of human rights, etc (see new section 6 (1) (a-h)).

Under the new section 6 (2) (a-e), the Commission is further empowered, through its Chairman, and by written order can direct an officer of the Commission to obtain a court order to enter upon any land or premises, or by any agent(s) where there is reasonable cause to suspect that there is evidence of any offence under the Act. This is done for the purpose of obtaining evidence or information, or of inspecting or taking copies of any document required or which may be of assistance to the Commission in its investigations or proceedings. The Commission also has the power to summon anybody or authority to appear before it in connection with a complaint of human rights violation, and issue a warrant to compel the attendance of any person who after having been summoned to attend, fails, refuses or neglects to do so without any justifiable reason and interrogate any person. It can also compel any person, body or authority who, in its opinion, has any information relating to any matter under its investigation to furnish it or to compel the attendance of witnesses to produce evidence before it.

In order to give teeth to the Commission's powers, the new section 6 (4) introduced into the Principal Act provides for various acts which infringe on its duties as offences. Thus, it is an offence for any person, body or authority to refuse to provide evidence, as may be requested to do so; obstruct any member of Council or an employee of the Commission from the lawful exercise of any of their functions; punish, intimidate, harass or discriminate against any person for co-operating with the Commission in the exercise of its functions; or refusing to comply with lawful directives, determination, decision of finding of the Commission. The new section 6(5) equally provides for punishment and makes any person who commits an offence under the subsection (4) to be liable on conviction to imprisonment for a term of 6 months or to a fine of N100,000 or to both such imprisonment and fine.

Consequent on the powers given to the Commission by the new paragraphs "(j)" – "(r)" of section 5 of the Principal Act,[51] to receive and investigate complaints concerning violations of human rights and make appropriate determination, and to act as a conciliator between parties to a complaint; the new section 22 introduced into the Principal Act by section 19 of the 2010 Act, in subsection (1) makes provision for the recognition and enforcement of an award or recommendation made by the Commission, by providing that such an award or recommendation shall be recognized as binding and upon application in writing to the court, shall be enforced by the court.[52]

This provision is intended to make the Commission act as an alternative dispute-resolution mechanism process for victims of human rights violation, by reason that it is cheap, speedy, flexible, accessible and availability of experts.[53] There is a need to insulate an award or recommendation to be enforced by the court from possible abuses. It must however be noted that by activating or submitting to the complaints procedure of the Commission, a party does not by such reason waive his/her right to approach the court for any claim, as final jurisdiction always rests with the courts.[54]

*4.4 Accessibility*

As part of the assessment of a national institution's effectiveness, it must be accessible to the people it has mandate to protect, both in terms of physical and structural accessibility. Factors that also determine accessibility includes awareness

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51 See section 6(b) of the 2010 Act.

52 In subsection (2), the definition of "court" in subsection (1) was interpreted to mean the Federal High Court or the High Court of the Federal Capital Territory, Abuja or the High Court of a State.

53 See United Nations, National Human Rights Institutions – Handbook, *op. cit.* at p. 13.

54 *Ibid.*

of the institution, as people who are unaware of its existence and functions cannot access it.[55] Physical accessibility means that an institution must be within the reach of those it seeks to protect. In a country with an estimated population of over 151 million,[56] the Commission apart from its head office in Abuja has only 6 zonal offices, covering the six geo-political zones of the country.[57] It is difficult to conceive how the Commission with a total of 7 offices located in capital cities, can be accessible to the majority of Nigerians who live mostly in rural areas.[58]

The majority of Nigerians will equally be excluded from utilizing the complaints procedure of the Commission, as it will be too expensive to travel to capital cities to access it. There is therefore the need for the Commission to acquire more offices. More access can be facilitated for broader population for instance, if all the local government councils in Nigeria are mandated to provide offices for the Commission, in order to make it more effective in the task of protecting rights.

It has been suggested that field officers may be recruited by a national institution to serve in different parts of the country, and that they can also perform other functions such as monitoring, witness interviewing and information

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55 *Ibid.*

56 See United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa Survey Report*, (New York, United Nations, 2011) p. 12. The 2006 census put Nigerian population at over 140 million. See Bolade Omonijo, Rotimi Ajayi & Ben Agande, "Census: Kano beats Lagos", *The Vanguard*, 10 January, 2007. Available at: <http://www.odili.net/news/source/2007/jan/10/399.html> last accessed 10 January 2007.

57 In Kano (North West), Maiduguri (North East Zone), Jos (North Central), Enugu (South East), Lagos (South West) and Port-Harcourt (South South). See National Human Rights Commission, The Commission. Available at: <http://www.nigeriarights.gov.ng/the-commission> last accessed 24 October 2013.

58 Over 62 percent of Nigerian population is believed to be living in the rural areas. See Federal Government of Nigeria (1997), Vision 2010 Committee Report, p. vi.

dissemination, etc, in addition to the development of a complaints procedure that dispense with the need for parties to be personally present at the national institution's office, as a means that can significantly boost physical accessibility.[59] However, a complaints procedure dispensing with personal attendance may not be suitable in Nigeria because of the high levels of poverty and illiteracy,[60] and infrastructural gaps.

### *4.5 Cooperation*

A national institution is obliged by the Paris Principles to cooperate with the United Nations and its agencies, regional and other national institutions that are competent in the areas of the promotion and protection of human rights.[61] A national institution is also required to collaborate with intergovernmental and non-governmental organizations that are involved in the promotion and protection of human rights in order to strengthen its own ability and effectiveness.[62]

In line with the requirement of the Paris Principles, the new paragraph (g) of new subsection 5 substituted in the Principal Act by section 6 of the 2010 Act provides for the Commission's liaising and cooperating in such a manner as it considers appropriate, with local and international organizations on human rights with the purpose of advancing the promotion and protection of human rights. It is however curious why the words "in such a manner it considers appropriate", were added to the new paragraph (g), this was not in the old paragraph. It may be interpreted that the Commission is to liaise and

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[59] See United Nations, National Human Rights Institutions – Handbook, *op. cit.* pp. 13-14.

[60] See Budlender, Geoff, *Access to Courts*, 121 S. African L.J. 339 (2004) p. 341.

[61] See para 3(vi)(e) under Competence and responsibilities of the Paris Principles.

[62] See United Nations, National Human Rights Institutions – Handbook, *op. cit.* at pp. 14-15.

cooperate with international organizations in a manner that is suitable to it or as may be dictated by the government, which introduces an element of subjectivity opposed to objectivity, to the kind of cooperation to be given.

It is to be noted that the Commission has so far demonstrated cooperation with international, regional and national bodies on the promotion and protection of human rights; for instance, it is accredited with the "A" status as noted above, by virtue of which it is entitled to vote and participate in the international and regional work and meetings of national institutions and in the Human Rights Council sessions. It is also a member of International Coordinating Committee of National Human Rights Institutions (ICC),[63] and also member of both the African National Human Rights Institutions and the ECOWAS National Human Rights Institutes.[64]

The Commission has equally collaborated with NGOs in Nigeria in carry out many activities, such as the prison audit report in 2012, workshops/conferences, holding of public tribunal on police abuse of human rights, training of informal policing group members, establishment of torture documentation centres, training for police officers, etc.[65] The trend should continue.

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[63] See Office of the High Commissioner for Human Rights, "OHCHR and NHRIs". Available at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> last accessed 11 October 2013.

[64] See Roland Ewubare, The Statutory Report of the National Human Rights Commission for the year 2009 p. 4 presented at the 2009 Annual Bar Conference of the Nigerian Bar Association held from 16th-21st August 2009 in Lagos p. 4; Amnesty International, <http://www.amnesty.org/en/library/asset/AFR44/012/2006/en/7e6e467b-d419-11dd-8743-d305bea2b2c7/afr440122006en.html> last accessed 30 October 2013.

[65] *Ibid* at pp. 4,5, 6,7,9 and 10 ; State of Human Rights Report, 2007 p. 13; See Harmonized Report of 2012 Prison Audit. Available at: <http://www.nigeriarights.gov.ng/resources> last accessed 31 October 2013.

*4.6 Adequate resources*

A national institution is required to have infrastructure or resources[66] which is suited to the smooth conduct of its activities, in particular adequate funding. In other words, a national institution should have funds which will enable it to have sufficient staff, premises and carry out its mandate, and in order for it to be independent, such funding must not be subjected to the control of government.[67]

In line with the above, the Commission has been granted financial independence, going by the provisions of the 2010 Act. A new subsection (2) inserted into the existing section 12 of the Principal Act[68] makes the funding of the Commission to be a charge on the Consolidated Revenue Fund of the Federation. This will save the Commission from financial strangulation by government in order to control or render it ineffective. This is a major victory for the Commission. Also, going by the provision of the new section 15 inserted in the Principal Act by section 12 (1) of the 2010 Act, a Human Rights Fund has been established (where any sum contributed by the Federal State or local Government, companies and institutions, etc shall be credited (see section 2(1) (a) and (b)); which is to be applied towards the conduct of research on human rights issues and other human rights activities (see subsection (1) (a) and (b)).

Other provisions that have subjected the Commission to the control of the Attorney-General of the Federation in budgetary and finance matters have equally been removed by the 2010 Act. For example, section 15 of the Principal Act which has been renumbered as section 16 by section 12(3) of

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[66] See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation (SCA) *op. cit.*

[67] See para 2 under Composition and guarantees of independence and pluralism of the Paris Principles.

[68] See section 10 of the 2010 Act.

the 2010 Act, and section 13 of the 2010 Act has amended the new section 16 by deleting the words "through the Attorney-General of the Federation. In other words, the Commission's Council is to submit an estimate of its expenditure and income for the following year to the Federal Executive Council directly for approval and not through the Attorney-General of the Federation, as previously required.

Furthermore, the Commission's Council borrowing power, capacity to invest funds or acquire or lease any land, which was formerly subjugated under the control of the Attorney-General of the Federation, as this requires the consent or approval or direction of the Attorney-General as contained in the old section 14 of the Principal Act has been removed by the section new 14 by which the Commission can do any of the aforesaid acts without consent of the Attorney-General.

Despite the lofty provisions of the 2010 Act granting financial independence to the Commission, it remains to be seen if this independence translates into adequate funding by way of capital vote, as a result of the broad mandate given to the Commission. It has been noted for instance, that funding is a major challenge to the Commission. In the Commissions' Statutory Report for 2009, the Executive Secretary complained about the challenge of funds in carrying out its mandate and in enabling it to reach the majority of Nigerians at the community level.[69] As discussed above, the Commission has no adequate offices to enable its presence be felt throughout the country, as its 6 zonal offices are only situated in the State capitals.

There are also acute shortages of facilities to work with, e.g. office equipment, such as computers, office furniture, vehicles

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[69] See Roland Ewubare, *op. cit.* p. 10; See Mrs. K.F. Ajoni, The Statutory Report of the National Human Rights Commission for the year 2007 presented at the 2007 Annual Bar Conference of the Nigerian Bar Association held from 26th-31st August 2007 in Ilorin p. 3.

etc.[70] As at 2007 the Commission has a staff of 373 comprising of 246 senior staff and 127 junior staff,[71] in a country with over 151 million people[72] and human rights abuses; it is doubtful if the staff strength of the Commission has increased significantly since then. The Commission is understaffed and underfunded, which may breed inefficiency. The problem of inadequate funding and of investigating officers has been mentioned in several reports and this has negatively affected the efficiency of the Commission in investigating human rights abuses.[73] If the Commission is not adequately funded, its credibility may be damaged as a result of ineffectiveness and also limit its capacity to fulfill its mandate.[74]

While recognizing budgetary constraints on the part of governments, it is recommended that government should adequately fund the Commission in terms of staff, offices, equipment and staff emoluments (with salaries and benefits comparable to similar public service salaries and conditions), to enable it efficiently discharge its mandate. This is because, in spite of adequate provisions of law which grants financial independence to the Commission, inadequate funding will only make a mockery of such independence and call to question, the

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[70] As at 2006, when the Commission had 5 zonal offices, only the Port Harcourt office has a vehicle. See C.O. Adekoya, "Poverty: Legal and Constitutional Implications for the Enforcement of Human Rights in Nigeria", unpublished Ph.D. Thesis submitted to the Faculty of Law, University of Ghent, Belgium, 2008 p. 208.

[71] See Mrs. K.F. Ajoni, *op. cit.* at p. 3.

[72] See United Nations Office on Drugs and Crime, *op. cit.* at p. 12.

[73] See Annual Report 2002 p. 36; Annual Report 2003 pp. 44 and 50; Annual Report 2004 pp. 36 and 41; Annual Report 2006 p. 33; Statutory Report 2007 p. 19 and Statutory Report 2009 p. 10. Available at: <http://www.nigeriarights.gov.ng/resources> last accessed 13 October 2013.

[74] See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ICC Sub-Committee on Accreditation Report – May 2011 Where the SCA referred to the Paris Principles para B.2: and General Observation para 2.6 on adequate funding, p. 19.

motive of government in establishing such a vital institution but without adequate staff and funding.[75]

*4.7 Accountability*

A national institution's effectiveness is also measured on account of its being accountable to a body, which in most cases is the parliament or to both executive and parliament. Therefore, national institutions are often saddled with reporting obligations, in view of which the Paris Principles requires national institutions to report on any matter concerning the promotion and protection of human rights and on national situation of human rights.[76] The Commission is required by the old section 16 of the Principal Act renumbered as section 17 and as substituted for a new section 17 to submit a report of its activities and administration, and its audited report to the President and the National Assembly, not later than 6 months after the end of each year.[77]

The requirement of submitting the annual report "through the Attorney-General of the Federation" in the old section 16 has been removed. Also, the new section 17 now requires the Commission to submit its annual report to the President and the National Assembly, as against the old provision, which was to be submitted to the President alone.

Consequently, since its inception to date, the Commission has submitted several reports, including annual reports.[78] In 2007, it also published a report on the State of Human Rights in Nigeria. The above provisions impose legal and financial

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75 See United Nations, National Human Rights Institutions – Handbook, *op. cit.* at p. 15.

76 See para 3 (a)(iii) of the Paris Principles, under Competence and responsibilities.

77 See section 14 of the 2010 Act.

78 See National Human Rights Commission, Annual Reports for 2002, 2003, 2004 and 2006, among others. Available at: <http://www.nigeriarights.gov.ng/resources> last accessed 30 October 2013.

accountability on the Commission, in a manner that will promote probity, transparency, self evaluation and ultimately, efficiency and credibility.[79]

However, the Commission should improve on its reports and upload them on its website for easy access by the public. While the annual reports for 2002, 2003, 2004 and 2006 are commendable, the statutory reports for 2007 and 2009 are not detailed enough. That of 2009 was only 11 pages and very scanty. While the annual reports should contain activities during the year under review, it should cover vital issues such as structure, governing council members and geographical areas they represent, offices, staff strength and breakdown, complaints procedure and rules of admissibility, relationship and collaboration with international, regional and national organizations, promotional activities, offices and infrastructure facilities, total number of vehicles (stating the number of vehicles used for investigation and those for executive officers), applications received and nature, zonal breakdown of complaints received, complaints resolved and awards/recommendations made, outstanding complaints and why, budgetary issues (including proposed budget, amount approved and amount released), donations, challenges in investigation of complaints, monitoring activities, funding challenges, major recommendations to government and rate of compliance, etc.

## 5. Time for true protection and accountability for human rights violations in Nigeria?

The United Nations General Assembly Resolution No. 48 / 134 of 20 December 1993 which encourages Member States to establish national institutions for the promotion and protection of human rights, also urges them to prevent and

[79] See United Nations, National Human Rights Institutions – Handbook, *op. cit.* at p. 17.

combat all violations of human rights.[80] Under the enabling law, the Commission as constituted, was an executive body, which makes it to be adjudged as 'too weak and lacks the will to speak out clearly against abuses or investigate complaints effectively.'[81]

However, going by the amendment effected by the 2010 Act, which strengthens the Commission and guarantees its independence by granting various powers as examined above, it can now be said that the time for the Commission to effectively protect human rights and for violators to be made accountable for human rights violations in Nigeria, is here.

The Commission however needs to do more with respect to its mandate of encouraging ratification or accession to international human rights instruments and ensure the effective implementation of those which Nigeria is a party. The ICC Sub-Committee has interpreted this as a key function of a national institution.[82] This because some Nigerian laws are still not in conformity with international standards, for example, Nigeria still retains death penalty and socio economic rights are not justiciable in the country. Also, in 2013 Delta State House of Assembly passed into law, the Anti-kidnapping and Anti-Terrorism Bill, 2012 imposing death penalty on kidnappers, terrorists and cultists.[83]

The Commission has the duty of ensuring that government harmonizes its laws, administrative regulations and practices, including bills, to be in tandem with international instruments to which Nigeria is a party. The Commission should also step

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80 See para 4.

81 See O.V.C. Okeme and G.A. Okpara, *Freedom of Association and the Protection of Trade Union Rights in Africa – Nigeria as a Case Study,* Recht in Africa 2007: 175 – 197, pp. 189-190.

82 See Sub-Committee on Accreditation, General Observations (as updated March 2009) sub para 1.3.

83 See Austin Ogwuda, "Delta Attorney-General clears air on death penalty law", *Vanguard* 2 June 2013. At: <http://www.vanguardngr.com/2013/06/delta-attorney-general-clears-air-on-death-penalty-law/> last accessed 29 October 2013.

up its monitoring mandate with respect to any situation of violation of human rights, and take them up, recommending some for prosecution and bring those it cannot take up to the attention of Government. It should also monitor government compliance with its advice and recommendations.

## 6. Conclusion and recommendations

From the above assessment, the Commission can be adjudged to be an effective institution. The amendment of its enabling Act is commendable for its lofty provisions which this paper believes are sufficient to reposition the Commission to enable it effectively protect rights and be responsive to victims of rights violation in Nigeria. With enormous powers now at its disposal, the Commission should be assertive in the discharge of its mandate to gain public confidence.

The Commission should improve its accessibility by providing more offices, to enable more Nigerians access it. The issue of adequate budgetary allocation to the Commission should also be a top priority, if government is to demonstrate that is has the political will to enable the Commission genuinely and effectively carry out its mandate.

It is recommended that government should henceforth stop interfering in the affairs of the Commission by arbitrary removal of the Commission's principal officers and disbandment of its governing council. Government should also be tolerant of Commission's criticisms/recommendations/ reports on its human rights record. It is only then that government's preparedness to guarantee true independence to the Commissions can be manifested and human rights taken seriously in Nigeria through effective protection and accountability for violations.

# HUMAN RIGHTS AND ISLAM

DAVIDE IOSIA

Through a careful reading of the Koran, we can deduce that life, dignity, justice, free will, property and privacy are considered sacred, inviolable and inalienable. Similarly, life, religion, intellect, family and property are considered to be the five essential elements (*al-darùrat*) or the five foundations (*al-usul al-Khamsah*) of good governance. But it is clear that in an eminently God-centered society, based on the philosophy of the absolute and of the transcendence, the freedom of individuals is reflected in their servitude to God. This link between divine law and state laws, however, determines the endorsement of serious problems with respect to issues of equality between men and women, freedom of religion, discrimination on religious grounds and corporal punishment in many Islamic countries. The recent dramatic developments of the popular movements that inflamed the Mediterranean basin two years ago lead the observer to reflect deeply on Islamic culture about human rights and the compatibility between the Western standards on protection of those rights and *sharia* law.

## 1. State law, civil society and democracy in the Arab-Muslim world

The scientific debate on the nature of the Arab-Muslim State, the power structure, the relationship between law and the "revelation" of God is relatively old. Yet it experienced a renewed vigor in the second half of the 70s, through the

works of, among others, B. Ghalioun,[1] Dali El Din Hilal[2] and Khalid Ahmad Khalid,[3] and through conferences organized by the Union of Arab Jurists,[4] the Centre for Arab Unity Studies (CEUA)[5] and the Arab thought Forum.[6]

The assumption is that Islamic law, meant as the law of the relationship between individuals and between individuals and power, is embodied in Shari'a. Shari'a is the organization of individual and collective life according to the imperatives of the divine positive law as it was given to and imposed on Muslims in the Qur'an and through the Summa, before being processed and interpreted by various canonical schools of Muslim law (*Fiqh*), in particular Sunni and Shia. Not only does Shari'a define the dynamics of worship and enumerate the essential articles of the creed, but it also points out the rules according to which the State should work both at home and abroad. In other words, in the Islamic world, rights and duties, prohibitions and contracts have religious roots, so that Shari'a, its individual interpretation (*ijithad*) and the predominance of duties over rights contribute to achieve full implementation of human rights in the Islamic political culture.[7]

The identification of Islamic law with Shari'a is, moreover, "codified" in different codes of Arab countries, such as the

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1 B. Ghalioun, *Manifesto per la democrazia*, Beyrouth, 1978.

2 Ali El Din Hilal, *La democrazia e i diritti dell'uomo nella patria araba*, Le Caire et Beyrouth, 1983.

3 Khalid Ahmad, *Gli arabi e la democrazia*, Beyrouth, dar Al-hadathan, 1984.

4 Union Des Juristes Arabes, *Droits de l'homme et libertés fondamentales dans le monde arabe*, Bagdad, revue Al-Houquouki Al-Arabi, n. special, 1979.

5 CEUA, *La crise de la démocratie dans la patrie arabe*, Beyrouth, 1984.

6 Saad Eddine Ibrahim, *Pluralisme politique et démocratie dans la patrie arabe*, Forum de la pensée arabe, Amman, 1989.

7 Daniel Price, *Islamic Political Culture, Democracy and Human Rights*, Praeger Pub, Westport, 1999, p. 161.

Egyptian Civil Code of 1948.[8] We can find similar references in the Algerian Civil Code of 1975 and in North Yemen Civil Code of 1979.[9]

Most of the Constitutions of the Arab countries also state that Islam is the state religion and that Shari'a is a main source of law, as proved by Article 2 of the Egyptian Constitution (as amended in 1980).[10] There are two primary sources of Shari'a law: the Koran and the Sunna. The Koran, sum and main source of Islamic law, is embodied in the revelation sent by God to the Prophet (Muhammad) between 610 and 632. The Sunna is, instead, the set of words, facts, behaviors and interpretation attributed to Muhammad, as reported in the traditions (*hadith*).

Islamic jurists developed from these two sources, through the creation of specific legal principles (*usul al-fiqh*), a set of rules to regulate relations between human beings in certain social contexts and human beings with God.

### *1.1 The issue of sovereignty*

The main problem for Islamic law scholars is the issue of sovereignty. Most of the authors believe, indeed, that the sovereignty of Islamic law (and the legislative power) belong to God expressed through the Koran, not to the people, it is right and good (*but 'roof*) what the divine law prescribed, and it is wrong and evil (*munqar*) what it condemns. After all, if human rationality were sufficient to regulate the right behavior, the revelation would be useless.[11]

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[8] Which states that "in the absence of a legal disposition, judges (*qadi*) speak out according to the morals (*'urf*) and, in their absence, according to the principles (*mabadi*) of Islamic Shari'a".

[9] In which it is asserted that "the rules of equity shall correspond to the fundamentals (*usul*) of Islamic Shari'a".

[10] That states that "Islam is the state religion. The principles of Islamic law represent the main source of law."

[11] Chafik Chehata, *La religion et les fondaments du droit en Islam*, in *Archives de philosophie du droit*, 1973, p.22.

The revelation has come to solve controversial issues, therefore, Muslims do not need to look elsewhere for an answer, because Islam absolutely provides good, eternal answers.[12] Thus Islamic law covers all aspects of life.[13] As quoted by Egyptian jurist 'Ayli, "in the Islamic system, the nation can not contradict a provision of the Koran or the Sunna or commit an act that would be contrary to them, regardless of the consent of the governors and the governed. Islam does not know bodies whose opinion prevails in case of conflict. It knows no minority or majority. It cannot refer to the opinion of the nation as a source of power (...). The nation and its leaders have no legislative power, they can only refer to God and His messenger to deduce the rules."[14] The denial of the sovereignty of the people for the benefit of God, author of Islamic law, is supported, in particular, in the several constitutional models developed by Islamists to replace the existing Western-inspired Arab-Muslim constitutions. This concept is best summed up by Article 15 of the constitutional model of Wasfi of 1980 (prepared by the Vice Chairman of the Egyptian Council of State Mustafa Kamal Wasfi) that asserts that "expressing an opinion in accordance with Islam is an obligation guaranteed by the State, which facilitates all activities necessary for this purpose. No majority opinion shall be considered if that opinion disagrees with Islamic law. "To be fair it should be clarified that, despite the references to Islamic law mentioned above, currently most legal matters governed by Arab-Muslim codes are Western-inspired, in particular concerning the judicial system, civil law, commercial law, administrative

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[12] Muhammad Mitwalli Al-Sha'rawi, *Qadaya islamiyyah, Dar al-shuruq*, Beyrouth&LeCaire 1977, p. 35-39.

[13] Mahmud Al-Khaldi, *Naqd al-nizam al-dimuqrati*, Dar al Galil & Maktabat al-Muh-tassib, Beyrouth & Amman, 1984, p. 156-7.

[14] Abd-Al Hakim Hassan Al-'Ayli, *Al-hurriyyat al-'ammah fil-fikr wal-nizam al siyassi fil-islam, dirassah muqaranah*, Dar al-fikr al-'arabi, Le Caire 1974, p. 205-206, 214-215.

law, criminal law and humanitarian law. Matters related to family law and successions are controversial.

It is clear that the Quran and the Sunnah alone can not be sufficient to govern the complex contemporary societies, they can only be supplemented with additional provisions that "actualize" the prophet's message, and make the revelation feasible, not being the shiaritic law directly applicable. The Koran itself acknowledges the existence of two categories of verses: those that contain a clear and unambiguous interpretation (*muhkam*) and those susceptible to more than one interpretation (*mutashabh*). We must, in fact, make a distinction between laws that are fully consistent with the shiaritic law or from which they derive, laws that are not dissimilar or conflicting (basically the ones included in the civil, criminal, and trade codes) and laws disagreeing with Islamic law. Regarding this latter case, the doctors of Islamic law (*fuqaha*) have produced over the centuries, a multitude of treaties attributable to one or another school or school of thought that follow the extreme fragmentation of the Islamic-Muslim doctrine (and the law), primarily through the Sunnitic/Shiitic bipartition. Over the centuries, in fact, the message of Islam was mediated by multiple interpretations and applications, so that modern Islam still continues to substantiate in multifarious manifestations. For example, it was used to legitimate monarchies in Morocco and Saudi Arabia, military regimes in Pakistan, Libya and Sudan or theocracies (Iran).[15] This heterogeneity is inevitably projected in the positive law of the Muslim-majority Countries and extends from full compliance with traditional Shari'a of Saudi Arabia to the Turkish secularism, from the conservatism of the Algerian legislation on family law to the cautious Moroccan reformism, to the modernity of the Tunisian law (except for the right of inheritance) etc.

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[15] Syed Jafar Alam, *Towards a New Discourse: Human Rights in Islam and Vice Versa*, in Indian Journal of International Law, Vol. 47, No. 2, p. 263.

## 2. Human Rights and Islam

Human rights within the Islamic conception are subordinate to divine revelation, like the rest of the law. It is superior to any other domestic or international positive law, either customary or covenantal, so that in case of conflict between a shiaritic precept and a provision dealing with human rights, a Muslim interpreter, if forced to choose, would not hesitate to give priority to Shari'a despite the binding nature of the subject of human rights.[16]

The Quranic principles of justice, fairness and human solidarity create duties for each member of the community taken individually. Islamic tradition recognizes the concept of "right" in the term "*huq*."[17] The Qur'an states "human dignity", in the sense that God chose man to "many other creatures."[18] The acceptance of this principle is not only a moral faculty but reveals the obligatory consequence of respecting the dignity of others. Human beings in the Koranic tradition, in fact, have respectability, dignity, responsibility and freedom of choice. These awards are deducted, in particular, from the verses II, 30 (appointing the man "lieutenant of God on earth") and XII, 70: "Many of us already honored the children of Adam (...) and we gave them great preference over a lot of beings we created". The concept of human rights, in brief, dominates the Muslim consciousness as it is based on the teachings of God. For example, speaking about the Universal Declaration of Human Rights of 1948, the Iranian Sultanhussein Tabandeh

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[16] See *Le mémorandum du Gouvernement du Royaume d'Arabie Saoudite relatif au Dogme des droits de l'homme en Islam et à son application dans le Royaume*, addressé aux Organisations Internationales intéressées, in Muslim Worls League, *Colloques de Ryad sur le Dogme musulman et les droits de l'homme en Islam*, Beyrout, Dar al-kitab allubnani, 50-51.

[17] Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law; Equal Before Allah, Unequal Before Man?*, Kluwer Law International, 2000, p.15.

[18] *Corano*, versetto XVII,70.

asserts that it "did not promulgate anything new nor opened any innovation. Every Clause (...) already existed in Islam in a better and more perfect form".

Many jurists and Islamic scholars claim the role of non-Western societies, and Islam in particular, as a source of epistemological concept of "human rights"[19] (*Huqùq Adamiyyin*). This assertion is indeed shared by many Western scholars of Islamic law.[20] Ostrorog, for example, noted that "looking at the context of Islamic law, some theories inspired not only admiration but also surprise. These Eastern thinkers of the ninth century coined, on theological grounds, the principle of Human Rights, in terms that included the right to individual liberty, inviolability of person and property, (...) have drawn up laws of war (...) exposed a doctrine of tolerance toward non-Muslims so liberal that our West had to wait a

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19 Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, F.T. Goulding and Company, London, 1985, p. 85.

20 See: Mohammed Al-Ghazzali, *Human Rights in the Teachings of Islam*, al-Makhtabat al-Tijariyah, Cairo, 1992; Adib Al-Jadir, *Foreword to the Special Edition on Human Rights in the Arab World*, in Journal of Arab Affiars, Vo.3, p. 1-4.; Said Mohamed El-Sayed, *Human Rights in the Third World: The Question of Priorities*, in Adanabtua Pollis and Peter Schwab (eds.), Human Rights: Cultural and Ideological Perspectives, Praeger, New York, 1979; Saad Eddin Ibrahim, *The future of Human Rights in the Arab World*, in Hisham Sharabi (ed.), The Next Arab Decade: Alternative Futures, Wstview, Colorado, 1988; Majid Khaddouri, *The Islamic Conception of Justice*, John Hopkins University Press, Baltimore, 1984; Maqbul Ilahi Malik, *The Concept of Human Rights in Islamic Jurisprudence*, in Human Rights Quarterly, Vol. 3, 1981, p. 56-67; Abu Al Ala Mawdudi, *Human Rights in Islam*, Al-Tawid, Vol.4, 1987, p.456-67; Sayyed H. Nasr, *The Concept and Reality of Freedom in Islam and Islamic Civilisation*, The Imperial Academy of Philosophy, Teheran, 1978; Abdul Aziz Said, *Human Rights in Islamic Perspectives*, in Adanabtua Pollis and Peter Schwab (eds.), Human Rights: Cultural and Ideological Perspectives, Praeger, New York, 1979.

hundred years before seeing equivalent principles adopted".[21] Fouad Zakaria argues that

> "the concept of human rights in the contemporary Arab world is due to Islam. So, to understand the philosophical foundations on which all law is based in the contemporary Arab world, it is imperative to analyze the Islamic conception of these rights, their interpretation by the Muslim scholars, as well as the effect of this concept in the way these rights are rendered intelligible and practiced by the Arabs today".[22]

### *2.1 The theological basis*

In general terms, through a careful reading of the Koran, we can deduce that within that sacred text there are elements that define Islam as a religion capable of creating a society based on a deep sense of freedom, responsibility and justice in order to protect and preserve the human dignity of each individual. Life, dignity, justice, free will, property and privacy are considered sacred, inviolable and inalienable.[23] Similarly, life, religion, intellect, family and property are considered to be the five essential elements (*al-darùrat*) or the five foundations (*al-usul al-Khamsah*) of good governance. The "sanctity" of private property, in particular, is an absolute rule in all Islamic schools of law, both in relation to private individuals and in their relations with the state.[24] Islamic

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[21] C.L. Ostrorog, *The Angora Reform*, University of London Press, 1927, pp. 30-31, citato in A.A.A. FYZEE, *Outlines Of Muhammadan Law*, Oxford University Press, 3rd ed., 1964, pp. 53, 54.

[22] Fouad Zakaria, *Human Rights in the Arab World: The Islamic Context, in Philosophical Foundation of Huma Rights*, United Nations, Geneva, 1985

[23] Mohamed Berween, *The Fundamental Human Rights: An Islamic Perspective*, in The International Journal of Human Rights, Vol. 1, 2002

[24] J. Schacht, *Islamic Law in Contemporary States*, Lahore: Sh. M. Ashraf, 1987, 7th Edn.

law also recognizes the rule of law expressed in the maxim: *'al-asl fi al-ash-yà ibahah* (every action is permitted until the contrary is established).[25] For Islamists the boundaries of *ijtihad* (individual interpretation of Islam) were already achieved in the ninth century and the shiaritic law is based on the traditions that have not changed in the last millennium.[26] It is clear that in an eminently God-centered society, based on the philosophy of the absolute and of the transcendence, the freedom of individuals is reflected in their servitude to God. This is the only thing that determines the value of an individual, and makes him worthy of this freedom. Only exclusive worship, directly and without intermediaries, determines the greatness of believers, ensuring their dignity. This concept derives from the same philosophy of Islamic sovereignty above, which denies the sovereignty of the people of the legislative power, prerogative power of God. It is not a coincidence, in this respect, that the Islamic conception of human rights, as we will see, consecrates also discriminations based on sex or religion under Islamic law and that the original main terms made by the Islamic countries to the International Conventions concern these two categories of protected rights.

It is good to clarify right away, nevertheless, that the discriminations which it refers to are not necessarily directly related to the subordination of positive law state to Islamic doctrine, being able to include cases of compatibility between revelation and a high degree of legal recognition of rights. We refer in particular to Countries such as Jordan, Egypt, Turkey or Tunisia that, despite the constitutional references to Shari'a, has succeeded in developing one of the most advanced codes of personal status of all Arab countries to the extent

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[25] Mashood A. Baderin, *Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States*, in Netherlands Quarterly of Human Rights, Vol. 2, 2004.

[26] G. H. Jansen, *Militant Islam*, Pan Book, London, 1979.

which prohibits polygamy and repudiation (Article 18, 30) and allows adoption. This does not mean that Islamic states have adopted blindly Western standards of human rights. It simply means that the extreme heterogeneity of the interpretation of the message of Islam has led to a different degree of protection from state to state. In confirmation of the absence of a direct link between political culture and Islamic human rights violations, it is important to mention the research by Daniel Price, who has developed a numerical index of the relationship between political culture and non-compliance with human rights. These studies involved 23 Islamic states and 23 non Muslim developing countries and showed that the determining factor in the low level of protection of human rights in many Islamic countries is the presence of authoritarian regimes rather than Islamic political culture.[27] To this must we must add the extreme heterogeneity of Muslim majority countries. To quote the words of An-Na 'im,

> "although Islam is always considered to be the main factor in the presumed unity of the Arab culture, there are considerable differences in the way it is interpreted and practiced in various areas of the region, especially in terms of relations between the state and public life, from Tunisia to Saudi Arabia and from Somalia to Syria to Iraq".[28]

Therefore, given that the more than 60 states of Islamic tradition of the international community have extremely divergent regulations, very often influenced by different schools of thought, we try to sum up the Islamic-Muslim common vision about specific categories of rights, which have particular problems, such as equality between men and

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[27] Daniel Price, *Islamic Political Culture, Democracy, and Human Rights: A Comparative Study*, Greenwood Publishing Group, 1999.

[28] Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, in Human Rights Quarterly, 23, 2001, p.701.

women, freedom of religion, discrimination based on religion and corporal punishment.

## 3. Civil and Political Rights

As seen, the Law, according to Islamic tradition, is divine and already given (revealed). It is the only one allowed to govern relations between individuals in a community: no legislative body seems to be so necessary, possible or compatible. The concept of "political rights", in this perspective, has no significance, as it is rather a set of "political duties".

### *3.1 The party system*

The interpretation of the verses LVIII, 19-22 and V, Article 56 of the Koran reveals a conception partly founded on the dichotomy between the party of the Devil (*Hizb al-shaytan*) and the party of God (*Hizb Allah*). It was clearly the party of God intended to bring the Muslim people to victory. Even today we see the spotlight of a Libyan party that follows the etymology: the Hizb Allah, better known as *Hezbollah*.

In general, now we can say that in no state, it is theoretically prohibited to create political parties as long as they are based on the Islamic dogma. To resume the constitutional models of the Islamic movements mentioned above, art. 19 of the constitutional model of the party of liberation asserts that "any group based on different principles of Islam is prohibited." Article 38 of the constitutional model of Wasfi adds that "it is forbidden to set up positivist political parties". Similarly, the constitutional model of the Islamic Council, Article 18a, although it recognizes the right of assembly and association, it is limited to cases in which it complies with the requirements of the divine law. This seems to explain the refusal to ratify the UN Covenant on Civil and Political Rights of 1966 by Brunei, Comoros, Guinea-Bissau, Malaysia, Oman, Pakistan, Katar, Saudi Arabia and United Arab Emirates. It is also

worth to underline that on a factual level, different countries of North Africa and sub-Saharan Africa have experienced periods of overt dictatorship or temporarily indefinite state of emergency that made political institutions move towards the single-party system. It is clear, however, that this conception of popular participation in political life affects freedom of association and, in particular non-discrimination on religious grounds.

### *3.2 Religious discriminations*

As to religious discrimination, although only within the Code of Mauritania (Article 306) and the Code of Sudan (Article 126) apostasy is subject to death penalty, the classical Islamic law punishes apostasy with death if it is a man and life imprisonment if it is a woman. Death penalty for apostasy is based on a statement of the Prophet who said: "kill all those who change religion".[29] In Egypt and Morocco, the apostate is generally sentenced to life imprisonment, although there is not a law concerning this offense, and Article 6 of the Arab Charter of Human Rights of 1994, states: "no criminal offense may be punished and no penalty can be applied if not by virtue of a legal text."[30] The fury against apostasy affects civil rights as an atheist or an apostate or an adherent to secular current (*al-'ilmaniyyoun*) can be separated from his spouse, deprived of his children, his succession remains open, he loses his job and is generally persecuted by Islamic circles in various manners,[31] in particular through judicial processes, as shown

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[29] Mashood Baderin, *International Human Rights and Islamic Law*, Oxford Monographs in International Law, 2003, p.124.

[30] *Charte Arabe des Droits de l'Homme*, in *Revue universelle des droits de l'Homme*, vol. 7, n° 4-6, 2 giugno 1995.

[31] K. Walhler, *Zur Behandlung des Religionswechsels im heutigen Recht islamischer Staaten*, in *Mélanges Fritz Sturm*, Vol. II, Liège University, 1999, p. 1297.

in the school-case of the Egyptian Court of Cassation in the Aboud Zayd affair.[32]

Moreover, the classical Islamic law recognizes only to the followers of other monotheistic religions based on revelation (Christians, Jews and Samaritans) a limited religious freedom with severe restrictions in terms of access to public offices, limited construction of churches and sanctuaries, prohibition of criticism of Islam, the prohibition to marry a Muslim woman and the payment of a special tax (*gizyah*). We must add, however, that despite this, the general condition of religious minorities (Christians in particular) in the recent years has greatly improved so as to void parts of such discrimination. This seems to support the thesis by the Representative of Sudan in the second periodic report of the International Covenant on Civil and Political Rights, which stated that "conversion from Islam in Sudan is not an offense in itself, it is only the manifestation of such conversion when it attempts to public safety.[33] "In fact, many scholars have emphasized over the years a certain openness to religious freedom of the Islamic message. With regard to the treatment of religious minorities, for example, Mayer maintains that the treatment of the Jews in particular, by the Islamic societies, has been particularly "enlightened" when compared to the persecution of the Christians of the last century.[34] Others maintain that the standard of religious freedom guaranteed

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[32] The case concerned the case of Prof. Abu Zayd accused of apostasy and for which the prosecution demanded the separation from his wife because of the illegality of a marriage between an apostate and a Muslim woman. By judgment of 5 August 1996 the Supreme Court gave effect to requests from the prosecution and ordered a death sentence that forced the defendant to repair the Netherlands. M. Charfi, *Islam et liberté*, Paris, Albin Michel, 1998, p. 86.

[33] Sudan's 2nd ICCPR Periodic Report of 1997, par.127 e 133 (UN Doc. CCPR/C/75/Add.2 of 13/03/97).

[34] Anne Elisabeth Mayer, *Islam and Human Rights*, in Tradition and Politics, 3rd ed., 1999, p.136.

by Shari'a on non-Muslims living in Islamic states has never been reached by other religions,[35] and others maintain that the Christian minorities in the nineteenth century preferred to live according to Islamic rules rather than being persecuted by the Byzantines or the Hapsburgs.[36] However, religious minorities in Islamic countries today still feel the weight of an orthodox, uncompromising shiaritic interpretation which, as seen, limits freedoms, *inter alia*, granted only to monotheistic revelation-based religions. This condition is constantly threatened by the Islamist rise to power, as it recently happened in Tunisia.

### *3.3 Criminal Law*

Regarding the global harmonization of criminal law, important according to the UN, especially with regard to the death penalty and torture, although most of the Arab countries have recently adopted codes in line with Western standards, classical Islamic law provided forms of punishment in stark contrast to the most elementary requirements of prohibition to cruel, inhuman and degrading treatment, in particular: stoning, crucifixion, amputation of limbs, flogging, torture and the law of retaliation. In this regard, it is necessary to point out that the UN Convention against Torture and Other Cruel, Inhuman and Degrading treatments of 1984 reported the defections of Brunei, Iran, Iraq, Malaysia, Oman, Somalia and Suriname. We must add that among the states that did not sign the optional Protocol of this Treaty (establishing an international system of inspections in places of detention), 16 are Arab-Muslim, namely: Albania, Azerbaijan, Beni, Burkina Faso, Gabon, Guinea, Kazakhstan, Kyrgyzstan, Lebanon,

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[35] Abdur Rahman I Doi, *Non-Muslims under Shari'a (in Islamic Law)*, 3rd ed., 1983.

[36] Heiner Bielefeldt, *Muslim Voice in the Human Rights Debate*, in Human Rights Quarterly 17, 1995, p. 597.

Maldives, Mali, Nigeria, Senegal, Sierra Leone, Togo and Turkey.[37]

The Koranic conception of punishment is certainly interesting, as it allows us to make the dimensions of Islamic justice more intelligible. Although the Koran does not totally exclude justice based on "retaliation", the institution of blood revenge, prevalent in pre-Islamic Arabia, was almost totally abolished by Islam. In this regard, the Koranic verse XVI, 120 says: "if you beat someone, do it as you were beaten, but if you are patient it is better." However, some of the corporal punishments mentioned above haven't yet been abolished *de facto* in Sudan, Iran, Afghanistan and Saudi Arabia. Regarding slavery, finally, there is no doubt that the Koran recognizes this practice. Slavery, however, is considered as an accidental exception and it must be limited so that it will gradually disappear. It is therefore recognized as a temporary and contingent occurrence. Not surprisingly, the Koranic text limits the possibility of slavery only to the capture of prisoners during a war or in cases of hereditary descent. There is no reference to the practice of buying slaves, as it wasn't considered a legal power at the time of Muhammed nor under his four immediate successors.[38] The Koran orders, also, the immediate liberation of the slaves by a believer convicted of murder (verse IV, 92), of perjury (V, 89), or in case of an illegal divorce (LVIII, 30). Other reasons for the liberation of slaves are: the violation of the Ramadan fast, and any cruel and degrading treatment perpetrated to a slave, according to the Prophet who said: those who beat or inflict excessive punishments to their slave can atone for their sin through liberation".

Muslims were also obliged to assist the slave financially in the view of his liberation, ensuring his personal safety and a

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[37] UNTS 1465, 85, 10/12/1984.

[38] Robert Roberts, *The Social Laws of the Qoran. Considered and Compared with those of the Hebrew and other ancient codes*, London, Carzon, riedizione della pubblicazione del 1925, 1971, X/126, p. 54.

real prospect of emancipation.[39] It should be emphasized, in this regard, that apart from the traditional forms of slavery, servitude and forced labor, new forms of modern slavery, such as trafficking in women for prostitution, child labor, forced labor (including children) and exploitation migrant workers have been convicted by a famous UN Report on slavery in 1984.[40] Although it has been officially abolished by the Arab-Muslim states, disturbing episodes prove that, until the '90s, it still existed in countries like Mauritania and Sudan.[41]And the return to this practice was explicitly advocated, in a very recent past, by eminent luminaries of Islamic culture in support of an orthodox interpretation of shiaritic tradition, such as Professor Saudi Islamic University of Medina Fayid,[42] the Egyptian Sheikh and parliamentary Abu-ISMA,[43] the Pakistani religious ideologue Mawdudi and the Egyptian Professor Doctor of the Sorbonne Ahmad.[44]

Nevertheless, we can deduce that, being the most "modern" Muslim countries *de jure* Parties of the major international conventions pertaining to the prohibition of slavery and the slave trade, there is still a general consensus about the compatibility between the inhibition of this practice and the principles of Islamic law. This thesis is attested by Article 11 (a) of the Cairo Declaration on Human Rights in Islam claiming that "all men were born free, and no one has the

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[39] Marcel A. Boisard, *Les Droits de l'Homme en Islam,* in *Islam e droits de l'Homme*, a cura di Marc Agi, Des Idées & des Hommes, pp.82-86.

[40] See Report on Slavery, UN Doc E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1,p.10.

[41] See *The flourishing business of slavery*, in *The Economist* del 21 settembre 1996; Nhial Bol, *Sudan Human Rights: Khartoum accused of selling slaves for arms*, in *Inter Press Service,* 12/07/1996.

[42] Mamud 'Abd-Al-Wahhab Fayid, *Al-riq fil-islam*, Dar al-i' tissam, Le Caire 1989.

[43] Salah Abu-Isma'il, *Al-shahadah*, Dar al-i' tissam, Le Caire 1984.

[44] Hamad Ahmad Ahmad, *Nahwa qanun muwahhad ili-giyush al-islamiyyah*, Makta-bat al Malik Faysal al-islaiyyah, 1988.

right to be enslaved, humiliated, abused or exploited, and there can be no other submission but to God."

## 4. Women's rights and sexual discrimination

According to the Koran, women are made of the same essence of men, they were not created from a man's rib, as in the Christian revelation, but women are the "twin halves" of men. The Prophet Muhammad said, that "women are sisters of men."[45] This sacred text also grants the gift of perfection to two women: Asiya, the wife of the Pharaoh, and Marie, the daughter of Imran. To them the prophetic tradition adds Khadiga and Fatma: bride and daughter of Muhammed. Shari'a orders to treat spouses with justice, goodness and kindness, and grant them sacred rights such as equality before the law, private property and personal rights of inheritance. Under the shiaritic precepts women have the right to marry through a civil contract legalizing sexual relations and procreation. As believers, women are, at the same time, equal to men on a spiritual and intellectual level, but are different from a physical and juridical point of view. Men, as enshrined in the Koranic verse II, 228, have a certain area of "eminence". It states, indeed, that "women have rights similar to their obligations and in accordance with customs.

However, "*men predominate over them*"[46]: in other words there was an equal dignity but with different rights. As mentioned above, the original model of Islamic protection of women's rights is extremely lower than the one in the West. This is proved by the terms inserted by many Arab-Muslim countries in the main international conventions in this field. In particular, art. 16 of the UN Convention on the

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[45] *Memorandum* of the Government of the Kingdom of Saudi Arabia on the doctrine of human rights in Islam and its application in the territory of the United Arab Saudi addressed to the secretary general of the League of Arab States, *the Saudi Ministry of Foreign Affairs.*

[46] Italics added

Elimination of All Forms of Discrimination Against Women, for which states commit themselves to ensure "the same rights and the same responsibilities during marriage and during its dissolution (...) *on the basis of equality between 'men and women*",[47] reported terms of Egypt, Iraq, Jordan, Libya and Tunisia and was never signed by Brunei, Iran, Somalia and Sudan. In addition, the Optional Protocol to the treaty in question, which recognized the competence of a *ad hoc* body in the UN to receive individual complaints about gender discrimination cases was opposed by Albania, Azerbaijan, Bangladesh, Benin, Burkina Faso, Gabon, Guinea Bissau, Indonesia , Kazakhstan, Kyrgyzstan, Libya, Maldives, Mali, Niger, Senegal, Sierra Leone, Tajikistan, Tunisia, Turkey, and Turkmenistan.[48]

### *4.1 The Islamic family law*

The concept of Islamic family law includes all those shiaritic dispositions relates to marriage, divorce, maintenance, child custody and inheritance. The discrepancies between Shari'a and modern standards of human rights regarding the family law essentially concern the repetition of polygamy, punishments (and aggressions) against adulterers and homosexuals, the concept of *talaq* (repudiation), post-divorce maintenance and the rejection of adoption. We must immediately clear that, basically, the Islamic conception of marriage, divorce, marital relationship, affiliation, and inheritance is different from the western one and this helps us understand the shock of a Westerner approaching to practices such as polygamy or repudiation. Unlike western thought, for which marriage is an intimate union with God, a "solemn covenant" or a "mystical union of souls," according to Islam it is only a legal act, it's

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[47] Italics added

[48] *Traités multilatéraux deposés auprès du secrétaire général*, Nations Unies, New York, 1992. Pp. 174-175 ss.

just a contract that can be terminated in the even of failing to comply with any term, despite the Koran encourages, in its multiple verses, conscientious respect for the commitments taken. This interpretation depends on the more general trend of shiaritic revelation to approaching issues in a more realistic rather than idealistic way, inspired by a very pragmatic spirit, taking into account the real nature of human beings.[49] According to an orthodox interpretation of the Koranic verse II, 221, traditional Shari'a envisages that Muslim men, can not marry a polytheist, but they can marry a "woman of the Book", ie Christian, Jewish and Zoroastrian, unlike Muslim women, who can marry only Muslim men.

A valid marriage can be contracted from the age of puberty, because the classical Shari'a identifies puberty with adult age. Similarly, the revelation allows polygamy to men only, and they are permitted to marry up to 4 women provided they can support them. Polygamy within the Islamic family law raises, primarily, the problem of its *ratio* in the light of the opposite ban on the international level. We must note that in the context in which the Koran first appeared, through the prayers of the Prophet Muhammad, polygamy was basically justified through a paternalistic logic, according to which this practice was used to provide justice and security to those women who were doomed to be in serious trouble because condemned, abandoned, repudiated or orphan.

The Koranic philosophy tended to perceive monogamy as the ideal form of association and to discourage believers from this type of practice through verses such as IV, 130 which state: "you will never reach a perfect emotional balance between your wives, as you wish." Secondly, over the years, Islamic jurists, following extensive interpretative paths, have identified in the Koranic legal source the methodological

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[49] Marcel A. Boisard, *Les Droits de l'Homme en Islam*, in Islam et droits de l'Homme, a cura di Marc Agi, Des Idées & des Hommes, pp. 77,78.

basis to limit polygamy, like in Pakistan,[50] Syria,[51] Iraq[52] and Tunisia[53] (where polygamy has been totally prohibited, and offenders may be subject to a one year detention or to the payment of a fine). These amendments do not find their "ratio" in a sterile emulation of the Western system, but are made possible through a "progressive" interpretation of the original message of the Koran. We refer, for example, to the legal doctrine of *takhayyar* (eclectic choice). The implementation of *takhayyar* in Islamic family law has led to the incorporation of specific voluntary inhibitory clauses, within the marriage contract, which prohibit husbands from marrying other women or injuring their wife.

### *4.2 The practice of divorce*

To this we must add the practice of divorce to which the Koran devotes an entire chapter (LXV), establishing the details of the procedure. Islamic law includes 4 types of dissolution of marriage: the unilateral repudiation by the husband (*talaq*), divorce upon a wife's request (*khul'a*), the dissolution by mutual consent (*mubara'ah*) and the termination following a court order (*faskh*). Despite being considered a social pathology, this practice is expressly permitted, although limited. As mentioned, a wife can ask for a divorce only under specific conditions and, despite her legal position, she is disadvantaged in many aspects. Nevertheless she has the right to material compensation. Moreover, although women have the right to remarry, men in many Muslim states still consider such unions as a taboo, and they often condemn these women to poverty and marginalization. In case of dissolution of marriage, child custody is rarely

[50] Muslim Family Law Ordinance (1961).
[51] Law of Personal Status 1953, art. 17 (Decree No. 59 of 1953).
[52] Law of Personal Status, 1959, art.3.
[53] Tunisian Code of Personal Status, 1956, art.18.

based on the child's interest, whereas the right of paternal education is privileged.

Another particularly contentious issue is the practice of *talaq*, which both the Koran and the Sunna oppose (verse LXVI, 1), but which is recognized by all Islamic schools. According to talaq a Muslim man has the absolute and extra-judicial right to legally divorce without having to give a reason and without having to ask nor obtain the consent of his wife. In addition, the *talaq* can be pronounced even in the absence of his wife. It has been said that "the Koran grants men total freedom of divorce does not ask any justification for it. So he can even divorce on a whim, whereas a wife does not have the same right".[54] Nevertheless, some countries have recently gone through a gradual process of amendment or repeal of the traditional Islamic rules of dissolution of marriage (in particular in relation to *talaq*), as in the case of Article 30 of the Tunisian Code of Personal Status of 1956 which states that "a divorce outside the Court has no legal effect" and Article 49 of the Algerian Code of personal Status of 1984 which states that "a divorce should be determined by a judge only after a period of reconciliation"; both based on the Koranic verse IV, 35 which states that" if you fear a breach between the two (husband and wife) appoint two arbiters".

The attempts of the most "enlightened" Arab countries to balance the rights of women, in respect to *talaq*, have shown how it is possible for the legislature to bypass the tenets of Islamic law schools by appealing directly to the Shari'a primary sources. In particular, we refer to the reforms introduced in recent decades, even in Egypt, where, in 1979, President Saddat proposed a rule that introduced compulsory registration for each *talaq* and demanded that a wife was informed if a husband intended to divorce by *talaq*, so that it was not effective until it was notified. Husbands were also

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[54] Arthur Jeffery, *The Family in Islam*, R.N. (ed.), *The Family: Its Future and Destiny*, 1949, p.39 e 60.

obliged to inform wives of every new polygamous marriage, which would have given wives the right to ask for a divorce.[55] In May 1985, however, the Egyptian Supreme Court revoked this law as it was considered *ultra vires* to the Constitution. Another reformist season took place in 2000, under the reign of President Mubarak, that completed the legislation with some innovations, like the introduction of the principle that the consent of a husband to divorce is not a necessary condition for his wife to obtain it.[56] For centuries, Muslim societies were convinced of the closure and inflexibility of *ijtihad*, thus betraying the real essence of Islam, which, instead, is based on change, contextualization, reforms and reinterpretations.[57]

### *4.3 Child custody and inheritance*

Although there are remarkable differences between the Sunni and the Shiite interpretation, the Koran lays down the right of succession sanctioning, in verses IV 11 and IV, 12, that the inheritance of a daughter is half the one of a son with regards to the offspring of a Muslim departed and that, in case of widows, the inheritance of a husband is twice the inheritance of a wife.[58] Yet the scriptures also recognize that a father and a mother inherit an equivalent sum in case of death of one of the children, the children (of both sexes) inherit in equal measure from parents and that, in the event that the heirs were a father and his daughter, they inherit

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[55] Law No.44 of 1979.

[56] Law No. 2000 on the Re-Organisation of Certain Terms and Procedures of litigation in Personal Status.

[57] Javaid Rehman, *The Sharia, Islamic Family Law and International Human Rights Law: Examining the Theory and Practice of Poligamy and Talaq*, in International Journal of Law, Policy and the Family 21, 108-127 (2007), pp. 110-124.

[58] Patrick Kinsch, *Le droit musulman de la famille, les droits de l'homme (ou de la femme) et l'ordre public des Etats européens*, in Bulletin des Droits de l'Homme, n. 14 (2009), pp. 30, 31.

an equal sum.[59] Muslim jurists maintain that the original differences of treatment are not discriminatory since the duty to provide for the needs of the family belongs to the men. In conclusion, to tell the truth, it must be added that in recent decades there has been a significant positive evolution of women's conditions in most of the Arab states. Intransigent positions related to repudiation and to the right to work have been almost totally abrogated. Women have achieved the right to vote, access to public office, the right to work, the right to education and the right to dress as they choose. As to the right to work, Islam allows women to undertake lawful activities that are compatible with her natural characteristics. During the lifetime of the Prophet, Muslim women were engaged in many occupations outside the home.

## 5. Conclusions. Comparative study of the concept of human rights in Islam and in the West.

We can conclude, therefore, that the main difference between the two cultures investigated lies not so much in the group or the essence of the rights protected, as in their basic inspiration. As it is known, in the western Conventions, religion is recognized as a freedom, not as a source of inspiration. In Islamic texts, however, the meta-historical and eschatological element is omnipresent, the primordial and universal power of God is the origin of all the regulatory system, the revelation is the source and the legal framework of all practices, so that the observer defines these instruments, without fear of contradiction, "confessional" rather than universal.[60] In other words, the concept of human rights in Islam is different from the western

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[59] Quran verses IV:11 E IV:12 in Mashood Baderin, *International Human Rights and Islamic Law*, Oxford Monographs in International Law, 2003, p.146.

[60] Mustapha Benchenane, *Les Droits de l'Homme en Islam et en Occident*, in *Islam et droits de l'Homme*, (sous la direction de) Marc Agi, La Librairie des Libertés, p. 296-302.

one for at least one evidence. This evidence is the fact that the doctrine of Islamic human rights refers primarily to God and to his relationship with men; it opposes a comprehensive theocentrism to the traditional enlightened anthropocentrism. This doctrine does not develop on a horizontal axis (drawn from the relationship between individuals) but on a vertical axis (formed by the relationship between an individual and God). In this regard, we may fully justify those who assert that imagining a dichotomous relationship between secular and religious spheres is totally misleading. This report should be developed on a complementary rather than dialectical plan.[61]

In essence, the key to the interpretation of Islamic practice for the protection of human rights lies in the recognition of the structures of legal pluralism, understood as heterogeneity of regulatory systems, influenced by their contexts of reference. Being the subject of human rights, alleging moral sensibilities and values of a community is at a such sensitivity must refer in order to "empower the system in front of his axiological pluralism".[62]

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[1] Syed Jafar Alam, *Towards a New Discourse: Human Rights in Islam and Vice Versa*, in Indian Journal of International Law, Vol. 47, No. 2, p. 267.

[62] Surya Prakash Sinha, *Legal Polycentricity*, in *Legal Policentricity: Consequences of Pluralism in Law*, (edited by) Hanne Petersen and Henrik Zahle, Dartmounth, 1995, p.43.

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# CONSTITUTIONS OF ANGLOPHONE WEST AFRICAN COUNTRIES AND PRIVATE PROPERTY RIGHTS TREATIES

OLUSESAN OLIYIDE

The article appraises treaties bordering on private property rights, examines the Constitutions of all Anglophone West African countries and ascertains the extent of consistency of those Constitutions with the salutary provisions of the treaties. It considers the pertinence, value and justification of treaties and Constitutions, particularly, from the viewpoint of both being veritable instruments for entrenching private property rights. It further treats the issue of hierarchy between private property related treaties and Constitutions of Anglophone West African countries as well as the history, nature, amplitude and philosophical foundation of private property rights and concludes with recommendations, including those deemed necessary for further entrenching private property rights through treaties and Constitutions of Anglophone West African countries.

## 1. Introduction

Treaties are a written agreement formally concluded between two or more sovereign States[1] on a given subject-matter; as such, signatory-States are expected to adhere to them.[2] Treaties cover, amongst others, virtually all aspects of fundamental rights, including private property rights.

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1 See, Garner, Bryan A. (ed.), *Black's Law Dictionary* (9th ed., West Pub., Minnesota, 2004), 1642.

2 This is pursuant to the rule: *"pacta sunt servanda"*, *infra*. It is noteworthy, that where the obligations created in such treaties have also attained the status of obligations recognized by the international customary law, those obligations will also bind non-parties to the treaties; see, *infra*.

Against this backdrop, *inter alia*, treaties play a fundamental role in international relations,[3] world peace and order as well as global growth and development.

Whether or not States are signatories to international treaties and the extent of internalization of the provisions of those treaties on a particular subject-matter, particularly, by way of incorporating them in local legislation, is an appropriate way of measuring compliance by a State with its international obligations and best practices on that subject-

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[3] See, for instance, the preamble to *the Vienna Convention on the Law of Treaties, 1969* - U.K.T.S. 58 (1980) Cmnd. 7964; 8 LL.M. 679 (1969); A.J.I.L. 875 (1969). Oyebode calls this treaty: "Treaty on Treaties"; see, Oyebode, Akin, *International Law and Politics: An African Perspective* (Bolabay Pubs., Lagos, 2003), 71. Wallace adds that the treaty is "a product of 20 years work by the International Law Commission"; see, Wallace, M.M. Rebecca, *International Law* (3rd ed., Sweet & Maxwell, London, 1997), 20. Dixon describes it as "the most important pieces of work ever undertaken by the International Law Commission"; see, Dixon, Martin, *International Law* (3rd ed., Blackstone Press Ltd., London, 1906), 52. Although the treaty was passed by the Vienna Conference on 23 May, 1969, it entered into force on 27 January, 1980. The eleven-year period between its adoption and entry into force, respectively, Dixon argues, is a reflection that it is comprehensive in scope and that it seeks solution to a variety of controversial issues; see, Dixon, *supra*, 52. The fact that as at January, 1996, 77 parties, including the United Kingdom had ratified it and that, so far, more than 100 countries have done so, attest to its pertinence and acceptability. See further, Wallace, *supra*, 224, Dixon, *supra*, 46 and 52, and Oyebode, *supra*, 71. Wallace, *supra*, Dixon *supra* and Oyebode, *supra*, respectively, attest that the expansive influence of treaties in international law and relations is reflected in the diversity and pervasiveness of the subject-matters regulated by them. Oyebode, *supra*, particularly, posits that "the pre-eminence of treaties in international life generally is borne out by the fact that the most urgent problems confronting humankind today - disarmament, peaceful use of nuclear energy, environmental pollution, ocean bed resources, and so on, can only be resolved through the proven, definitive instrumentality of the international agreement", which treaties represent; see, Oyebode, *supra*, 71. All of the Anglo-phone West African countries, *infra*, are signatories to this treaty; see, http://en.wikipedia.org/wiki/Vienna_Convention, accessed on 26 November, 2011, 1. As such, they are bound by it, pursuant to the rule: *"pacta sunt servanda"*, *infra*.

matter. By implication, this is also a reflection of the level of adaptability of that State to the dynamics of best practices to good governance and of its civilization.

The thrust of this Paper is to appraise the treaties dealing with private property rights and to ascertain the extent to which the Constitutions of English-Speaking West African States[4] incorporate the model provisions contained in those

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[4] West African countries are constituents of West Africa, which is the westernmost region of the African continent. West African countries, which are sixteen in all, are as follows: Benin Republic, Burkina Faso, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. This is approximately, three-and-half of the entire constituent-nations of the African continent, which are fifty-four. While the western and southern border of West Africa is the Atlantic Ocean, the sub-region's northern border is the Sahara Desert; and while some indicate that the eastern border is the Benue Trough, others maintain that it is a line which runs from Mount Cameroon to Lake Chad. Colonial boundaries are reflected in the modern boundaries between contemporary West African nations, cutting across ethnic and cultural lines, often dividing single ethnic groups between two or more countries. It occupies a landmass more than 6,140,000 square kilometers, which approximates one-fifth of the total landmass of the African continent. Linguistically, West Africa is diverse, indeed. Culturally, the sub-region is varied, although, profound similarities pervade the varied cultures. Two official languages exist. These are the English language and the French language. While the former is the official language in Liberia and countries having British colonial background, such as The Gambia, Ghana, Nigeria, and Sierra Leone, the latter is the official language in countries having French colonial background, such as Benin Republic, Burkina Faso, Cape Verde, Cote D'Ivoire, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, and Togo. It is noteworthy that although English is the official language in Liberia, Liberia is not a former colony of Britain. The country never even had roots in European scramble for Africa. Beginning in 1820, it was colonized by freed American slaves with the help of the American Colonization Society, a private organization that believed ex-slaves would have greater freedom and equality in Africa. The capital city of Monrovia is named after James Monroe, the fifth President of the United States of America and a prominent supporter of the Liberian colonization process; see, http://en.wikipedia.org/wiki/Liberia, 1. Importantly, the focus of this paper is on Anglo-phone West African countries, namely: The Gambia, Ghana, Liberia, Nigeria and Sierra Leone.

treaties. The Paper is divided into 7 parts. These introductory remarks constitute Part 1. In Part 2, pertinence, value and the justification of treaties and constitutions being veritable tools for entrenching private property rights will be explored. Part 3 is devoted to an examination of the significance, worth and historical antecedents of private property rights. The nature and amplitude of private property rights, respectively, are appraised in Part 4. In doing this, first, the bases and rationale of private property rights are examined, and, second, it is determined whether the rights are absolute and "illimitable". Part 5 consists of the evaluation of relevant treaties and the determination whether Anglo-phone West African States[5] are signatories to them, in which case, they are bound by virtue of the *pacta sunt servanda* doctrine or whether they are otherwise bound. In Part 6, the Constitutions of Anglo-phone West African States[6] are examined and this is done with the aim of comparing them with the provisions of the treaties and ascertaining the level of compatibility of both. Part 7 consists of our concluding submissions and recommendations.

## 2. Importance of Treaties and Constitutions in Preserving Private Property Rights

### *2.1 Treaties*

#### *2.1.1 Treaties: General Overview*

Treaties are an agreement formally signed, ratified, or adhered to between nations or sovereigns.[7] Alternatively,

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5 *Supra* (fn.4).

6 *Supra.*

7 See, *supra* (fn.1). In *Maclaine Watson v. Department of Trade and Industry* [1989] 3 All E.R. 523 (Tin Council Litigation), Lord Templeman likened treaties to contracts in municipal law, when His Lordship declared: "treaty is a contract between governments of two or more sovereign states". Dixon argues that treaties are the result of

they are an agreement concluded between two or more States in written form and governed by international law.[8] In the definition proffered by him, *Umozurike* emphasizes that treaties create binding obligations among subjects of international law.[9] *Wallace* submits that treaties represent the most tangible and most reliable method of ascertaining, in exact terms, what has been agreed between States on a particular subject-matter.[10] *Dixon* asserts that treaties, being instruments governed by international law, once they enter into force, the parties thereto have a legally binding obligation in international law.[11] "Treaties" is a generic term also used to denote "Accords", "Conventions", "Covenants", "Declarations", "Pacts";[12] and are referred to as "international

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direct negotiations between legal equals and each party is bound by the terms of the agreement because they have deliberately consented to the obligations contained therein. Thus, just as national contracts create specific obligations which "the law" says must be fulfilled, so international treaties create specific obligations which international law says must be fulfilled; see, Dixon, *supra*, 26. Oyebode argues that, in the context of this comparison, the *pacta sunt servanda* doctrine (in the international realm) is, in fact, analogous to the *consensus ad idem* doctrine (in the domestic sphere); see, Oyebode, *supra*, 81.

8 See, Garner, Bryan A. (ed.), *Black's Law Dictionary*, *supra*, 1642 and *Article 2(1)(a) of the Vienna Convention on the Law of Treaties*, *supra*; see also, the I.C.J. in *Qatar v. Bahrain*, otherwise known as the *Maritime Delimitations and Territorial Questions Case* 1994 J.C.J. 112, 121 - 122, regarding what may constitute an international agreement. It is noteworthy, however, that this meaning differs from the meaning ascribed to "Treaties" in *the Constitution of the United States of America*. In that Constitution, "Treaties" are defined as "an agreement made by the President [of the United States of America] with the advice and consent of the Senate"; see, *Article II, section 2 of the Constitution of the United States of America* and Garner, Bryan A. (ed.), *supra*, 1640, citing Baderman David J., *International Law Frameworks* (2001), 158.

9 See, Umozurike, U.O., *Introduction to International Law* (3rd ed., Spectrum Books Ltd., Ibadan, 2005), 16.

10 See, Wallace, *supra*, 20.

11 See, Dixon, *supra*, 47.

12 See, Garner, Bryan A. (ed.), *Black's Law Dictionary*, *supra*, 1642. See also, Watergehr, *The International Law of Treaties*, http://web.me.com/

conventions" in *Article 38(a)* of the *Statute of the International Court of Justice*.[13] Treaties constitute one of the three sources of international law encapsulated in the said Statute;[14] and adherents of the Soviet School of thought insist that treaties are the most important source of international law.[15] In this context, *Oyebode* contends that "international law is today largely a product of treaties ..."[16] and stresses that

> "the United Nations Charter which is arguably the most important source of modern international law, is itself a treaty, whose provisions consider treaties as the main source of international law".[17]

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waltergehr, 1 and Umozurike, U.O., *supra*, 16. Umozurike adds the following to the list of synonyms for Treaties; namely: "Protocols", "Arrangements", Understandings", "Compromises", "Regulations", "Provisions", "Charters", "Statutes" and "Acts" and emphasizes that the synonyms are so used notwithstanding that they have other meanings; see, Umozurike, *supra*, 16. Wallace adds "Agreement" and "Exchange of Notes", among others, to the list; see, Wallace, *supra*, 225. As regards this multiplicity of names given to treaties, see, Oyebode, *supra*, 81.

13 See, Wallace, *supra*, 19, Watergehr, *supra*, 1 and Umozurike, U.O., *supra*, 15. This Statute is otherwise known as the "Bible of the Poor".

14 See, *Art. 38 (1)* of the Statute, Watergehr, *supra*, 1, and Umozurike, U.O., *supra*, 15. The other two sources mentioned in the Article are: (i) international custom, being evidence of a general practice accepted by law; and (ii) general principles of law recognized by civilized nations. Umozurike, U.O., *supra*, however, adds a third source; namely judicial decisions and teachings of "the most highly qualified publicists of the various nations", these "being subsidiary means" for determining the rules of law. This addition, according to the author, is, however, subject to *Art. 59* of the Statute. It is noteworthy that writers are at a consensus that treaties or international conventions, international custom and general principles of law, respectively, are the most authoritative sources of international law and that, in any case, the sources specified in *Art. 38 (1)* of the Statute of the International Court, *supra*, are not exhaustive; see, Umozurike, *supra*, 15.

15 See, Wallace, *supra*, 20.

16 See, Oyebode, *supra*, 71.

17 *Supra*, 71. The learned author cites, in support, the Preamble to the Charter as well as *Art. 38* of the Statute of the International Court of Justice, *supra*.

Originally, the rules regarding treaties were either part of customary international law or of the general principles of law. In contemporary times, however, the rules governing treaties have been codified and are embodied in the *Vienna Convention on the Law of Treaties.*[18]

The power to enter into treaties derives from the sovereignty and independence of nations. *Umozurike* posits that sovereignty, in this context, is analogous to "Sovereign equality" of States, which culminates, *inter alia*, in the formidable international law rule of one-State-one-vote as well as that of non-discrimination against resident foreigners. Closely related to this is the principle that the power to enter into treaties is vested, exclusively, in an international person and an "international person" has been described as "an entity that is recognized as having rights and duties in international law".

*Umozurike* correctly argues that the most important development in contemporary international law is the widening concept of international personality and that, to the extent that modern international law confers rights and duties on individuals, they may be said to enjoy a measure of international personality, *pro tanto.*

However, whereas the scope of international personality may be a subject of controversy among writers, certainly, it is incontrovertible that States remain the typical and primary subjects of international law. "State" has been defined as "any entity that has a defined territory and population under the control of a government that engages in foreign relations".

*The Montevideo Convention, 1933*, which was signed by the United States of America and South American States, enumerates the main features of Statehood as:

(i) a permanent population;
(ii) a defined territory;

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[18] See Watergehr, supra 1.

(iii) a government; and
(iv) capacity to enter into relations with other States.

Whereas the first three of the above features are controversial, the fourth is sacrosanct and is controversy-free. Thus, a State must possess the capacity to enter into relations with other States. In reinforcing the necessity of this feature, *Umozurike* submits that this is the only feature of a State that distinguishes it from other territories, such as colonies, protectorates and units within a federation, which normally have no such capacity.

Independence is an indispensible attribute of Statehood and this connotes the power to take decisions without reference to another party. Thus, the PCIJ, in *Austro-German Customs Union Case* characterized it as the "sole right of decision in all matters economic, political, financial or otherwise, with the result that the independence is not violated". Independence is coterminous with sovereignty, which *Judge Huber* defined in the *Island of Palmas Case.*

International personality is, normally, granted to a federal authority, although municipal constitutions may confer the federating units with limited powers to conduct foreign relations, especially in economic and cultural matters. Flowing from this principle of recognition of a federal authority as the recognized personality in international relations, if a federal unit commits an international misdemeanor, this is imputed to the federal authority.

Although the *Vienna Convention on the Law of Treaties* is inapplicable to Treaties made prior to its coming into force, yet, *de facto*, the Convention is also applicable to those pre-existing treaties because, to a large extent, the Convention incorporates pre-existing customary rules.

It requires emphasis that treaties remain pertinent since they are the major instrument through which international relations are conducted, and, by implication, the chief means by which universal civility and quality of lives within subjects of

the international community are sustained and by which global cooperation and peace, respectively, are upheld. *Rebecca M.M. Wallace* argues that treaties are "the most tangible and most reliable method of identifying what has been agreed between states" and are "increasingly utilized to regulate relations between international persons". *Dixon* explains this pertinence of treaties by emphasising that they are the only source of international law which allows State-parties the opportunity of deliberately and consciously creating rights and duties. As such, the author insists, they are bound to be respected.

Also, adherents of the Soviet School of Thought insist that treaties are the most important source of international law. *Charles Edward Minenga* adds two interesting dimensions to the significance of treaties when the writer canvases that treaties reduce problems involving conflicts between States and promote the international rule of law. The challenges posed to twenty-first century trade and investments between States by globalization, particularly, the necessity of safeguarding foreign investments, including capital inflows, increases the relevance of treaties. In the context of the focus of this Paper, in order to create incentive-effects in property owners, that is, citizens and foreigners alike, which incentive-effects are essential for socio-economic growth and development, it is necessary to guarantee private property rights and treaties are a ready veritable tool for achieving this lofty objective.

Treaties are categorized into:

(a) a contract treaty, which is treaty that merely regulates a specific relationship between two or more States, for instance, a loan agreement;
(b) a constitutional treaty, which creates an international organization in which case, the treaty is also the constitution of the international organization; and
(c) a law-making treaty, which lays down rules for a number of States.

The focus of this Paper is on the third category of treaties. In relation to this class of treaties, although treaties bind only the parties thereto, in line with the cannon *pacta tertiis nec nocent nec prosunt*, (which is one of the five fundamental principles that regulate the operation of treaties) yet, *Umozurike* argues that they are the nearest to legislation in a partially organized international society. Thus, parties to a treaty are bound by all of the obligations in the treaty by virtue of the *pacta sunt servanda* doctrine. However, non-parties too may be bound, where the obligations created by the treaty have attained the status of customary law, or to the extent that a treaty lays down a code of conduct. If State practice develops along the lines of the treaty code, the result could be that new rules of custom, which are similar to those found in the treaty, come into being. Either of these occurrences constitutes an exception to the *pacta tertiis nec nocent nec prosunt* and the *pacta sunt servanda* doctrines, since these doctrines, themselves, originated from customary international law.

On a final note, here, it is pertinent to underscore the cardinal principle of international law that a State may not plead a breach of its constitutional provisions or those of other States relating to treaty-making so as to invalidate a treaty to which it is a party.

### *2.1.2 Nature of Private Property Rights-Related Treaties*

As profound as the importance of treaties is in international law, their major drawback is in the fact that scholars have been unable to reach a consensus on their exact juridical interpretation. This challenge is more visible in relation to treaties relating to private property rights, which, like other human rights' treaties, belong to a class of international law referred to as "non-traditional class". This category of treaties does not stipulate concrete rights or obligations for sovereign parties to them. In other words, they are normative rules only.

As such, although they are rules of law, nonetheless, their content is inherently flexible or vague.

Three prominent characteristics of private property rights-related treaties as well as other non-traditional treaties are discernible. First, is the apparent wariness of sovereign-parties to establish clear-cut norms, particularly, in novel situations. Second, is the creation of "scaled" or "relative" obligations. Third, is that the obligation purportedly created may be vague and equivocal as it relates to what it requires States to do in order to avoid international responsibility. Such vague obligations, in the words of *Dixon*, lack precise and practical legal content. An example of a "scaled" or "relative" obligation is in *Article 2* of the *Covenant on Economic, Social and Cultural Rights, 1966*, which obliges parties to "take steps, individually and through international assistance ... with a view to achieving progressively" the rights recognized in the treaty. Another example of such vague obligation is the alleged customary law obligation to pay "appropriate" compensation following an expropriation of foreign-owned property.

These pitfalls notwithstanding, these treaties, undoubtedly have, at least, two merits. First, sovereign states still respect the compulsion of law and of morality to respect the provisions of the treaties to which they are parties and this, eventually, results in the development of more concrete and harder laws in due course. Second, such rules lessen the chances of conflict between competing ideologies. These merits, thus, solidify the significance of treaties in world order.

### *2.2 Constitutions*

*Phillips* and *Jackson* describe the term "Constitution" in two different senses. First, as "the system of laws, customs and conventions which defines the composition and powers of organs of the state, and regulates the relations of the various state organs to one another and to the private citizen"; and

second, as "the document in which the most important laws of the Constitution are authoritatively ordained". According to the authors, "Constitution", in the former sense, being unwritten, is abstract while, in the latter sense, Constitution being written, is concrete. Almost all civilized societies, with the exception of the United Kingdom, New Zealand and Israel now operate written, concrete Constitutions. All Anglo-phone West African countries, which are the focus of this paper, operate written Constitutions.

A written, concrete Constitution, which *Stanley* refers to as "one of the hallmarks of modern democratic governance" and the "skeleton ... upon which the legal existence of the society hangs", is the most fundamental law in any civilized country. It is often referred to as "the *grundnorm*" or "supreme law" within that country. As such, every other law or power derives legitimacy from it. Conversely, every conflicting law is void to the extent of its inconsistency. For instance, all the Constitutions of Nigeria since independence have contained provisions establishing their supremacy. *Section 1 (1) of the 1999 Nigeria Constitution* provides that "this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". *Section 1 (3) of the Constitution* adds that "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void".

It is apposite to state that part of the most visible powers expressly conferred by the Constitution are treaty-making powers as well as powers regarding the implementation of treaties. In this connection, constitutional provisions do not only specify the organs that are competent to conclude treaties in the exercise of the sovereign powers of the State but also the procedure to be followed in order to bring the treaties concluded into operation within the domestic domain.

## 3. Pertinence and Historical Antecedents of Private Property Rights

Historically, private property rights, like other innate rights, are as old as human existence.

Also, jurisprudence, which, as deep and wide legal thoughts, underlies every aspect of human existence, is so broad in both concept and scope that it provides a lot of teachings about the significance of the subject of private property rights.

The inter-relationship between jurisprudence, otherwise called legal philosophy, and private property rights is knit, indeed. This is, essentially, because of the primary nature of jurisprudence or legal philosophy as either an art or science committed to investigating the attributes, essence and growth of law generally or any area of it, private property rights included. "Philosophy", which originated in ancient Greek and from the Greek language, has as its Latin language translation: *"philosophia"* meaning "love of wisdom". Little wonder, therefore, that *Descartes* describes "philosophy" as "nothing but the study of wisdom and truth".

Jurisprudentially, property rights are private rights, in the sense that they attach to the very essence and existence of a person, whether natural or corporate and the institute of private property rights is universal. This is so because there is, virtually, no culture in the whole universe in which the institute of private property is not solidly entrenched.

"Property" is what *Robert Nozik* calls "just acquisition" which refers to a good, possession or commodity acquired through the acquirer's intellect, knowledge and labour. The property concept vests a near-absolute ownership or title which consists of a bundle of sacred and inviolable rights. This is probably in recognition of the fact that, usually, immense labour, expenditure and risk-taking by a natural or corporate person precede the acquisition of the property which he owns interest in. This, therefore, naturally, explains the

"justness" in the "acquisition" of that property. This property, as noted earlier, is privately intrinsic in its owner and vests proprietary rights in him, which rights are inherently sacred and inviolable.

All the jurisprudence schools of thought, unusually, unite in the thinking that property rights are sacred and inviolable. The rationale for this resolution is manifold but it lies chiefly in the imperative of shielding the person, natural or corporate, from the arbitrary, capricious and unfathomable incursion of the State into his private property rights.

This enviable recognition of private property rights is the rationale for this category of rights being entrenched as an immutable right in important treaties as well as in the Constitution of every civilized society; and this has been so since the *Declaration of the Rights of Man and the Citizen, 1789.* In that Declaration, this right was reflected in the following affirmation:

> "Since property is a sacred and inviolable right, no one may be deprived thereof".

## 4. Constituents of Private Property Rights

As indicated earlier, property rights are a variant of fundamental human rights since, like other fundamental human rights, they are innate in man. This explains why they are more appropriately referred to as "private property rights". Private property rights encapsulate rights over a very wide range of categories of private property, and include land, property in possession or corporeal personal property and property in action or incorporeal personal property.

Defining "land" has been rightly identified as herculean, the challenge emanating, in the main, from the nature of proprietary interest in land, which is an amalgam of corporeal interests and incorporeal interests. Regarding this challenge, *Banire* enthuses:

> "The multifaceted nature of land raises a challenge in providing a definition of land which is acceptable and also captures its varied aspects. This challenge is complicated by the fact that apart from the physical components of land ("corporeal hereditaments"), land also comprises abstract concepts ("incorporeal hereditaments") which are not "the object of sensation and can neither be seen nor handled. Incorporeal hereditaments are creatures of the mind, and exist only in contemplation".

However, the learned authors of *Black's Law Dictionary* describe "land" in restricted but clear terms as an "immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it". This definition is similar to that proffered by both *Smith* and *Utuama*, which is that "land" is a "physical thing which comprises the surface of the earth and all the things that are attached to it".

A "property in possession" or "corporeal personal property" refers to the proprietary interest which subsists, only, where the owner has the right both to occupy and to enjoy the property. *Jegede* posits that it consists "of corporeal chattels which by their nature can be the subject of physical possession and enjoyment" and that being so, its possession and ownership pass, only, by physical delivery.

On the other hand, "property in action" or "incorporeal personal property" is "a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. *Jegede* describes it as follows:

> "A proprietary right in property; a right of recognizable economic value, though it has no tangible or physical existence and therefore not capable of being physically

> possessed. Being an abstract right in property, if it is infringed or wrongfully or unlawfully determined, it can only be protected, claimed or enforced by action and not by taking physical possession".

Examples of property in action or incorporeal personal property include right to debts, shares in a joint-stock company or in partnership property, debentures in a limited company, insurance policies, negotiable instruments, bills of lading, patent rights, copyrights, trade marks, rights of action arising from a contract, for instance, right to damages for the breach of such contract, rights arising by reason of the commission of tort or other civil wrong, for example, right of liquidator against directors of a company for misfeasance, rights of a beneficiary in a trust and rights under legacies. In *Colonial Bank v. Whiney*, property in action is said to denote "all incorporeal personal property".

Having defined "land" and highlighted the distinction between corporeal personal property or property in possession and incorporeal personal property or property in action, it is pertinent to emphasise that there cannot be a hybrid form of personal proprietary right in-between both types of private property. This is because, in the words of *Fry, L.J.* in *Colonial Bank v. Whiney*, "the law knows no *tertium quid* between the two".

## 5. Treaties Relating to Private Property Rights

Treaties relating to private property rights contain wide provisions. These cover inviolability of property rights as well as exceptions to them. These provisions shall, now, be discussed.

### *5.1 Inviolability of Private Property Rights*

The sanctity and inviolability of property rights has become

endemic in treaties, since the *American Declaration of the Rights and Duties of Man, 1948.* This is reflected, generally, in the preamble to the Declaration as follows:

> "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another".

In specific terms, it is reflected in the following words:

> "Every person has the right to own ... private property..."

It is also a prominent feature of the *Universal Declaration of Human Rights, 1948*, which does not only provide for the right to own property, either solely or in association with others, but also provides for insulation against arbitrary deprivation of property.

The *American Convention on Human Rights, 1978* also assures of the right of everyone within Party-States to the use and enjoyment of his property.

Furthermore, it is visible in the *African Charter on Human and Peoples' Rights, 1981*

which, unequivocally, guarantees the right to private property.[116]

The *Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), 197* also seeks to obliterate all forms of discrimination against women, among others, in relation to acquisition, ownership, management, administration, enjoyment and disposition of properties.

Similarly, the *International Convention on the Elimination of all Forms of Racial Discrimination, 1965* contains a provision abolishing discrimination on the basis of race, colour and national or ethnic origin, relating, among others, to ownership of property, either solely or jointly.

Furthermore, in the *Indigenous and Tribal Peoples'*

*Convention, 1989*, tribal peoples in independent countries who are distinguishable by virtue of social, cultural and economic conditions, have the right to decide their priorities in the process of development as it affects, among others, the lands they occupy. By virtue of *Article 13* of the Convention, governments must "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship".

*Article 44* contains robust provisions. First, the "rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy" are recognized. Second, the right of the peoples concerned to use lands not exclusively occupied by them, but to which they traditionally have access for their subsistence and traditional activities, are preserved. Third, governments are obliged to take steps to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession of those lands, and, finally, adequate procedures must be established within the national legal system to resolve land claims by the peoples concerned.

By virtue of *Article 17*, whatever procedure has become established by the peoples concerned for the transmission of their land must be respected.

Finally, persons who are not part of these peoples are barred from taking advantage of their customs as well as their lack of understanding of the laws, in order to secure the ownership, possession or use of land belonging to them.

*Article 18* provides for the criminalization of unauthorized intrusion upon or use of the lands of the peoples concerned and for deterrence from such offence as well as for adequate compensation.

*Article 15* provides for safeguard of the rights of the peoples concerned to the natural resources embedded in their lands, such rights including participation in the use, management

and conservation of the resources. Also, the peoples concerned shall, whenever possible, participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

The *Declaration on Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, 1985*, reserves the right of aliens to own property either alone or jointly with others in the country in which they live.

The *Universal Declaration of Human Rights, 1948* was expressly adopted for the purpose of defining the meaning of the words "fundamental freedoms" and "human rights" that appear in the *United Nations Charter*. The Declaration, therefore, represents a fundamental constructive document of the United Nations, which should apply to all United Nations Member States, including all Anglo-phone West African countries. Thus, the 1968 United Nations International Conference on Human Rights advised that the Declaration "constitutes an obligation for the members of the international community".

This argument is reinforced by the consensus of International Law experts that the Declaration forms part of customary international law and that this makes it binding on all governments, particularly governments of United Nations' Member States, including all Anglo-phone West African countries.

All Anglo-phone West African countries being State-Parties to the *African Charter on Human and Peoples' Rights, CEDAW* and the *International Convention on the Elimination of all Forms of Racial Discrimination*, are bound by the provisions of the treaties, in accordance with the doctrine of *pacta sunt servanda.*

Finally, like the *Universal Declaration of Human Rights, 1948*, the *Declaration on Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, 1985*, is a United Nations' instrument and should apply to all United Nations Member States, including all Anglo-phone West

African countries either as signatories to the *United Nations Charter* pursuant to which the instrument was made or as part of customary international law.

*5.2 Exception to Private Property Rights*

Most of the treaties relating to private property rights that we have discussed contain provisions that allow for incursion into private property rights in deserving situations. For example, the following exception to the sanctity and inviolability of private property rights appears in the *American Declaration of the Rights and Duties of Man, 1948*:

> "It is the duty of every person to pay the taxes established by law for the support of public services".

Also, in the *Universal Declaration of Human Rights, 1948* it is established that a property owner may be deprived of his property provided the deprivation is not arbitrary.

The *American Convention on Human Rights, 1978* approves of subordination of private property rights to "the interest of society" on conditions that the subordination must:

(i) be done through law;
(ii) on "payment of just compensation", and
(iii) in strict compliance with the procedure established by relevant law.

What amounts to "interest of society" is expressed to be "reasons of public utility or social interest".

Furthermore, the *African Charter on Human and Peoples' Rights, 198* allows encroachment into private property rights only in the interest of public need or general interest of the community and in accordance with appropriate laws.

By virtue of the *Indigenous and Tribal Peoples' Convention, 1989*, the peoples concerned must be consulted whenever

consideration is given regarding their capacity to alienate their lands and they must be adequately compensated for any such alienation.

Also the State may retain the ownership of mineral sub-surface resources or rights to other resources relating to lands but this is conditional upon:

(a) governments establishing and maintaining procedures through which they shall consult the peoples with a view to ascertaining whether and to what degree the peoples' interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of the lands of the peoples concerned;
(b) the peoples concerned, whenever possible, participating in the benefits of such activities; and
(c) the peoples concerned receiving fair compensation for any damages which they may sustain as a result of such activities.

In the *Declaration on Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, 1985*, there are three exceptions to the private property rights of a person who is not a national of the country in which he or she lives. These are:

(1) if ownership of property contravenes any domestic law;
(2) if restrictions are prescribed by law provided that such restrictions are necessary in a democratic society for the purpose of protecting national security, public safety, public order, public health or morals or the rights and freedoms of others; and
(3) non-arbitrary deprivation of his or her lawfully acquired assets.

The foregoing, clearly, shows that an obligation is foisted

on Anglo-phone West African countries to be bound by all of the private property related treaties which we have discussed above, except the *American Convention on Human Rights, 1978*. This is based on either the *pacta tertiis nec nocent nec prosunt* and the *pacta sunt servanda* doctrines or customary international law.

Against this background, it is apposite to look at the Constitutions of the countries with a view to discovering the extent of their compliance with the treaties.

## 6. Constitutions of Anglophone West African Countries and Private Property Rights

### *6.1 Inviolability of Private Property Rights*

Constitutions of all of the world's civilized nations incorporate and guarantee the inviolability of private property rights by making such rights fundamental. The strategic nature of this entrenchment should be viewed from the perspective of the supremacy of the Constitution, most of these civilized nations being countries which operate under written Constitutions.

All of Nigeria's Constitutions since political independence in 1960 have had this sacredness of property rights entrenched in them.

*Section 43* of the current Constitution of Nigeria - *the 1999 Constitution*, entrenches the right of Nigerians to own immovable property within Nigeria. This provision is, apparently, both restrictive and confusing. A holistic interpretation of *section 43* and *section 44 (1) of the Nigeria Constitution*, which provides that "no movable property ... shall be taken possession of compulsorily ...", would, however, suggest a latent intention to grant absolute proprietary rights over movable property within Nigeria to all persons - Nigerians and non-Nigerians.

*Article 22 of the Constitution of Liberia, 1986*, clearly

guarantees the right of all persons to own movable property within Liberia. However, it restricts the right to own immovable property within Liberia only to Liberians. This is much clearer and confusion-free. The situation in Ghana is very similar to that in Liberia. Thus, whereas *Article 18 (1) of the Constitution of Ghana, 1992,* unequivocally, reserves the right of all persons to own movable and immovable property in Ghana, *Article 266 of the Constitution,* nevertheless, limits the interest which a non-Ghanaian may hold in an immovable property to a lease-hold of a term of fifty years. The approach in Liberia and Ghana is, thus, commended to Nigeria.

These provisions, for instance, forestall any effort by anyone, particularly the Sovereign, to unjustly prevent a Nigerian from lawfully acquiring immovable property in Nigeria or a Liberian from lawfully acquiring immovable property in Liberia. They also prohibit any attempt by the Nigerian or Liberian government to, unjustly, compulsorily, acquire such immovable property subsequent to acquisition.

However, unlike in Ghana, Nigeria and Liberia where the rightto property is restricted

to the extent of discrimination between citizens and non-citizens in respect of ownership of real property, the right is not so qualified in The Gambiaand Sierra Leone. The approach in The Gambia and Sierra Leone, in this regard, is similar to that in Tanzania and is applauded and commended to Ghana, Nigeria and Liberia.

The significance that the The Gambia, Ghana, Nigeria and Sierra Leone Constitutions each attach to the inviolability of property rights is so strong that they provide, in *section 18 (4) (a), Article 13 (2) (a), section 33 (2) (a)* and *section 16 (2) (a),* respectively, that killing may be just and excusable if it is done in defence of property. This, therefore, constitutes an exception to another fundamental right - the right to life. Thus, Liberia is the only Anglo-phone West African country which, by constitutional arrangement, disallows killing on account of defence of property. Clearly, therefore, only Liberia,

although partly, conforms with *Article 4* of the *African Charter on Human and Peoples' Rights, 1981,* which prohibits capital punishment for whatever reason. However, the conformity of Liberia, in this respect, is not total because killing is still allowed by the Liberia Constitution, if it is in furtherance of a sentence of a court.

*Sections 43 and 33 (1) (a) of the Nigerian Constitution* are enhanced, in the entrenchment of the sacredness and illimitability of property rights, by *section 44* which, ordinarily, disallows compulsory acquisition of both movable and immovable proprietary rights. *Section 44* of the *Nigeria Constitution* is similar to *Article 20* of the *Liberia Constitution.*

By virtue of *Article 18 of the Constitution of Ghana,* the right of every person to own property, either alone or jointly with others, is safeguarded. An individual is also protected from interference with the privacy of his property, among others.

*Section 22 (1) of the Constitution of The Gambia, Article 20 of the Ghana Constitution, Article 24 of the Liberia Constitution* and *section 21 (1) of the Sierra Leone Constitution* are the same as *section 44 of the Nigerian Constitution*; they all entrench the sacredness and inviolability of private property by, generally, disallowing compulsory acquisition of private property rights. Although the Ghana Constitution does not expressly state so, unlike the Nigeria Constitution, the scope of proprietary rights protected would encompass interests in both movable and immovable properties.

*Article 22 of the Ghana Constitution* provides for the enactment of legislation which would regulate the property rights of spouses. It also provides for equal access of spouses to property that is jointly acquired during marriage and for equitable distribution of such property between the spouses upon the dissolution of the marriage.

Similarly, *Article 23 of the Liberia Constitution* preserves the right of ownership and possession which a spouse may acquire either before or during marriage and such property

must not be applied to off-set the obligations of the other spouse or be used as security or be controlled or alienated without the owners' voluntary consent. It also mandates Parliament to enact laws that would regulate devolution of estates and ensure adequate protection for surviving spouses of both statutory and customary marriages and the surviving children of such spouses.

These lofty provisions of the *Ghana* and *Liberia Constitutions*, respectively, are in line with the provisions of *CEDAW* and they are commended to The Gambia, Nigeria and Sierra Leone.

### *6.2 Exception to Private Property Rights*

Exception to the inviolability of private property rights, generally, indicates that the private property rights concept is not absolute, after all. Thus, in certain excusable circumstances, the State is permitted to make incursion into private property rights and whenever it does, such incursion will be justified. This exception is both Constitutional and Jurisprudential in foundation. It is noteworthy, however, that both perspectives to the exception are inter-related, the former deriving from the latter. These two perspectives shall, now, be examined.

#### *6.2.1 Jurisprudential Perspective*

The starting-point in discussing the jurisprudential perspective of the exception is to underscore the truth that the said exception derives from the nature and concept of the State or Sovereignty. Just as the case is regarding the concept of illimitability or inviolability of property rights, all Jurists coincide in approving, either expressly or tacitly, of the just existence, stature and functioning of a Sovereign, in any given society.

Thus, one of the theories of the Natural Law Jurists is that

a universal duty of human and legal beings is to contribute to the general order and welfare of society and that this duty imposes an obligation to abide by the lawsmade by a Sovereign law-maker for the good of society.

But while the approval of the Natural Law theorists of the just existence and power of a law-making Sovereign appears somewhat implicit, that of the Legal Positivists is express. Thus, *Jeremy Bentham, John Austin, H.L.A. Hart, William Edward Hearn* and *Joseph Raz* are all in agreement on the sanctity of the doctrine of Sovereignty.

Seminal proponents of such other jurisprudential theories as the sociological theory, he historical theory, the pure theory, the economic theory, and the American Realismare not in disagreement with the naturalists and the positivists on the existence and functionality of a Sovereign who, in any society, has the power to make laws for the order and well-being of that society.

Apart from the general jurisprudential explanation for Sovereignty discussed above, the doctrine is, also, often explained from the perspective of two ancillary doctrines; namely:

(i) the social contract doctrine; and
(ii) the eminent domain theory.

The thrust of the social contract doctrine is that persons - human and legal - must surrender a portion of their private rights and liberty to an established authority in return for an organized, stable, orderly and peaceful society. In the context of this theory, it has been asserted that the established authority has the "legal right to deal as it thinks fit with anything and everything within its territory".

The theory of eminent domain or of "*dominium eminens*" refers to the transcendental property of the Sovereign or the power vested in the Sovereign to take private property for public use. Although of American origin and operation, *Keir and*

*Lawson* argue that this doctrine is synonymous with what is known in English law as compulsory purchase or expropriation.

On the whole, the foregoing establishes that the expropriation of property rights of persons, human and legal, although, ordinarily, antithetical to the concept of inviolability of the proprietary rights of those persons, is, nevertheless, legal, as it enjoys tremendous jurisprudential support in virtually every conceivable legal philosophy. This overwhelming support can, in turn, be traced to the very nature of man as a triune being, having a make-up consisting of body, soul and spirit. *Thomas Hobbes* posits that these constituents are capable of making man intrinsically averse to living in an environment where life is "solitary, poor, nasty, brutish and short" and this elicits his willingness to submit to an overriding authority, charged with the responsibility of initiating and coordinating the daily order, well-being, growth and development of his environment.

### *6.2.3 Constitutional Perspective*

From the viewpoint of the Constitution, the following exception is, for instance, made to the right to own property contained in *Article 17 of Declaration of the Rights of Man and the Citizen, 1789*:

> "Legally established public necessity".

Also, the following exceptions to private property rights are contained in *section 22 (2) of the Constitution of The Gambia, section 44 (1)* and *(2) of the Nigeria Constitution*, and *section 21 (2) of the Constitution of Sierra Leone*, namely; expropriation of property rights:

(i) in pursuance of an existing law;
(ii) by way of imposition or enforcement of taxes, rates and duties;

(iii) by way of imposition of penalties or forfeitures for breaching a law, whether under civil process or after conviction for an offence;
(iv) by way of grant of leases, tenancies, mortgages, charges, bills of sale or other rights or obligations which arise out of contracts;
(v) by way of vesting or administering the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, and of corporate or unincorporated bodies in the course of being wound-up;
(vi) by way of execution of judgments or orders of court;
(vii) by way of taking possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
(viii) by way of possession of enemy property by the State;
(ix) by way of administration of trusts by trustees;
(x) by way of the operation of limitation of actions;
(xi) by way of vesting of interests in bodies corporate directly established by an existing law;
(xii) by way of temporary taking of possession of property for the purpose of any examination, investigation or inquiry;
(xiii) by way of allowing for the carrying out of work on land for the purpose of soil conservation;
(xiv) by way of allowing any authority or person to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities;
(xv) by way of government exercising its absolute interest in and under control of all minerals, mineral oils and natural gas in, under or upon

any land in or upon the territorial waters and the Exclusive Economic Zone; and

(xvi) by way of compulsory acquisition of property for general public purpose.

Regarding the last exception, however, the Constitution of The Gambia, the Ghana Constitution and the Constitution of Sierra Leone, respectively, are much more explicit in relation to the activities that constitute "general public purpose". These activities include defence, public safety, the economic well-being of Ghana, protection of public health or morals, prevention of disorder or crime, protection of the rights of others, country planning necessity and any activity whose aim is public necessity or benefit. The conditions upon which these activities must take place are, thus, similar in The Gambia, Ghana, Liberia, Nigeria and Sierra Leone.

The conditions in The Gambia, Ghana, Liberia and Sierra Leone can be gathered from *section 22 (1) (b)* and *(c)* of the *Constitution of The Gambia, Articles 18 (2) and 20 (1) (b), (2), (3), (5) and (6)* of the *Constitution of Ghana, Article 24* of the *Constitution of Liberia* and *section 21 (1) (b)* and *(c)* of the *Constitution of Sierra Leone*, respectively.

These are:

(a) pursuant to a law which is necessary in a "free and democratic society";
(b) necessity established by reasonable justification for causing any hardship that may result to the holder of interest in a property sought to be acquired;
(c) authorising law providing for prompt payment of adequate compensation;
(d) authorizing law providing for right of access to court regarding the determination of his interest and the amount of compensation to which he is entitled;
(e) where compulsory acquisition involves displacement of inhabitants, the State must resettle the displaced

inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values; and

(f) a property compulsorily acquired must be used, solely, for the public interest or purpose for which it was acquired.

Where a property acquired was not used for the public interest or purpose for which it was acquired, the State shall give the owner the first option to re-acquire the property for consideration consisting of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

It ought to be reiterated that the Constitutional perspective to the exception to private property rights is deeply-rooted in the Jurisprudential nature and concept of Sovereignty, which has as its central-objective the common-good, as opposed to individual, selfish good.

### *6.3 Treaties and Constitutions in Hierarchy of Norms*

The drawbacks on the pertinence of treaties are exacerbated by the usual absence of a statement in the Constitutions of countries, relating to the status of treaties, first, in relation to the Constitutions and second, in relation to the other laws of those countries. This phenomenon engenders the usual debate on the position of treaties in relation to Constitutions, a debate *Oyebode* stresses usually re-kindles what the learned author terms "sterile controversy" and "academic opinions" about the relationship between international and domestic laws.

In the Constitutions of The Gambia, Ghana, Nigeria and Sierra Leone, unlike in the Constitution of Liberia, there is no categorical statement of the status of treaties within the legal order in those countries. This vacuum, obviously, creates a big task for the courts. This challenge is less visible where there is no conflict between the provisions of treaties on private property rights and Constitutions of Anglo-phone countries.

On the other hand, the challenge is prevalent where there is such conflict. Also, the Constitution of Liberia proceeds a step further by also providing for its supremacy over treaties; thereby resolving, as far as Liberia is concerned, the supremacy controversy between the Constitution and treaties, *infra*. This is salutary and is commended to The Gambia, Ghana, Nigeria and Sierra Leone.

The challenge is exacerbated by generally disallowing the application of treaties on private property rights, through constitutional arrangement, in Ghana, Nigeria and Sierra Leone. The position in Sierra Leone is aggravated by the provision of *section 170 (1) of the Constitution of Sierra Leone, 1991 (as amended)*, which excludes treaties from the list of extant laws in Sierra Leone. The implication of this, by virtue of the *expressio unius est exclusio alterius* doctrine, is that treaties are, ordinarily, unenforceable in Sierra Leone.

*Art. 2, Paras. 1 and 2 of the Constitution of Liberia, 1986,* provides for the supremacy of the Liberia Constitution over treaties, thereby resolving, as far as Liberia is concerned, the supremacy controversy between the Constitution and treaties. This is salutary and is commended to The Gambia, Ghana, Nigeria and Sierra Leone. It would also appear that by the same provision, treaties are constitutionally recognized as part of the domestic laws of Liberia.

Unfortunately, the *Constitution of Sierra Leone, 1991 (as amended)* contains no provisions whatsoever, on its supremacy over other domestic laws and treaties. This should, therefore, be remedied, by way of constitutional amendment, without further delay.

It however smacks of incongruity and is, indeed, unfathomable and irreconcilable that Anglo-phone West African countries would, on the one hand, share in the vision underpinning treaties on private property rights and consciously and deliberately create rights and duties pursuant to them and, on the other hand, turn-around and exclude the operation of those treaties within their domains, particularly,

by constitutional arrangement. It is submitted that this approach is not rational. This is perhaps the justification for the international customary law principle that a country cannot exclude its treaty obligations by constitutional and other legal means.

It is submitted, therefore, that Anglo-phone West African countries must, by constitutional amendment, align with the provisions of all private property rights related treaties which we have discussed in this Paper.

## 7. Conclusion

In this Paper, the pertinence, value and the justification of treaties and constitutions being veritable tools for entrenching private property rights have been appraised. It has been established that the preponderance of experts' opinion favours treaties as instruments creating binding obligations; as representing the most tangible and most reliable method of exactly ascertaining what has been agreed between States on a particular subject-matter; as instruments governed and enforced in pursuance of international law; as the most important source of international law; as the major instruments through which international relations are conducted and, by implication, the chief means by which universal civility and quality of lives within subjects of the international community are sustained and global cooperation and peace, respectively, are enthroned; as being the only source of international law, which allows State-parties, the opportunity of deliberately and consciously creating rights and duties; as promoting international rule of law; as intrinsically capable of attracting and safeguarding foreign investments, including capital inflows to the Anglo-phone West African countries, particularly, in view of the challenges posed to twenty-first century trade and investments between States by globalization; and as representing international expectations and best practices on a subject-matter, compliance with which

shows the level of civilization of a country and its adaptability to the dynamics of best approaches to good governance.

The nature and significance of private property rights - from historical and jurisprudential perspectives have also been examined and it has been ascertained that these rights are profoundly important; for being as old as man, for attaching to the very essence and existence of a person, for being a universal institution solidly entrenched in every culture in the world, for being a prominent feature of past and contemporary constitutions of civilized nations and of treaties, and for being "just acquisition" because it is acquired through the acquirer's intellect, knowledge and labourand in recognition that immense labour, expenditure and risk-taking by a person precede the acquisition of property.

The various exceptions to the concept of inviolability of property rights have been pointed out and it has been opined that those exceptions are founded on the necessity, in certain circumstances, of depriving a person of property rights for the common good. The rationale for the exceptions has also been founded on the unique Jurisprudential nature, stature, characteristics and functioning of the Sovereign and the concept of Sovereignty has been explained both in general terms and from the twin-ancillary perspectives of the social contract and the theory of eminent domain.

Happily, it has been established that all Anglo-phone West-African countries, through their Constitutions, ensure substantial compliance with the provisions of the treaties dealing with private property rights. First, all of the Constitutions entrench the inviolability of private property rights in them. Second, they all excuse infringement of private property rights on account of overall public interest - in the exercise of the powers of the Sovereigns in the respective countries. Therefore, these countries are in compliance with international expectations and best practices on the subject-matter of private property rights. By implication, Anglo-phone West-African countries manifest civilization and adaptability

to the dynamics of best approaches to good governance in the area of private property rights. In specific terms, this entrenchment creates incentive-effects in property owners, which incentive-effects are essential for socio-economic growth and development.

However, certain inadequacies regarding the compliance of Anglo-phone West African countries with private property rights related treaties have been observed. In this context, it has been observed that the strategic nature of Constitutions make them a suitable tool through which compliance with treaties on private property rights may be ensured. This strategic nature manifests, mainly, in the supremacy of the Constitutions over all other laws. This makes fatal, indeed, the absence of any provision in the Constitution of Sierra Leone on the supremacy of that Constitution. This is unlike the Constitutions of The Gambia, Ghana, Liberia and Nigeria. It is surprising that the Constitution of Sierra Leone has been amended twice and this anomaly was not remedied in any of those amendments. It is submitted that this should be remedied without further delay.

The use of the word: "should" instead of the word: "shall" in enshrining the supremacy of the Constitution of Ghana is capable of creating interpretation challenges for Ghana courts. This is because the word implies that the supremacy of the Ghana Constitution over other laws is made a matter of persuasion and not of compulsion. In this regard, therefore, the approach in The Gambia, Liberia and Nigeria where the word: "shall" is used, is preferable and should be adopted in the Constitution of Ghana by way of an amendment.

The discriminatory treatment in the Constitutions of Ghana, Liberia and Nigeria between citizens on the one hand and aliens on the other hand, in relation to ownership of immovable property, is inapt. It is antithetical to the norms expressed in treaties on private property rights and is capable of discouraging foreign investments that are much needed by these countries for growth and development. Ghana,

Liberia and Nigeria must, thus, follow the good example of The Gambia and Sierra Leone in this regard by removing this discrimination through constitutional amendment.

Although the tremendous economic and ancillary significance of private property to the life of its owner cannot be over-emphasized; nonetheless, this must not be justification for excusing killing on account of protection of private property, as it is currently the case in the Constitutions of The Gambia, Ghana, Nigeria and Sierra Leone. The exemplary position in Liberia, in this regard, is, therefore, commended to these countries.

It is inappropriate for Anglo-phone West African countries to sign treaties on private property rights and turn-around to exclude the operation of those treaties within their domains, through their constitutions. It is recommended that this conflict should be removed. Assuming, *arguendo*, that this situation does not change, then, it is submitted that The Gambia, Ghana, Nigeria and Sierra Leone should follow the example of Liberia, in, specifically, providing for the legal status of a treaty. That is; first, whether a treaty is a domestic law, *pro tanto*; and second, whether a treaty is inferior or superior to or is at par with the Constitution.

The explicitness of what constitutes compulsory acquisition of private property for "general public purpose", in the Constitutions of The Gambia, Ghana and Sierra Leone, is commended to Liberia and Nigeria.

Certain conditions-precedent to compulsory acquisition of property in the Constitutions of The Gambia, Ghana, Liberia and Sierra Leone are salutary. These are:

(i) the necessity of establishing reasonable justification for causing the hardship that may result to the owner of a property sought to be acquired;
(ii) the need for authorizing law to provide for prompt payment of adequate compensation;
(iii) the imperative of the authorizing law providing for

right of access to court regarding the determination of the owner of the property sought to be acquired and the amount of compensation to which he is entitled;

(iv) where compulsory acquisition sought to be made involves displacement of inhabitants, the necessity of resettling the displaced inhabitants on suitable alternative land, having due regard for their economic well-being and social and cultural values; and

(v) the compulsion to use the property compulsorily acquired, solely, for the public interest or purpose for which it was acquired.

It is submitted that these noble provisions are rooted in the doctrine of inviolability of private property rights. They reflect the utmost regard which the State in The Gambia, Ghana, Liberia and Sierra Leone still has for private property rights, notwithstanding the Sovereign power to acquire private property for general public purpose. The provisions are, therefore, commended to Nigeria.

Also, the provision in the Constitutions of The Gambia, Ghana and Liberia which compel the State to give the owner of a property not used for the public purpose for which it was acquired the first option to re-acquire the property for a consideration consisting of the compensation paid to him or such other amount as is commensurate with the value of the property at the time of the re-acquisition, must be applauded. This provision is, therefore, commended to Nigeria and Sierra Leone.

Finally, the laudable provisions of the *Ghana* and *Liberia Constitutions*, respectively, which are aimed at ensuring gender equality in relation to acquisition, use, enjoyment and disposal of property by spouses, are in line with *CEDAW* and they are commended to The Gambia, Nigeria and Sierra Leone.

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# LA PROPOSTA DI REGOLAMENTO PER UN DIRITTO COMUNE EUROPEO DELLA VENDITA: PROFILI DI CRITICITÀ DI UNO (OPINABILE) STRUMENTO NORMATIVO "OPZIONALE"

PASQUALE LAGHI

La Commissione europea ha approvato l'11 ottobre 2011 la Proposta di Regolamento del Parlamento e del Consiglio volta a definire un "diritto comune europeo della vendita" (*Common European Sales Law* – CESL), contenente un ampio numero di disposizioni applicabili alle negoziazioni transfrontaliere tra imprese e tra imprese e consumatori. Tale disciplina, una volta entrata in vigore, costituirà un "secondo regime giuridico", alternativo rispetto a quello di ciascuno Stato membro, ed a natura "opzionale", in quanto applicabile solo sulla base di uno specifico accordo delle parti. Il contenuto del CESL, tuttavia, si caratterizza per la presenza di numerosi profili di criticità, dovuti sia ad approssimazioni dogmatiche e concettuali, sia ad interferenze disciplinari con altre normative comunitarie – soprattutto con riguardo al diritto dei consumi -, che rischiano di pregiudicarne l'effettiva applicabilità, incrementando la situazione di incertezza giuridica presente nel sistema europeo.

## 1. Premessa.

Il processo di uniformazione del diritto europeo dei contratti ha conosciuto una recente accelerazione con l'approvazione – intervenuta l'11 ottobre 2011 - da parte della Commissione Ue di una Proposta di Regolamento del Parlamento e del Consiglio recante norme sul "diritto comune europeo della vendita" (*Common European Sales Law* – CESL).

L'adozione del predetto atto è avvenuta in esercizio dei poteri riconosciuti all'istituzione comunitaria da parte dell'art. 114 TFUE, che consente al Parlamento e al Consiglio di promuovere ed elaborare – seguendo la procedura legislativa ordinaria, preceduta dalla consultazione del CES (Comitato Economico e Sociale) - misure volte al riavvicinamento delle disposizioni normative dei Paesi aderenti, finalizzate (in origine all'instaurazione, ma ora) a favorire il funzionamento e l'efficienza del mercato interno[1].

La Proposta CESL si compendia in un articolato e corposo elenco di norme applicabili alle negoziazioni transfrontaliere tra imprese e tra imprese e consumatori, inerenti alla vendita di beni, alla fornitura di contenuto digitale e alla prestazione di servizi connessi, definendo un "secondo regime" giuridico a base volontaria, ossia avente natura "opzionale", in quanto la sua applicazione è rimessa alla libera scelta delle parti contraenti, senza imporsi (e sostituirsi) autoritativamente alla disciplina di ciascuno Stato membro, rispetto alla quale costituisce una mera alternativa[2].

Rinviando alle pagine che seguono le osservazioni critiche relative al contenuto dispositivo della Proposta di Regolamento in esame, occorre evidenziare come la stessa rappresenti uno degli ultimi punti di arrivo del lungo e difficoltoso tentativo di uniformazione del diritto contrattuale europeo, rispetto al quale costituisce un approdo dagli intensi profili di contraddittorietà, tali da tradire il meritorio intento di "semplificazione" normativa a cui era inizialmente ispirata, rischiando di inserire nel sistema numerosi aspetti di confusione concettuale e di conflittualità sistematica con altre disposizioni vigenti.

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[1] Contributo sottoposto a referato. v. Ferrari-Laghi, *Diritto europeo dei contratti*, Milano, 2012, p. 43 ss.

[2] v. Donadio, *Diritto contrattuale comunitario e "optional instrument": una valutazione preventiva*, in *Contr. impr. eur.*, 2011, p. 649; Doralt, *Rischi e opportunità del Regime Opzionale*, in *Resp. civ. prev.*, 2011, p. 1208 ss.

Al fine, quindi, di poter compiutamente analizzare il "tessuto" giuridico del CESL è necessario contestualizzarlo nel complesso delle iniziative promosse a livello continentale con l'arduo proposito di addivenire alla formazione di un codice civile europeo, la cui effettiva realizzazione allo stato dell'attuale situazione di incertezza politica ed economica, sembra di poco superare il confine mobile dell'illusorietà.

## 2. Il processo europeo di "codificazione" del diritto dei contratti nelle iniziative dottrinali ed istituzionali.

Il processo di uniformazione europea delle normative civilistiche ha conosciuto negli ultimi decenni una significativa sinergia istituzionale coadiuvata dagli importanti apporti dei formanti dottrinali e giurisprudenziali, addivenendo spesso a risultati interessanti che, se da un lato lasciano ipotizzare (ed auspicare) ulteriori sviluppi nel senso della piena condivisione disciplinare – stimolando una più intensa armonizzazione -, dall'altro, non mancano di evidenziare gli ostacoli che a tale scenario si frappongono[3].

Il predetto *iter* giuridico-politico ha costantemente individuato il proprio nucleo centrale di intervento nel contesto del diritto contrattuale, attesa la sua stretta correlazione con gli interessi relativi alla realizzazione di una effettiva "unione economica" ed al potenziamento del mercato interno.

Tendenza quest'ultima rafforzata anche dalla constatazione per cui l'estrema frammentazione dogmatica emergente dalle differenti tradizioni giuridiche europee avrebbe impedito l'elaborazione di discipline aventi carattere generale,

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[3] v. Busnelli, *La faticosa evoluzione dei principi europei tra scienza e giurisprudenza nell'incessante dialogo con diritti nazionali*, in *Riv. dir. civ.*, 2009, I, p. 287; Castronovo, *Verso un codice europeo: i principi di diritto europeo dei contratti*, in *Studi in onore di Bianca*, III, Milano, 2006, p. 134 ss.; Rodotà, *Il codice civile e il processo costituente europeo*, in *Giustizia sociale e mercato nel diritto europeo dei contratti*, a cura di Somma, Torino, 2007, p. 195

inducendo, quindi, a privilegiare delle modalità di intervento settoriali, demandando ad un (eventuale) momento successivo la creazione di un *corpus* normativo organico, allorché il riavvicinamento sostanziale dei sistemi e la sensibilità comune degli interpreti avessero raggiunto una dimensione tale da permettere il passaggio ad un più intenso livello di condivisione.[4]

Sintetizzando l'insieme delle iniziative promosse e dei risultati raggiunti negli ultimi decenni occorre individuarne i principali approdi istituzionali ed accademici al fine di dar conto del significato che rispetto ad essi assume il CESL.

Tra questi un ruolo di impulso ha certamente avuto il primo tentativo di uniformazione del diritto contrattuale posto in essere dalla *Commission on European Contract Law* (altrimenti nota come Commissione Lando, dal nome del suo presidente), che ha elaborato i cc. dd. *Principles of European Contract Law* (PECL) – pubblicati in distinte tre parti dal 1995 al 2005[5] – costituiti da un insieme di disposizioni arricchite dalle relazioni illustrative, con le quali si è proceduto all'enucleazione ed alla sistematizzazione dei principi comuni del diritto europeo dei contratti, rivolti ad una generalità di destinatari – senza distinguerne la qualità soggettiva – e finalizzati ad orientare l'attività esegetica dei legislatori e della giurisprudenza dei diversi Paesi membri, o scopo di consentire l'emersione di una base giuridica

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cfr. Meli, *Armonizzazione del diritto contrattuale europeo e quadro comune di riferimento*, in *Europa dir. priv.*, 2008, p. 59; Jorges, *Un codice civile europeo è davvero l'unica soluzione?*, in *Riv. crit. dir. priv.*, 2003, p. 8; Mazzamuto, *Il diritto civile europeo e i diritti nazionali: come costruire l'unità nel rispetto delle diversità*, in *Contr. impr. eur.*, 2005, p. 523.

5 I PECL sono divisi in tre parti:
(I) esecuzione, inadempimento del contratto e rimedi esperibili;
(II) formazione, validità e interpretazione del contratto, rappresentanza;
(III) obbligazioni solidali, cessione dei crediti e del contratto, compensazione, condizione, interessi e prescrizione.

condivisa, in grado di essere successivamente positivizzata in una codificazione comune.[6]

Un ruolo altrettanto importante ha svolto la pioneristica impresa portata avanti dall'*Accademia dei Giusprivatisti europei* che, seguendo un criterio sistematico di ispirazione romanistica modellato sul Libro IV "Delle Obbligazioni" del Codice civile italiano, ha elaborato un progetto di codice contrattuale (*Code Européen des Contrats*) – ancora in corso di pubblicazione – organizzato in articoli dedicati alla disciplina dei singoli istituti negoziali, rifuggendo l'opzione operativa "per principi comuni", ritenuta potenziale foriera di confusione concettuale in sede applicativa, a causa della tendenza degli interpreti di far prevalere il modello esegetico derivante dalla propria tradizione giuridica nazionale.[7]

Tali iniziative – a cui se ne sono aggiunte altre aventi portata onnicomprensiva o dedicate a singoli settori giusprivatistici[8]

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[6] Resta, tuttavia, ferma la possibilità – espressamente considerata dalla Commissione Lando – delle parti private di applicare i *Principles* nella regolazione di negoziazioni transfrontaliere.

[7] L'*Accademia dei Giusprivatisti europei* ha già pubblicato il progetto preliminare del primo libro, diviso in undici titoli sul contratto dedicati:
alle disposizioni generali (I);
alla formazione (II);
al contenuto (III);
alla forma (IV);
all'interpretazione (V);
agli effetti (VI);
all'esecuzione (VII);
all'inesecuzione (VIII);
alla cessione del contratto e dei rapporti che da questo nascono (IX);
all'estinzione (X);
alle anomalie del contratto ed ai rimedi (XI).
Attualmente è in corso di realizzazione il secondo libro sulle singole fattispecie negoziali, di cui è stato presentato il Titolo Primo sulla vendita; v. in dottrina Gandolfi, *Una proposta di rilettura del libro quarto del codice civile nella prospettiva di una codificazione europea*, in *Riv. trim. dir. proc. civ.*, 1990, p. 339

[8] Tra i numerosi gruppi di studio a dimensione europea si segnalano: la *Society of European Contract Law* (SECOLA); il *Social Justice in*

– hanno notevolmente contribuito alla sensibilizzazione delle istituzioni comunitarie, compulsandole nel senso della proposizione di appositi progetti finalizzati all'approfondimento di siffatte tematiche ed alla consequenziale adozione di atti di natura normativa destinati a disciplinare in modo uniforme specifiche aree del diritto contrattuale europeo.

L'accennato percorso - che si è caratterizzato per il significativo attivismo del Parlamento dell'Ue, intervenuto con diverse risoluzioni volte a stimolare azioni comunitarie idonee a favorire un graduale ravvicinamento dei sistemi privatistici dei Paesi membri, armonizzandone determinati settori[9] – è giunto ad una svolta, quanto meno sul piano della volontà politica, con la Comunicazione della Commissione dell'11 luglio 2001 sul diritto contrattuale europeo, attraverso la quale è stata aperta la consultazione in ordine all'approccio

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*European Contract Law*; lo *Study Group on a European Civil Code*; la *Société de Legislation Comparée*; l'*Association Henri Capitant des Amis de la Culture Juridique Francaise*; l'*European Research Group on Existing EC Private Law*, altrimenti noto come Gruppo "*Acquis*"; il *The Common Core of European Private Law* ("*Il nucleo comune del diritto europeo*"); lo *Ius Commune Casebooks for the Common Law of Europe*. Altre iniziative sono invece dedicata a settori specifici del diritto privato, come nel caso dei gruppi: *Commission on European Family Law; Eurohypothec: a common mortgage for Europe*; *European Centre of Tort and Insurance Law* (ECTIL); *Pan European Organisation of Personal Injury Lawyers*.

[9] Il Parlamento europeo ha dato impulso al processo di armonizzazione del diritto privato europeo attraverso le Risoluzioni del 26 maggio 1989 e del 6 maggio 1994, con cui proponeva l'avvio di un'azione comunitaria volta a riavvicinare il diritto privato degli Stati membri e ad armonizzarne determinati settori, da perseguirsi anche attraverso la costituzione di un comitato di esperti e la promozione della comparazione giuridica tra i diversi modelli nazionali. L'istituzione comunitaria ha proseguito nella sua iniziativa con le Risoluzioni del 15 novembre 2001 - "*riavvicinamento del diritto civile e commerciale degli Stati membri*" - e del 2 settembre 2003 - sull'attuazione del piano d'azione volto a dar maggiore coerenza al diritto europeo dei contratti – manifestando la volontà di realizzare l'uniformazione disciplinare accrescendone i profili di democraticità, secondo una linea ribadita anche dalle Risoluzioni del 23 marzo 2006, del 7 settembre 2006 e del 6 settembre 2007.

di politica legislativa da doversi assumere al fine di dar luogo ad un'armonizzazione delle discipline contrattuali.[10]

A questa iniziativa ha fatto seguito la Comunicazione del 12 febbraio 2003 ("*maggiore coerenza nel diritto contrattuale europeo: un piano d'azione*"), con la quale, premessa l'opportunità di non abbandonare il metodo per interventi settoriali, è stato proposto un "piano d'azione", destinato a realizzare un miglioramento dell'*acquis communitaire*, mediante la combinazione di soluzioni normative e non normative, volte ad accrescere la funzionalità del mercato e prevedendo l'opportunità di adottare uno strumento "opzionale" di disciplina della materia contrattuale.

L'atto normativo in commento ha, altresì, previsto la creazione del c. d. "quadro comune di riferimento" o "*Common Frame of Reference*" (CFR), con lo scopo di individuare una serie di principi comuni in ambito contrattuale, in grado di orientare l'attività normativa ed esegetica rispettivamente dei legislatori e degli organi giurisdizionali nazionali ed europei, così determinando un progressivo e "fisiologico" riavvicinamento delle regolamentazioni di settore.

Con la Comunicazione dell'11 ottobre 2004, "*diritto contrattuale europeo e revisione dell'*acquis*: prospettive per il futuro*", la Commissione ha definito le modalità di sviluppo del CFR, escludendo dalle intenzioni politiche delle istituzioni, quella di addivenire all'elaborazione di un codice civile

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[10] Tra le possibili soluzioni sottoposte a pubblica consultazione dalla Comunicazione della Commissione dell'11 luglio 2001, si segnalano quelle che ritenevano di addivenire all'armonizzazione del diritto contrattuale: affidandone la soluzione alle dinamiche fisiologiche del mercato; promuovendo l'enucleazione di principi comuni non vincolanti, idonei ad orientare i privati nelle negoziazione ed i legislatori e gli organi giudiziari nazionali ed europei nella creazione e nell'esegesi degli atti normativi; riorganizzando ed implementando la disciplina comunitaria in ambito contrattuale, al fine di renderla funzionale alla risoluzione di esigenze sopravvenute; adottando un atto normativo che coesistesse o sostituisse le discipline interne.

europeo, destinato ad imporsi autoritativamente sui singoli sistemi giuridici nazionali.

Tale progetto è stato pubblicato nel 2009 nella stesura definitiva con la denominazione di "*Draft Common Frame of Reference*", articolato in dieci libri[11], contenenti disposizioni di principio, definizioni e norme-modello, inerenti non solo alla materia strettamente contrattuale, ma estese anche al settore delle obbligazioni e della responsabilità civile.[12]

L'ampliamento "non autorizzato" del campo di lavoro si è scontrato con l'opposizione della Commissione che, con la Decisione del 26 aprile 2010 – seppur utilizzando espressioni neutre e semanticamente ambigue –, ha stabilito la necessità di restringere l'ambito settoriale di intervento del CFR al solo diritto dei contratti, istituendo a tal fine l'"*Expert Group on a Common Frame of Reference in the area of European Contract Law,* il quale, intervenendo sulla bozza già presentata, avrebbe dovuto elaborare uno "studio di fattibilità" in ordine ad un possibile atto normativo in materia contrattuale.

Obiettivo questo ribadito anche dal Libro verde del 1° luglio 2010 "*sulle opzioni possibili in vista di un diritto europeo dei contratti per i consumatori e le imprese*", con il

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[11] I dieci Libri in cui si articola il DCFR, sono così suddivisi:
(I) Disposizioni generali;
(II) Contratti ed altri atti giuridici;
(III) Obbligazioni e corrispondenti diritti;
(IV) Contratti specifici e diritti ed obbligazioni da essi derivanti;
(V) Gestione di affari altrui;
(VI) Responsabilità extracontrattuale derivante da danni cagionati ad altri;
I) Arricchimento senza causa;
Acquisto e perdita della proprietà di cose mobili; (IX) Garanzie reali su patrimoni mobiliari; (X) *Trusts*.
n Bar-Clive (a cura di), *Principles, Definitions and Model Rulesof opean Private Law: Draft Common Frame of Reference (DCFR), ll Edition*, I, Munchen, 2009, p. 25 ss.; von Bar, *A Common Frame reference for European Private Law – Academic Efforts and Political Realities*, in *Tulane European and Civil Law Forum*, 2008, p. 39.

quale la Commissione ha avviato una consultazione volta ad individuare le soluzioni ottimali circa la natura giuridica del possibile strumento di regolazione uniforme e l'ambito di operatività dello stesso.[13]

Il risultato di questo percorso – che si definirà nei suoi passaggi salienti nel prosieguo – è costituito dall'approvazione, l'11 ottobre 2011, da parte della Commissione Ue di una Proposta di Regolamento del Parlamento e del Consiglio recante norme sul "*diritto comune europeo della vendita*" (*Common European Sales Law* – CESL).

Tale atto, quindi, restringe – svelando una scelta che sa di incomprensibile e segue una sistematica quanto meno criticabile sul piano della commistione di regole giuridiche – di molto il settore di regolazione per materia, incentrandosi in via esclusiva sul contratto di vendita di beni mobili, malgrado non manchino disposizioni dedicate a profili di ordine generale o riferite al diritto delle obbligazioni.

## 3. La Proposta di Regolamento del Parlamento e del Consiglio sulla vendita (*Common European Sales Law*): percorso evolutivo e profili contenutistici.

Il Libro verde del 1° luglio 2010 sulle "*opzioni possibili in vista di un diritto europeo dei contratti per i consumatori e le imprese*", come accennato, ha avviato una pubblica consultazione volta a consentire l'individuazione della soluzione adeguata in ordine alla natura giuridica ed all'ambito oggettivo e soggettivo di intervento di uno strumento di disciplina uniforme del diritto contrattuale, che consentisse di implementare l'efficienza del mercato interno, rimuovendo i costi di transazione aggiuntivi derivanti dall'assenza di una

[13] v. Max Planck Institute for Comparative and International Private Law, *Policy Options for Progress Toward a European Contract Law. Comments on the issues raised in the Green Paper from the Commission of 1 July 2010*, COM (2010) 348 final, in *RabelsZ*, 2011, p. 371 ss.

normativa comune e la conseguente diffidenza rispetto al diffondersi delle negoziazioni transfrontaliere.[14]

Nelle intenzioni della Commissione l'emanando atto avrebbe dovuto essere dotato di un elevato livello di autonomia concettuale, senza attingere da uno specifico modello nazionale, ed al tempo stesso in grado di assicurare un'intensa protezione ai consumatori.[15]

Le possibili opzioni sottoposte alla consultazione pubblica realizzavano un'ampia gamma di soluzioni, ricomprese tra la predisposizione di uno strumento di natura normativa a carattere vincolante e destinato a sostituirsi alle singole regolamentazioni nazionali; di un atto non vincolante suscettibile di applicazione facoltativa e destinato a coesistere con le legislazioni interne; di uno strumento finalizzato a svolgere una mera funzione di orientamento, così da favorire una progressiva armonizzazione disciplinare attraverso l'individuazione dei principi condivisi ed irrinunciabili.[16]

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[14] Il percorso giuridico-istituzionale che ha condotto all'approvazione del CESL ha ricevuto significativo impulso anche dal Programma di Stoccolma 2010-2014, dalla Comunicazione della Commissione "Europa 2020" del 3 marzo 2010 e dalla Agenda digitale europea, prevista con la Comunicazione della Commissione del 19 maggio 2010, attraverso i quali si sono create le basi per l'adozione di uno strumento unitario di disciplina contrattuale.

[15] cfr. Donadio, *Diritto contrattuale comunitario e "optional instrument": una valutazione preventiva*, cit., p. 649; Mazzamuto, *Il diritto civile europeo e i diritti nazionali: come costruire l'unità nel rispetto delle diversità*, cit., p. 523.

[16] Nello specifico le opzioni proposte erano le seguenti:

1) pubblicazione dei risultati raggiunti da un gruppo di esperti, in grado di servire quale strumento di orientamento per i legislatori e i contraenti, sia per l'elaborazione di norme e clausole uniformi, sia per la formazione culturale dei giuristi europei, così da determinare un "naturale" riavvicinamento delle discipline contrattuali;
2) elaborazione di uno "strumentario" ufficiale per il legislatore, da adottarsi mediante comunicazione, o decisione o accordo interistituzionale, il quale muovendo dai risultati raggiunti dal gruppo di esperti, consenta di "garantire la coerenza e la qualità della legislazione" in materia di diritto europeo dei contratti, costituendo

Per quanto concerne la definizione del contesto di operatività dell'atto *de quo*, la discussione era finalizzata a stabilire se lo stesso avrebbe dovuto applicarsi a tutte le negoziazioni, interne e transfrontaliere, solo tra imprese o anche tra imprese e consumatori.

Altra questione delicata era quella inerente al settore tematico che lo strumento comunitario avrebbe dovuto regolare, disquisendosi se limitarne la portata ai soli aspetti generali della materia contrattuale, ovvero estenderla anche alle singole fattispecie negoziali e ad altri settori quali quelli della responsabilità extracontrattuale e dell'arricchimento senza causa, ovvero addirittura prevedere la realizzazione di un vero e proprio codice civile europeo.

Gli esiti della consultazione – che ha visto la partecipazione, anche se su orientamenti difformi, delle varie istituzioni

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il parametro di riferimento a cui ricorrere nella redazione di nuove proposte normative o nella revisione delle discipline esistenti;

3) emanazione di una raccomandazione della Commissione con allegato uno strumento di diritto europeo dei contratti, che induca gli Stati membri ad integrarlo nel sistema nazionale, sostituendolo alle discipline interne ovvero introducendolo come strumento opzionale, alternativo a quello interno;
4) predisposizione di uno strumento facoltativo di diritto europeo dei contratti introdotto con regolamento, e come tale capace di imporre un regime vincolante in ciascun Paese membro, alternativo alla disciplina nazionale, la cui concreta applicazione sarebbe rimessa alla scelta dei contraenti;
5) emanazione di una direttiva che "potrebbe armonizzare i diritti nazionali sulla base di norme minime comuni";
6) adozione di un regolamento volto ad istituire una disciplina europea di diritto contrattuale, dotata di un insieme di disposizioni omogenee ed a carattere imperativo, che andrebbe a sostituirsi di imperio ai diversi regimi giuridici nazionali, realizzando l'uniformazione immediata dei differenti sistemi;
7) emanazione di un regolamento istitutivo di un "codice civile europeo", dotato di una disciplina ampia, estesa anche ad ambiti ulteriori rispetto a quello contrattuale (ad esempio con riguardo ai temi delle obbligazioni in generale e della responsabilità extracontrattuale).

europee[17] – si sono attestati sul versante di uno strumento "opzionale", sfornito di carattere vincolante, la cui applicazione fosse rimessa alla libera scelta delle parti, in alternativa al regime nazionale, in quanto coerente con il principio di sussidiarietà ed idoneo a garantire un'armonizzazione progressiva delle discipline contrattuali.

L'accennato percorso multilivello ha condotto l'11 ottobre 2011 all'approvazione di una Proposta di Regolamento del Parlamento e del Consiglio relativa ad "*una disciplina comune sulla vendita*" (*Common European Sales Law - CESL*), realizzando una significativa (ed inaspettata) riduzione del settore negoziale di regolazione, rispetto agli originari propositi che sembravano univocamente riferirsi all'intera materia contrattuale.

Dal punto di vista strutturale, la Proposta si divide in tre parti: il Regolamento, l'Allegato I e l'Allegato II.

Il Regolamento contiene la definizione degli scopi e delle finalità della normativa che segue, individuando l'ambito oggettivo e soggettivo di applicazione dello strumento, avente natura "opzionale", in quanto volto a realizzare un "secondo regime contrattuale", alternativo a quello di ciascuno Stato membro, e suscettibile di applicazione solo sulla base dell'espressa scelta dei contraenti. Questo è teso a regolare – in virtù del disposto degli art. 5 e 7 – i contratti transfrontalieri (con facoltà ai sensi dell'art. 13 per i singoli Paesi di estenderne la portata anche ai contratti domestici) di vendita, di fornitura di contenuto digitale e di servizi connessi, conclusi tra professionisti e consumatori o tra imprese. Segue l'indicazione e la disamina degli obblighi

[17] Il Consiglio si è pronunciato per strumento non vincolante, da adottarsi mediante accordo interistituzionale, idoneo a fungere da orientamento per i legislatori nazionali ed europeo; il Parlamento, con la Risoluzione dell'8 giugno 2011, ha indicato la strada di uno strumento opzionale, da adottarsi con regolamento, in esito ad una valutazione di impatto e corredato da un "pacchetto" di strumenti idonei a garantire la funzionalità, da approvarsi mediante accordo interistituzionale.

informativi relativi all'intenzione di applicare il diritto comune europeo sulla vendita e delle sanzioni previste per l'ipotesi di loro violazione.

L'Allegato I, contiene la disciplina europea sulla vendita transfrontaliera, articolata in 186 disposizioni, raggruppate in otto parti, inerenti alle disposizioni preliminari; alla conclusione di un contratto vincolante; alla valutazione del contenuto del contratto; alle obbligazioni e ai rimedi delle parti del contratto di vendita o del contratto per la fornitura di contenuto digitale; alle obbligazioni e ai rimedi delle parti nei contratti di servizi connessi; al risarcimento del danno e agli interessi; alla restituzione e alla prescrizione.

L'Allegato II determina il contenuto della nota informativa standard che il professionista deve consegnare al consumatore prima dell'accordo.

A fronte di una struttura complessa, che fa della Proposta il prodromo di un vero e proprio codice europeo della vendita, l'analisi del suo contenuto dispositivo evidenzia numerosi profili di problematicità, che dagli aspetti più propriamente concettuali tendono a trasferirsi sul piano sistematico del coordinamento con il fitto reticolato normativo comunitario.[18]

Tali rilievi – che si approfondiranno a breve – sembrano tradire il dichiarato proposito di favorire una più intensa armonizzazione del diritto contrattuale continentale, prospettando per contro, l'incremento del livello di incertezza e di frammentarietà giuridica che contraddistingue l'attuale assetto disciplinare comunitario, e rispetto alla cui risoluzione si frappongono ancora numerosi ostacoli.

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[18] v. Lando, *Comments and Questions Relating to the European Commission's Proposal for Regulaton on a Common European Sales Law*, in *Eur. Rev. Priv. L.*, 2011, p. 718; Huber, *European Private International Law, Uniform Law and the Optional Instruments*, in *ERA-Forum*, 2007, II, p. 85 ss..

## 4. La controtendenza comunitaria verso la tipicità contrattuale.

L'analisi contenutistica della Proposta CESL suscita numerose perplessità sia con riguardo alla sua collocazione rispetto all'*iter* procedurale che ha caratterizzato la formazione del diritto europeo dei contratti, sia con riferimento alla sua coerenza concettuale e sistematica con il resto della normativa comunitaria vigente in materia negoziale.

In primo luogo, deve evidenziarsi come l'ambito di regolamentazione della Proposta si presenti notevolmente ristretto rispetto non solo agli originari propositi della Commissione, ma anche a quanto emerge dalla Relazione illustrativa che precede il testo in esame, laddove si fa chiaro ed inequivocabile riferimento al "diritto dei contratti", senza diffondersi in specificazioni relative ad una singola fattispecie negoziale, come la "vendita di beni mobili", la quale, invece, ha costituito l'oggetto esclusivo di disciplina da parte dell'iniziativa in commento.[19]

Una tale scelta – le cui motivazioni sono tutt'altro che chiare – si pone in netto contrasto con la tecnica legislativa utilizzata fino ad ora dal legislatore comunitario, tendente a definire la regolamentazione applicabile a determinati comparti negoziali, dettando le disposizioni ritenute necessarie al raggiungimento degli obiettivi protettivi perseguiti, senza ridurli ad una determinata fattispecie contrattuale (si pensi ad esempio alle normative sui "contratti del consumo" ed in questi ai "contratti a distanza", etc.).

In altre parole, se la normativa europea ha natura settoriale, procedendo attraverso l'emanazione di atti distinti, non riuniti in compendi disciplinari organici, essi sono comunque riferiti ad ambiti categoriali ampi, e non già a singole figure negoziali.

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[19] cfr. Ajani, *Un diritto comune europeo della vendita? Nuove complessità*, in *Contr. impr. eur.*, 2012, I, p. 71 ss.; Franzoni, *Dal codice europeo dei contratti al regolamento sulla vendita*, ibidem, p. 343.

La Proposta CESL, conseguentemente, inaugura una nuova "stagione" della legislazione comunitaria, in cui si svela l'avviarsi di una controtendenza verso la "tipizzazione" contrattuale, probabile espressione dell'intenzione di addivenire ad una più ampia uniformazione disciplinare.

Deve, tuttavia, segnalarsi l'approssimazione metodologica attraverso cui è stato compilato il testo in commento, atteso che accanto all'ampio corpo di disposizioni dedicate al diritto europeo della vendita di beni mobili, è possibile riscontrare la presenza di diverse norme riferite essenzialmente alla disciplina generale del contratto – come nelle parti I-II e III, in cui si tratta delle disposizioni preliminari, della conclusione e del contenuto del contratto -, nonché ad altre tematiche attinenti al diritto delle obbligazioni, come nel caso delle parti VI-VII e VIII espressamente inerenti al risarcimento del danno, agli interessi, alla restituzioni e alla prescrizione.[20]

Il risultato che ne discende – probabile conseguenza dell'intervento della Proposta sull'insieme di principi che avevano formato oggetto del DCFR, addirittura trascendenti la materia contrattuale - è quello di una consistente "confusione" concettuale, che rischia di inserire nel già eccessivamente frammentato sistema comunitario, nozioni e principi contrastanti, così pregiudicando – a discapito dei propositi chiarificatori – la semplificazione e l'uniformazione del diritto europeo dei contratti.

In ogni caso, non deve trascurarsi l'autorevole opinione dottrinaria che, alla luce del contenuto sostanziale del CESL e pur segnalandone le intense contraddizioni, pone il "dubbio interpretativo", secondo cui la disciplina in esso contemplata potrebbe in realtà essere estesa anche "ad altri

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[20] cfr. De Cristofaro, *Il (futuro) <<Diritto comune europeo>> della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE*, in *Contr. impr.*, 2012, I, p. 358 ss.

tipi contrattuali e ad obbligazioni diverse da quelle nate dalla compravendita".[21]

In questo senso, infatti, depongono le numerose disposizioni che si estendono in generale alla materia negoziale, escludendone limitazioni relative alla sola vendita, ma che così facendo riducono le possibilità di futuro successo dell'iniziativa comunitaria, in considerazione delle prevedibili difficoltà di coordinamento sistematico e concettuale che possono sorgere rispetto ad altre normative vigenti.

## 5. Questioni di diritto internazionale privato: il problema del coordinamento del CESL con la disciplina di cui al Regolamento (CE) n. 593/2008 sulla legge applicabile alle obbligazioni contrattuali (Roma I).

L'eventuale (futura) entrata in vigore del Regolamento sul diritto europeo della vendita – contenuto nella Proposta approvata dalla Commissione – pone il delicato problema di definirne i criteri di coordinamento con il Regolamento CE n. 593/2008 sulla legge applicabile alle obbligazioni contrattuali (Roma I).

Al riguardo, tuttavia, deve considerarsi come il CESL, in quanto contenuto in un atto normativo avente il rango gerarchico di "regolamento", ai sensi dell'art. 288 TFUE si integrerà immediatamente nell'ordinamento giuridico di ciascuno Stato membro, divenendo direttamente applicabile, e dando luogo alla creazione di "un secondo regime contrattuale" parallelo a quello già esistente.

Pertanto, nel caso in questione non sorgerà alcun problema di diritto internazionale privato, inerente all'individuazione della legge applicabile al rapporto giuridico, atteso che le parti, optando per il "diritto europeo della vendita" non realizzeranno

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[21] v. Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, in *Europa dir. priv.*, 2, 2012, p. 293 ss.

una scelta tra le normative di diversi Paesi aderenti all'Ue, ma, viceversa, effettueranno una scelta tra uno dei due diversi "regimi giuridici" disponibili nell'ordinamento interno.[22]

Ne deriva, conseguentemente, che l'eventuale entrata in vigore del CESL non inciderà sulla disciplina del Regolamento "Roma I", che resterà applicabile (soprattutto in ordine al disposto degli artt. 3 e 4 sull'individuazione della legge regolatrice) per quanto riguarda gli aspetti "residui" non disciplinati dal "diritto comune europeo della vendita" (ad es. in tema di "illegalità del contratto" o di "rappresentanza", etc.).[23]

Ciò, del resto, risulta coerente anche con quanto stabilisce il Regolamento "Roma I" al 14° considerando, laddove espressamente contempla l'ipotesi della successiva adozione di uno strumento giuridico unitario relativo ai profili sostanziali del diritto del contratti, statuendo che tale

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[22] v. Hesselink, *How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation*, in *ERPL*, 2012, p. 208 ss.; Kruisinga, *What do consumer and commercial sales law have in common? A comparison of EC Directive on consumer sales law and the UN Convention on contracts of international sale of goods*, in *ERPL*, 2011, p. 177 ss.

[23] In questo senso depone il Considerando n. 27 della Proposta di Regolamento CESL, nel quale si afferma che "Qualsiasi materia di natura contrattuale o extracontrattuale non rientrante nel campo di applicazione del diritto comune europeo della vendita è regolata dalle norme preesistenti, estranee al diritto comune europeo, dalla legge nazionale applicabile in virtù del regolamento (CE) n. 593/2008, del regolamento (CE), n. 864/2007 o di altre norme di conflitto pertinenti. Tali materie includono la personalità giuridica, l'invalidità del contratto derivante da incapacità giuridica, illegalità o immoralità, la determinazione della lingua del contratto, la non discriminazione, la rappresentanza, la pluralità di debitori e creditori, la modifica delle parti compresa la cessione, la compensazione e la confusione, il diritto di proprietà compreso il trasferimento del titolo, la proprietà intellettuale e la responsabilità extracontrattuale. La questione se domande concorrenti attinenti alla responsabilità contrattuale ed extracontrattuale possano essere fatte valere assieme è anch'essa esclusa dal campo di applicazione del diritto comune europeo della vendita".

atto possa "prevedere la possibilità per le parti di scegliere l'applicazione" delle norme contenute nel medesimo Reg. CE n. 593/2008.

Un'ulteriore questione che si pone è quella della compatibilità del CESL con l'art. 6, paragrafo secondo, del Regolamento CE n. 593/2008, secondo cui la scelta della legge applicabile "non vale a privare il consumatore della protezione assicuratagli dalle disposizioni alle quali non è permesso derogare convenzionalmente", cioè quelle stabilite dalla legislazione dello Stato in cui il consumatore ha la sua residenza abituale (art. 6, paragrafo primo).[24]

Tale disposizione, infatti, costituisce una "clausola di salvaguardia" che tende a garantire l'effettività della normativa a tutela del consumatore, impedendo, per conseguenza, che l'accordo sulla legge regolatrice del rapporto negoziale, possa avere quale effetto indiretto la riduzione degli standard minimi di protezione.

La *ratio* di questa regola deve essere rintracciata nell'intenzione del legislatore comunitario di superare le divergenze intercorrenti tra i diversi sistemi nazionali, per quanto concerne il livello medio di tutela riconosciuto al contraente-debole, nonché le difficoltà per gli stessi consumatori di conoscere i diritti a loro derivanti da una legge diversa da quella del loro Paese di residenza.

Sta di fatto che, nel caso della CESL, viene espressamente esclusa ogni ipotesi di conflitto sostanziale tra le due fonti di regolazione e, di conseguenza, la stessa applicabilità concreta dell'art. 6, paragrafo secondo Reg. Ce 593/2008, essenzialmente per due diversi ordini di ragioni: sul piano formale, la "scelta" operata dalle parti in relazione al diritto europeo della vendita non andrebbe a riguardare la disciplina

[24] v. Zorzi Galgano, *Dal Codice europeo dei contratti al Regolamento della vendita: la logica del sistema, anche con riferimento alla protezione del consumatore*, in *Contr. impr. eur.*, 2012, I, p. 239; Tonner, *CESL and consumer contract law: integration or separation?*, ibidem, p. 316.

propria di un altro ordinamento giuridico, ma si riferirebbe ad uno dei due regimi disponibili all'interno del sistema dello stesso Paese membro.[25] Infatti, la (futura) normativa comune sarà contenuta in un atto avente natura di "regolamento", che come tale si inserisce direttamente nell'ordinamento interno di ciascuno Stato aderente, ed è immediatamente applicabile senza necessità di atti di trasposizione; sul piano sostanziale, le norme contenute nel CESL, per ciò che concerne la tutela del consumatore, definiscono un livello di protezione globalmente equivalente, se non superiore, a quello garantito nei singoli diritti nazionali.[26]

La conclusione per cui il nuovo regime europeo sulla vendita non costituisce una "scelta" in ordine alla legge applicabile al rapporto contrattuale, nel senso di cui al Regolamento "Roma I", consente di escludere un'ulteriore situazione di conflitto, relativamente all'art. 9 di tale atto, il quale garantisce la

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[25] Nella Relazione illustrativa alla Proposta CESL si afferma espressamente che "Il diritto comune della vendita sarà un secondo regime di diritto dei contratti all'interno dell'ordinamento nazionale di ciascuno Stato membro. Se le parti avranno convenuto di applicare il diritto comune europeo della vendita, le sue saranno le sole norme nazionali vigenti per le materie rientranti nel suo campo di applicazione. Alle materie rientranti nel campo di applicazione del diritto comune della vendita non sarà possibile applicare nessun'altra norma nazionale. La scelta di avvalersi del diritto comune europeo della vendita è operata fra due rami distinti del diritto della vendita all'interno dello stesso ordinamento nazionale e non equivale pertanto, né deve essere confusa con la scelta della legge applicabile ai sensi del diritto internazionale privato".

[26] Tale aspetto è oggetto di espressa illustrazione nella Relazione illustrativa alla Proposta CESL, nella quale con riferimento all'art. 6, paragrafo 2, del regolamento Roma I, si evidenzia come "Quest'ultima disposizione può non avere rilevanza pratica se le parti hanno optato, nell'ambito del diritto nazionale vigente, per il diritto comune europeo della vendita. Questo perché le norme di diritto comune europeo della vendita del diritto nazionale prescelto sono identiche alle norme di diritto comune europeo del paese del consumatore. Di conseguenza, le norme imperative a tutela del consumatore del paese del consumatore non sono superiori né questi è privato della protezione assicuratagli dalla legge del paese in cui ha la residenza abituale".

persistenza della "norme di applicazione necessaria", ossia di quelle strettamente inerenti agli interessi pubblici ed economici dello Stato in cui viene a radicarsi la competenza a conoscere del rapporto contrattuale.

Anche in questo caso, infatti, deve evidenziarsi, al di là dei rilievi strettamente contenutistici, che il diritto europeo della vendita – in quanto contenuto in un regolamento comunitario – preclude l'insorgenza di questioni internazional-privatistiche, atteso che esso rientra immediatamente ed in posizione di preminenza, nell'ordinamento di ciascun Paese membro, con conseguente coincidenza del "campo d'applicazione".

## 6. Incongruenze concettuali ed interferenze applicative del CESL con la normativa comunitaria vigente in ambito contrattuale: contraddizioni ed approssimazioni di diritto sostanziale.

La Proposta di Regolamento sul diritto comune europeo della vendita pone delicati problemi di coordinamento – la cui attualità, come ovvio, è subordinata all'eventuale entrata in vigore – con la normativa comunitaria vigente in materia contrattuale, malgrado si uniformi, comunque, ad alcuni dei canoni caratterizzanti di quest'ultima.[27]

Tali questioni – che emergono per intensità specialmente con riguardo alle contrattazioni tra imprese e consumatori, su cui, pertanto, dovremo concentrare la nostra attenzione – spesso si risolvono in vere e proprie ripetizioni ed approssimazioni concettuali, che finiscono per determinare delle situazioni di conflittualità, tali da pregiudicare l'obiettivo di semplificazione ed uniformazione disciplinare a livello europeo, aumentando, per contro, i profili di frammentarietà e lasciando presagire un difficile successo all'iniziativa in commento.

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[27] v. De Cristofaro, *Il (futuro) <<Diritto comune europeo>> della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE*, cit., p. 358 ss.

Procedendo per ordine può evidenziarsi innanzitutto come il CESL si innesti nella tendenza formalista propria del sistema comunitario che - sovvertendo vistosamente il tradizionale principio della libertà delle forme negoziali - attribuisce agli adempimenti documentali un ruolo cardine nella tutela del contraente-debole. La forma, infatti, risulta arricchita di una funzione "informativa", essendo alla stessa demandato il compito di veicolare la penetrazione nel regolamento contrattuale delle informazioni pre-negoziali, al fine di garantire la genuinità del processo di autodeterminazione volitiva del consumatore. In questo modo viene a ripianarsi la posizione di squilibrio in cui originariamente si trova il contraente-debole, in virtù della sua qualità soggettiva, atteso che lo stesso non possiede quel "bagaglio" di conoscenze specialistiche proprie del contraente-professionista, le quali sul piano sostanziale possono tradursi in un assetto negoziale a lui pregiudizievole.[28]

Nell'ambito della Proposta per un diritto europeo della vendita la tendenza formalista assunta dal legislatore, è anticipata dal momento della formazione del contenuto contrattuale a quello della scelta del regime giuridico applicabile al rapporto.

In altre parole, viene ad essere procedimentalizzata attraverso una serie di adempimenti formali ed informativi, la fase in cui le parti devono decidere se applicare la disciplina interna ovvero quella contenuta nel CESL, con

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[28] v. Laghi, *L'incidenza dei diritti fondamentali sull'autonomia negoziale*, Padova, 2012, p. 428 ss.; Ferrari-Laghi, *Diritto europeo dei contratti*, cit., p. 73 ss.; Di Marzio, *Riflessioni sulla forma nel nuovo diritto dei contratti*, in *Riv. crit. dir. priv.*, 2001, p. 397 ss.; Modica, *Vincoli di forma e disciplina del contratto. Dal negozio solenne al nuovo formalismo*, Milano, 2008, p. 133; Montesano, *Questioni attuali su formalismo, antiformalismo e garantismo*, in *Riv. dir. proc. civ.*, 1990, p. 12; Putti, *Il neoformalismo negoziale*, in Calvari-Putti-Scarpelli, *I contratti del consumatore*, in *I contratti del consumatore*, in *I diritti dei consumatori*, a cura di Alpa, Torino, 2009, p. 492 ss.

l'evidente finalità di proteggere il consumatore rispetto ad una mera "adesione inconsapevole" alle determinazioni del professionista.[29]

In questo senso, l'art. 8 stabilisce che la "scelta" di applicare il diritto comune europeo della vendita sia rimessa ad uno specifico accordo delle parti, che deve risultare a pena di invalidità dall'osservanza di precise modalità procedurali: il consenso del consumatore deve essere contenuto in un'esplicita dichiarazione distinta da quella con cui si esprime l'accordo alla conclusione del negozio, di cui il professionista deve dare conferma su supporto durevole. In aggiunta a ciò, ai sensi dell'art. 9, il professionista, prima dell'accordo, è tenuto ad informare il contraente-debole dell'intenzione di applicare il CESL, rilasciandogli a tal fine un'apposita nota informativa, da redigersi utilizzando il formulario contenuto nell'Allegato II.

Siffatte prescrizioni – ulteriormente complicate nell'ipotesi di contratti conclusi mediante strumenti telematici – senza alcun dubbio, presentano evidenti profili di contraddittorietà rispetto alle finalità dichiarate nella Relazione illustrativa che precede la Proposta, oltre che nei "considerando" della medesima, relative all'obiettivo di realizzare l'innalzamento dei livelli di protezione del consumatore.[30]

Infatti, se il regime giuridico contenuto nel CESL determina un chiaro incremento della tutela del contraente-debole – anche in considerazione del fatto che le prescrizioni in esso contenute sono di portata quanto meno equivalente, se non superiore, a quelle dei singoli diritti nazionali – limitarne l'applicazione attraverso un esasperato procedimento formalistico di scelta del regime giuridico da utilizzare, rappresenta una fin troppo

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[29] Così Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, cit., p. 297 ss.

[30] v. Zorzi Galgano, *Dal Codice europeo dei contratti al Regolamento della vendita: la logica del sistema, anche con riferimento alla protezione del consumatore*, cit., p. 239 ss.; Tonner, *CESL and consumer contract law: integration or separation?*, cit., p. 316 ss.

palese incongruenza, tenuto conto che il consumatore sarebbe di sicuro meglio garantito da quest'ultimo.

Spostando l'attenzione sul piano contenutistico, emerge la tendenza esasperata del redattore del progetto a diffondersi in definizioni minuziose dei vari istituti presi in considerazione, e di aspetti decisamente secondari (ad es. la definizione di "prezzo") a cui fa riscontro un "irrigidimento" dell'attività interpretativa, con conseguente difficoltà per la nuova emananda normativa di adattarsi alle dinamiche esegetiche seguite dalla giurisprudenza comunitaria e nazionale, e ad eventuali esigenze – tutt'altro che infrequenti in un diritto in formazione - che dovessero emergere nella realtà socio-economica, imponendo una "evoluzione" delle nozioni giuridiche.[31]

Peraltro, il ricorso ossessivo alle definizioni non segue i canoni dell'ortodossia propria della terminologia giuridica, spesso scadendo in "confusioni" ed "approssimazioni", i cui effetti negativi finiscono per incidere sia sul piano applicativo, che su quello concettuale.

In tal senso, a titolo esemplificativo, può considerarsi la "misteriosa" (poiché sprovvista di plausibile giustificazione) introduzione dell'espressione innovativa di *trader*, individuato come il soggetto che "agisce nell'esercizio del proprio commercio, impresa, arte o professione" (art. 2, lett. e), secondo una formula coincidente con la consueta nozione di "professionista" (*business*), con l'evidente rischio di ingenerare inutili quanto pericolosi problemi di identificazione e di coordinamento normativo con le altre regolamentazioni che diffusamente fanno riferimento a quest'ultimo termine.[32]

Sotto altro profilo appare senza dubbio censurabile la scelta di escludere dall'ambito previsionale del CESL istituti di

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31 v. Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, cit., p. 304 ss.

32 v. Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, cit., p. 302 ss.

primaria importanza nel contesto dei rapporti negoziali, quali quelli della "nullità" e della "responsabilità precontrattuale"[33], che proprio nella vendita trovano uno degli ambiti elettivi di più frequente applicazione.

In particolar modo per quanto riguarda la nullità, la cui disciplina incontra significative variazioni nei diversi sistemi nazionali e che è oggetto di una importante evoluzione dogmatica nel contesto comunitario come evidenziato dall'emersione delle "nullità di protezione", la lacuna appare particolarmente grave, presentando il rischio di ingenerare difformità applicative soprattutto per ciò che riguarda gli effetti dell'invalidità e la possibilità o meno si sottoporla a sanatoria.[34]

Singolare e non condivisibile è anche il recupero da parte del CESL di classificazioni dogmatiche, come nel caso della distinzione tra obbligazioni di mezzi ed obbligazioni di risultato (art. 148), ormai superate dalla maggior parte dei Paesi membri, a seguito di un'annosa e complessa evoluzione interpretativa che ha valorizzato ed in parte autonomizzato l'obbligo di diligenza, ponendolo quale "risultato" sotteso ad ogni rapporto obbligatorio.[35]

La Proposta di Regolamento in commento presenta, inoltre, delle interferenze contenutistiche con alcuni atti normativi vigenti in tema di rapporti di consumo, le quali se

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[33] v. Ferrante, *Diritto privato europeo e Common European Sales Law (CESL). Aurora o crepuscolo del codice europeo dei contratti?*, in *Contr. impr. eur.*, 2012, I, p. 477 ss.

[34] cfr. Mantovani, *Le nullità di protezione nella tassonomia dei rimedi*, in *Studi Cian*, Padova, 2010, II, p. 1619; Passagnoli, *Le nullità di protezione*, in *Studi Messinetti*, Napoli, 2008, p. 627; G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici*, Napoli, 2010.

[35] In questo senso emblematica è l'evoluzione seguita dalla giurisprudenza di legittimità in tema di responsabilità medica originata da Cass. civ., sentenza 22 gennaio 1999, n. 589; in dottrina si v. le tesi di Mengoni, *Obbligazioni di risultato e obbligazioni di mezzi*, in *Riv. dir. comm.*, 1954, p. 54 e di Rescigno, Voce "*Obbligazioni*", in *Enc. dir.*, Milano, 1979, p. 190.

non determineranno (una volta entrata in vigore) dei concreti problemi applicativi – atteso che qualora le parti abbiano espressamente optato per il CESL, questo sarà l'unica fonte a disciplinare il rapporto negoziale – di certo pregiudicheranno il processo di semplificazione del diritto europeo dei contratti, provocandone un'ulteriore frammentazione, che finirà per ostacolarne l'uniformazione sostanziale.[36]

Infatti, benché vi sia una sovrapposizione tra le norme considerate quanto al loro contenuto, non può comunque asserirsene la specularità.

Tali questioni sono essenzialmente da imputare alla tecnica compilativa seguita dall'estensore della Proposta, il quale anziché prevedere delle clausole di collegamento o di rinvio ad altri atti regolamentari vigenti, volti a disciplinare singoli istituti, ne ha riprodotto – con più o meno intense variazioni – il contenuto.

Ciò è accaduto con riguardo alle disposizioni della direttiva 93/13 relativa alle clausole abusive, a cui fanno riscontro gli artt. 79-86 inerenti al medesimo ambito tematico, ma soprattutto con la direttiva 2011/83 sui diritti del consumatore, rispetto alla quale si profilano numerosi punti di coincidenza: così per gli obblighi informativi (artt. 5 direttiva 2011/83 e 13 ss. CESL); per il diritto di recesso (artt. 9-16 direttiva 2011/83 e 40-47 CESL); per la consegna (artt. 18 direttiva 2011/83 e 93-97 CESL); per il trasferimento del rischio (artt. 20 direttiva 2011/83 e 140-146 CESL). [37]

Tutti gli accennati aspetti si risolvono in profili di criticità che, in spregio alle intenzioni del legislatore comunitario, accrescono e non riducono l'incertezza giuridica che vige nel sistema continentale, rischiando di fare del futuro regolamento sul diritto comune della vendita un'astratta costruzione

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36 v. Tonner, *CESL and consumer contract law: integration or separation?*, cit., p. 316 ss.

37 v. ampiamente al riguardo Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, cit., p. 300 ss.

normativa, destinata – stante il suo carattere "opzionale" – a non essere applicata nelle transazioni transfrontaliere.

## 7. Considerazioni conclusive.

Le considerazioni esposte nelle pagine che precedono evidenziano la sostanziale inidoneità della Proposta di Regolamento per un diritto comune europeo della vendita a raggiungere gli obiettivi di uniformazione e di semplificazione del sistema continentale dei contratti, mettendone per contro in luce la potenziale capacità decettiva.

Del resto, già la scelta di uno strumento "opzionale" la cui concreta applicazione è rimessa all'accordo delle parti, non fa altro che palesare la "debolezza" del tentativo approntato dalle istituzioni comunitarie, che rimettono essenzialmente alla volontà dei contraenti l'effettiva realizzazione del processo di armonizzazione delle discipline negoziali. Volontà che è agevole prevedere sarà quella della parte dotata di maggior potere contrattuale (soprattutto nei rapporti tra professionisti e consumatori), che di fatto "imporrà" all'altra la propria decisione di ricorrere alla disciplina comune.[38]

Ne deriva, pertanto, che l'operatività o meno del diritto europeo della vendita non sarà questione di decisione politica, da parte dei Paesi membri o della stessa Ue, ma diventerà espressione prevalente di una valutazione economica ed opportunistica, che potrà "premiare" o condannare al "dimenticatoio" il CESL, a seconda della sua funzionalità o meno agli interessi di parte.

Se appare lecito "dubitare" che la scelta in sé di uno strumento di *soft law* possa favorire il processo di uniformazione contrattuale, più fondato diventa il timore se ci si concentra sul contenuto della Proposta di Regolamento in commento.

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[38] v. De Cristofaro, *Il (futuro) <<Diritto comune europeo>> della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE*, cit., p. 369 ss.

Questa, infatti, per motivi difficili da cogliere, è limitata alla sola compravendita mobiliare, ma presenta disposizioni inequivocabilmente riferite al contratto in generale e al diritto delle obbligazioni; al tempo stesso emergono delle "ingiustificabili" lacune previsionali (ad esempio in tema di rappresentanza, invalidità, etc.), che, quindi, ne impongono il collegamento ad altre fonti di disciplina con i correlativi problemi internazional-privatistici sull'individuazione della legge applicabile; evidenzia il recupero di nozioni dogmaticamente ambigue e foriere di potenziali disguidi interpretativi (come nel caso della distinzione tra obbligazioni di mezzi e di risultato), accentuati dall'ossessivo ricorso alle definizioni; senza infine trascurare la sovrapposizione priva di coordinamento che in tema di rapporti di consumo si registra con altri atti normativi.

Tali profili di criticità mettono, quindi, in evidenza il rischio che la futura disciplina comune della vendita possa provocare un'ulteriore frantumazione del diritto contrattuale europeo, vanificando i passi avanti fin ad ora compiuti nel processo di armonizzazione e rendendo ancora più complesso e confuso il "tessuto" positivo comunitario.[39]

Appare prematuro ed eccessivamente pretenzioso, allo stato attuale, diffondersi nell'elaborazione di un corpo articolato di norme di dettaglio riferite ad un determinato ambito tematico, essendo preferibile procedere nel delicato e complesso processo di enucleazione dei principi comuni e di "assimilazione" degli stessi negli operatori del diritto. Solo, allorquando, questa

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[39] Tra i diversi suggerimenti volti a proporre una revisione della Proposta CESL, si segnala la posizione di Castronovo, *Sulla proposta di regolamento relativo a un diritto comune europeo della vendita*, cit., p. 315 ss., il quale ritiene opportuno procedere ad una semplificazione della stessa, in modo da articolarne il contenuto in una parte generale dedicata al contratto, all'adempimento ed inadempimento delle obbligazioni, seguita da una sezione relativa alla vendita, a cui aggiungere di volta in volta - secondo il livello di armonizzazione raggiunto – la disciplina attinente alle altre singole fattispecie contrattuali, con gli opportuni collegamenti alla parte generale.

fase verrà ultimata e sarà acquisita una coscienza giuridica condivisa, si potrà positivizzare una disciplina uniforme di settore.

Non sembra, infatti, prospettabile, con ragionevoli probabilità di successo, alcuna altra strada in grado di realizzare l'effettiva rimozione dello stato di incertezza giuridica presente nel sistema ed il conseguente sviluppo delle potenzialità del mercato interno.

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# THE COEXISTENCE OF DIVERSE LEGAL TRADITIONS IN A SINGLE TERRITORY: THE CASE OF FREEDOM OF EXPRESSION IN PALESTINE

MUTAZ M QAFISHEH

This paper examines the coexistence among the three legal traditions in Palestine (continental law, common law and Islamic law) by revising various legislative pieces relating to the freedom of expression and comparing such instruments with the International Covenant on Civil and Political Rights (ICCPR). The paper proposes certain measures to reform the existing systems, taking into account the assumption that Palestine would be interested to become party to the Covenant as it declared in its 2003 Amended Basic Law (constitution), particularly in the light of Palestine's recent attempts to acquire full membership of the United Nations. Using comparative and inductive approach, the paper adopts a wider definition of the freedom of expression that comprises five components: privacy, freedom of religion, freedom of opinion, right to peaceful assembly, and freedom of association.

## 1. Introduction

Although the West Bank and Gaza Strip are recognized as a single entity (i.e. Palestine), legislation that regulates the freedom of expression differs in these two areas. In the West Bank, which inherited the Jordanian legal system as Jordan controlled that part of Palestine from 1948 to 1967, the continental law tradition prevails. Gaza retained most of the common law practices adopted by the British authorities during the Palestine Mandate era. In the two parts of

Palestine, certain rules derived from Islamic law remain enforceable today as produced by the Ottoman Empire that governed the territory for centuries. As both areas fell under Israeli occupation in 1967, a set of military orders were imposed, amending a number of pre-existing laws and adding new rules. After its establishment in 1994, the Palestinian Authority, while retaining the previous legislation,[1] launched a process aiming to modernize and unify the applicable law in the two regions of the country.

This paper examines the coexistence among the three legal traditions in Palestine (continental law, common law and Islamic law) by revising various legislative pieces relating to the freedom of expression and comparing such instruments with the International Covenant on Civil and Political Rights (ICCPR).[2] The paper proposes certain measures to reform the existing systems, taking into account the assumption that Palestine would be interested to become party to the Covenant as it declared in its 2003 Amended Basic Law (constitution),[3] particularly in the light of Palestine's recent attempts to acquire full membership of the United Nations.[4] Using comparative and inductive approach, the paper adopts a wider definition of the freedom of expression that comprises five components: privacy, freedom of religion, freedom of opinion, right to peaceful assembly, and freedom of association. Each of these freedoms/rights would be addressed in a separate section below.

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1 Decree No 1 of 20 May 1994, Palestine Gazette, No 1, 20 November 1994, 10.

2 999 UNTS 171.

3 Palestine Gazette, Extraordinary Ed, 19 March 2004, 5.

4 M Qafisheh, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (2013).

## 2. Privacy

Privacy may relate to the freedom of expression by a passive sense, namely through the right to preserve one's own personal life.[5] By this definition, privacy is connected to the choices that one may wish to make regarding the home in which one elects to settle in,[6] the food he or she wants to eat, customs one follows, spouse one chooses to marry,[7] the language/accent one prefers to speak,[8] right to one's own image,[9] people he or she opt to socialize or refrain from contacting, his or her religious practice or non-practice, and one's sexual life,[10] sexual orientation,[11] communications and

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5 See, in general, W Gordon, 'The Right of Privacy' (1902) 1 *Canadian LR* 196; F Walton, 'The Comparative Law of the Right to Privacy' (1931) 47 *LQR* 219; E Wanderer, 'Right of Privacy' (1948) 34 *Women Lawyers J* 21; J Thauberger, 'Right to Privacy' (1965) 30 *Sask BR* 167; S Skala, 'Is There a Legal Right to Privacy' (1977) 10 *Univ Queensland LJ* 127; J Williams, 'Invasion of Privacy' (1973) 11 *Alb LR* 1; S Davies, 'Constructing an International Watchdog for Privacy and Data Protection: The Evolution of Privacy International' (1992) 3 *JL & Info Science* 241; A Samuels, 'Privacy: Statutorily Definable' (1996) 17 *Statute LR* 115; J Breslin, 'Privacy - The Civil Liberties Issue' (1996) 14 *Dickinson J Int L* 455; S Uniacke, 'Privacy and the Right to Privacy' (1997) *Bul Australian Society L Phil* 1; R Barrett, 'The Right to Privacy' (1998) 137 *L & Jus - Christian LR* 39; B Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 *LQR* 47; L Aryani, 'Privacy Rights in Shari'a and "Shari'a – Based" States' (2007) 3 *J Islamic State Practices Int L* 3; E Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1 *J Media L* 49; E Reid, 'Rebalancing Privacy and Freedom of Expression' (2012) 16 *Edinburgh L R* 253.

6 R Cosman, 'A Man's House Is His Castle-Beep: A Civil Law Remedy for the Invasion of Privacy' (1971) 29 *Faculty L R* 3.

7 B Wilson, 'Women, the Family, and the Constitutional Protection of Privacy' (1992) 17 *Queen LJ* 5.

8 H MacQueen, 'My Tongue is Mine Ain': Copyright, the Spoken Word and Privacy' (2005) 68 *Modern LR* 349.

9 S Barnett, 'The Right to One's Own Image: Publicity and Privacy Rights in the United States and Spain' (1999) 47 *Am J Com L* 555.

10 K Botha & E Cameron, 'Sexual Privacy and the Law' (1993) 4 *S Afr Hum*

information-sharing,[12] children's education,[13] clothes he or she wishes to wear, the way he sleeps, his or her health state,[14] and his or her financial situation,[15] etc. In this sense, privacy, or non-interference in the private sphere,[16] is linked to various sets of rights, including the right to housing, food, clothing, religion, education, and cultural life. Some of these rights would be discussed in the subsequent sections of this paper; others are addressed by the present writer somewhere else.[17] In this section, however, we will briefly look at the

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*Rts YB* 219; L Gotell, 'When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' (2006) 43 *Alb LR* 743.

11 R Green, 'Fornication: Common Law Legacy and America's Sexual Privacy' (1988) 17 *Anglo-Am LR* 226; M Hryce, 'The Legal Protection of Privacy and HIV/AIDS' (1993) 3 *Australasian Gay & Lesbian LJ* 46; K Beattie, 'Homosexual Sexual Activity and the Right of Privacy' (1994) *UCL Jurisp R* 43 (1994); G Selvanera, 'Gays in Private: the Problems with the Privacy Analysis in Furthering Human Rights' [1994] 2 *Adelaide LR* 331; R Louw, 'Sexual Orientation, Criminal Law and the Constitution: Privacy versus Equality' (1998) 11 *S Afr J Crim Jus* 375.

12 K O'Connor, 'Privacy and Information Systems' (1980) 5 *L Service Bul* 167; D Dawe, 'Privacy and Freedom of Information' (1988) 36 *Chitty LJ* 1.

13 V Steeves, 'It's Not Child's Play: The Online Invasion of Children's Privacy' (2006) 3 *Univ Ottawa L & Tech J* 169.

14 B Tigerstrom, 'Protection of Health Information Privacy: The Challenges and Possibilities of Technology' (1998) 4 *Appeal R Current L & L Reform* 44; A Grulich & J Kaldor, 'Individual Privacy and Observational Health Research: Violating an Individual's Privacy to Benefit the Health of Others' (2001) 24 *Univ New S Wales LJ* 298.

15 V Boyd, 'Financial Privacy in the United States and the European Union: A Path to Transatlantic Regulatory Harmonization' (2006) 24 *Berkeley J Int L* 939.

16 Cf W Creech, 'The Privacy of Government Employees' (1966) 31 *L & Contem Probm* 413; E Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of Private Facts' (1998) 61 *Modern LR* 318; N Moreham, 'Privacy in Public Places' (2006) 65 *Cam LJ* 606; Z Balogh, G Polyak, B Ratai & G Szoke, 'Privacy in the Workplace' (2012) 150 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 9.

17 M Qafisheh, 'The Ability of the Palestinian Legal System to Secure Adequate Standards of Living: Reform or Failed State Duty' (2013) *Asian J Int L* (available online; printed version forthcoming).

privacy in its narrow sense as it has enshrined in the ICCPR and its corresponding legal regulation in the applicable law in Palestine.

Article 17 of the ICCPR protects privacy in the following terms:

> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> (2) Everyone has the right to the protection of the law against such interference or attacks.

This article comprises two rights: (1) personal privacy, and (2) protection against attacks on one's honour and reputation. Let us look at these rights in Palestinian law.

Article 17 of the Amended Basic Law covers one aspect of the privacy; that is the inviolability of homes:

> Homes shall be inviolable. Homes may not be subject to surveillance, broken into or searched, except in accordance with a valid judicial order and in accordance with the provisions of the law. Any consequences resulting from violations of this article shall be considered invalid. Individuals who suffer from such violation shall be entitled to a fair remedy, guaranteed by the Palestinian National Authority.

The Palestinian the Penal Procedures Law No 3 of 12 May 2001,[18] in its Articles 39-52, sets out the steps that should be pursued to search homes.[19] Search should be based on a signed

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[18] Palestine Gazette No 38, 5 September 2001, 94.

[19] Cf E Geddes, 'The Private Investigator and the Right to Privacy' (1989) 27 *Alb LR* 256 (1989); P Li-ping, 'Criminal Search and Protection to Citizen Right of Privacy' (2007) 4 *US-China LR* 22.

official judicial memo against a person accused of committing a serious crime.[20] The memo should be reasoned and include specific information regarding the home's owner, his or her address, purpose of search, name of authorized officer in charge of the search, the memo's period of validity and its date of issuance. The searching of homes should be carried out during the day light;

> 'a house shall not be entered at night unless it is the scene of a flagrant crime or if the exigencies so warrant'.[21] 'If the person required to be searched is female, she may only be searched by another female delegated for this purpose by the person in charge of the search operation'.[22] And 'sealed or closed documents in any other way found in the house being searched may not be opened by the judicial [i.e. police] officer'.[23]

Regarding correspondence, the same law stated:

a. The Attorney General or one of his assistants may seize letters, communications, newspapers, printed matter, parcels and telegrams at post and telegraph offices when such relate to the crime and its perpetrator.

b. He may also tap telephone and wireless communications and record conversations in private places on the basis of an authorization from the magistrate judge when such is useful in revealing the truth in a felony or a misdemeanour punishable by imprisonment for a term of not less than one year.

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[20] Cf R Genderen, 'Trading Privacy for Security' (2009) 1 *Amst L Forum* 95 (2009).

[21] Art 41.

[22] Art 47.

[23] Art 50, para 3.

c. The search warrant or the tapping or recording authorization must be reasoned and remains in force for a period of not more than fifteen days, subject to renewal once.[24]

Any procedure contrary to these provisions is deemed null and void.[25]

However, the General Intelligence Law No 17 of 26 October 2005[26] gives the intelligence agency the right to 'collate information related to the functions which the law approves and to request such information from the agencies of the National Authority and others without objection'.[27] The law further gives intelligence personnel the power to act as judicial, or police, officers.[28] These stipulations open the door for the intelligence agency to act as a judicial authority without adhering to the aforementioned terms of the Penal Procedures Law. Such rules run against Article 17 of the ICCPR and should be modified. Censorship should be subject to judicial review in all circumstances.[29]

Protection against attacks on one's honour and reputation is guaranteed in both the penal law and law of tort. The (Jordanian) Penal Code No 16 of 10 April 1960,[30] applicable in the West Bank, protects privacy under a chapter entitled 'Crimes against Personal Freedom and Honour'.[31] It punishes anyone who enters the property of others without permission, those who threat to use arms, officials or professionals in charge

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24 Art 51.

25 Art 52.

26 Palestine Gazette No 60, 9 November 2005, 84.

27 Art 11.

28 Art 12.

29 Cf I Vassilaki, 'Crime Investigation versus Privacy Protection - An Analysis of Colliding Interests' (1994) 2 *Euro J Crime, Crim L & Crim Jus* 39(1994); M Ghazvini, Respect for a Victim's Privacy during Police Procedure' (2002) 75 *Police J* 67.

30 Jordan Official Gazette, No 1487, 1 May 1960, 374.

31 Arts 346-367.

of correspondence, such as postal or phone services, who release confidential information without a legal justification. It also sanctions defamation, slander, verbal or material assaults, like throwing dirt on a person or humiliating dead people. Similar rules can be found in the Penal Code Ordinance No 74 of 14 December 1936,[32] applicable in Gaza, in the provisions concerning defamation or destruction of reputation[33] and to the inviolability of homes.[34] Those injured as a result of such crimes have the right of compensation for the damages they sustain in accordance with the Civil Wrongs Ordinance of 20 December 1944,[35] enforceable in both Gaza and the West Bank.[36]

Judicial law guarantees privacy in court proceedings. Although judicial hearings should be held publicly, as a general rule; the law gives criminal or civil courts the right to conduct proceeding in private, i.e. in the presence of the parties, their lawyers and the court officials only, in cases when public order or public morals require so.[37] Family law cases may be held in confidence to preserve the family honour.[38] Judges hearing cases in which children are accused of committing crimes should convene in a different location and time or even outside the court itself. In court, juveniles

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Palestine Gazette, Supp 1, No 652, 14 December 1936, 399.

s 201-209.

294-299.

stine Gazette Supp 1, No 1380, 28 December 1944, 149, Arts 15-25. Chester, J Murphy & E Robb, 'Zapping the Paparazzi: Is the Tort ivacy Alive and Well' (2003) 27 *Adv Q* 357; P Telford, 'Towards ort of Invasion of Privacy' (2004) 29 *Int L Pract* 211; R Brown, aking Privacy: Exclusivity, Private Relation and Tort Law' (2006) *LR* 589.

rocedures Law No 2 of 12 May 2001, Palestine Gazette, No 38, 5 nber 2001, 5, Art 115; Penal Procedures Law No 3 of 12 May 2001, 1, 94, Art 237.

y Procedures Law No 31 of 1959, Jordan Official Gazette, No 1449, vember 1959, 931 Art 46 (West Bank); Family Procedures Law No 28 April 1965, Palestine Gazette, Special Ed, 22 May 1965, 3, Art aza Strip).

should be separated from adults. No one is allowed to attend a juvenile court's session except the probation officer, the child's parents or guardian, the court staff, and persons directly related to the case. Courts sessions are confidential, according to Jordanian Juvenile Rehabilitation Law No 16 of 29 April 1954,[39] applicable in the West Bank.[40]

Notwithstanding the proceeding provisions, Palestine still needs to adopt specific civil and criminal provisions relating to the protection personal privacy, for example by punishing those who invade health confidentiality of patients,[41] hacking databases and electronic communications,[42] and releasing private financial records.[43] It should draw the border between media freedoms and privacy,[44] preserving privacy through

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39 Jordan Official Gazette No 1182, 16 May 1954, 396, Art 7.

40 No similar rule exists in Gaza. The applicable legislation in the Gaza Strip regarding children in conflict with the law is the British-enacted Juvenile Offenders Ordinance No 2 of 18 February 1937, Palestine Gazette No 667, Supp 1, 18 February 1937, 187. See M Qafisheh, 'Juvenile Justice System in Palestine: Current Situation and Reform Prospects' (2011) 25 *Int JL Policy & Fam* 365, 377-378.

41 N Terry, 'Privacy and the Health Information Domain: Properties, Models and Unintended Results' (2003) 10 *Euro J Health L* 223 (2003); J Loughrey, 'The Confidentiality of Medical Records: Informational Autonomy, Patient Privacy, and the Law' (2005) 56 *N Ireland LQ* 293; N Ries, 'Patient Privacy in a Wired (and Wireless) World: Approaches to Consent in the Context of Electronic Health Records' (2006) 43 *Alb LR* 681.

42 J Tealby, 'E-Mail & Privacy at Work' (1999) 10 *JL & Info Science* 207; M Cunningham, 'Privacy in the Age of the Hacker: Balancing Global Privacy and Data Security Law' (2012) 44 *George Washington Int LR* 643; C Scott, 'Our Digital Selves: Privacy Issues in Online Behavioral Advertising' (2012) 17 *Appeal: R Current L & L Reform* 63.

43 N Masete, 'The Challenges in Safeguarding Financial Privacy in South Africa' (2012) 7 *J Int Comm L & Tec* 248; W Voss, K Woodcock, D Dumont & N Wells, 'Privacy, E-Commerce, and Data Security' (2012) 46 *Int Lawyer* 97.

44 R Clarke, 'Privacy and the Media - A Platform for Change' (2012) 36 *Univ W Australia LR* 158; J Lipton, 'Digital Multi-Media and the Limits of Privacy Law' (2010) 42 *Case W Reserve J Int L* 551.

electronic social media networks,[45] and even to protect the right 'to be let alone.'[46]

## 3. Right to freedom of religion

It is undisputed in international law that the right to freedom of religion is a manifestation of the freedom of expression.[47] In this connection, Article 18 of the ICCPR protects that right/freedom in the following terms:

> (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order,

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J Stoddart, 'Privacy in the Era of Social Networking: Legal Obligations Social Media Sites' (2011) 74 *Sask LR* 263.

Sparkes, 'The Right to Be Let Alone: A Violation of Privacy' (1981) *l Australian Society L Phil* 58; N Jacoby, 'Redefining the Right to Let Alone: Privacy Rights and the Constitutionality of Technical rveillance Measures in Germany and the United States' (2007) 35 *orgia J Int & Comp L* 433.

, in general, N Smith, 'Freedom of Religion: The Right to Manifest r Beliefs' (2002) 119 *S Afr LJ* 690; E Wiles, 'A Right to Artistic sphemy - An Examination of the Relationship between Freedom of pression and Freedom of Religion, through a Comparative Analysis f UK Law' (2006) 6 *Univ College Dublin L R* 124; L Junning, 'Freedom of Religion: The Primary Human Right: The World Does Not Belong to Caesar' (2010) 6 *Chinese L & Religion Monitor* 41 (2010).

health, morals or the fundamental rights and freedoms of others.

(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

After stipulating that 'Islam is the official religion in Palestine and respect for the sanctity of all other divine religions shall be maintained',[48] the Palestinian 2003 Basic Law added that

> 'freedom of belief, worship and the performance of religious functions are guaranteed, provided that public order or public morals are not violated' (Article 18).[49]

The British-enacted 1936 Penal Code Ordinance (mentioned above), applicable in Gaza, incorporated a number of provisions that consider as misdemeanour any act that violates the rights of people to practice religion or to manifest religious beliefs, including by destroying religious materials,[50] disturbing gatherings of worshipers,[51] attacking places of worship or cemeteries,[52] and publishing or expressing anything

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48 Art 4, para 1.

49 Cf M Heyward, 'What Constitutes Europe: Religion, Law and Identity in the Draft Constitution for the European Union' (2005) 1 *Hanse LR* 227; T Stahnke & R Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2007) 5 *Int J Civil Society L* 43; I McLean & S Peterson, 'Entrenching the Establishment and Free Exercise of Religion in the Written U.K. Constitution' (2011) 9 *Int J Const L* 230.

50 Art 146.

51 Art 147.

52 Art 148.

that humiliates or disrespects the religious feelings.[53] Similar provision can be found in the West Bank 1960 Penal Code.[54]

The law in Palestine allows each sect to organize its own religious affairs, including family status laws,[55] religious endowments,[56] or administrating places of worship,[57] based on religious beliefs and tradition.[58] The law obliges schools to teach children no religion except their own.[59] Religious minorities, particularly Christians, are accorded the right to exercise their own sacred holidays and weekends.[60] A number of seats in parliament[61] and municipalities[62] are reserved for religious minorities.[63]

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53 Art 149.

54 Arts 273-278.

55 M Qafisheh, 'The Dilemma of Legislative Reform in Line with International Standards on Gender Equality in the Islamic World: The Case of Palestine' (2013) 1 *Int J Legis Draf & L Reform* 219.

56 Charitable Trusts Ordinance of 1 October 1924; in R Drayton (ed), *The Laws of Palestine in Force on the 31st Day of December 1933* (1934), 125.

57 Land Registration Fees Law No 26 of 26 May 1958, Jordan Official Gazette No 1385, 1 June 1958, 549, Art 4; Law concerning the Exemption of the Charitable Endowments from Taxes and Fees No 36 of 27 June 1973, Jordan Official Gazette No 2432, 16 July 1973, 1352.

58 Law of the Jerusalemite Greek Orthodox Patriarchate No 27 of 26 March 1958, Jordan Official Gazette No 1385, 6 January 1958, 556.

59 Education Law No 16 of 11 May 1964, Jordan Official Gazette No 1763, 26 May 1964, 720, Arts 71 and 77.

60 Decision of the Council of Ministers No 217 of 23 December 2004 concerning the Official and Religious Holidays for the Government Employees, Palestine Gazette No 55, 27 June 2005, 152; Decision of the Council of Ministers No 125 of 11 November 2006 concerning the Holiday of Christian Private Schools, Palestine Gazette No 69, 27 April 2007, 190.

61 Decree-Law No 1 of 2 September 2007 concerning General Elections, Palestine Gazette No 72, 9 September 2007, 2.

62 Presidential Decree No 10 of 22 March 2005 on the Number of Members of the Municipal Council of the Municipality of Bethlehem and Similar Cities, Palestine Gazette No 55, 27 June 2005, 75.

63 Cf G Gilbert, 'Religious Minorities and Their Rights: A Problem of Approach' (1998) 5 *Int J Minority & Group Rts* 97; J Rehman, 'Accommodating Religious Identities in an Islamic State: International

It can thus be concluded that the applicable law in Palestine is generally in agreement with Article 18 of the ICCPR.

Nonetheless, religious laws of various groups discriminate against or prevent persons from another religion to enjoy certain rights, for instance by prohibiting the marriage with a person because he or she believes in another religion,[64] the non-acceptance of the testimony of witnesses affiliated with another religion;[65] and denying the inter-religion inheritance amongst family relatives.[66] Such religious-based discriminations do not only affect the 'freedom to have or to adopt a religion or belief of his choice' but it also runs contrary to Article 18 of the Universal Declaration of Human Rights that gives everyone the 'freedom to change his religion or belief'. If the person, for instance, risks losing his or her spouse or the right of inheritance; such person's freedom to change religion might be affected.[67] Such provisions can be changed by, for example, adopting a civil uniformed personal status law in Palestine that could be introduced as an optional possibility for those individuals who opt for governing their family lives under such a law.[68]

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Law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7 *Int J Minority & Group Rts* 139; M Crouch, 'Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities' (2007) *Sing JL Studies* 96.

64 Qafisheh, above n 55, 227-228.

65 See, for example, [Muslim] Personal Status Law No 61 of 1 December 1976, Jordan Official Gazette No 2668, 1 December 1976, 2756, Art 16; Personal Status Law for Syrian Orthodox of 3 April 2000, enacted in Jerusalem on 9 September 2000, Art 3.

66 Qafisheh, above n 55, 231-233.

67 Cf M Shava, 'The Effect of a Change of Religion on Jurisdiction in Matters of Personal Status' (1984) 10 *Tel Aviv Univ LR* 177; N Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory Int LR* 477.

68 Qafisheh, above n 55, 228.

## 4. Freedom of opinion

Article 19 of the ICCPR guarantees the freedom of opinion as follows:

> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 3 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In Palestine, Article 19 of the 2003 Amended Basic Law provides similar provision to that of ICCPR; with the rule and an exception:

> Freedom of opinion may not be restricted. Every person shall have the right to express his opinion and to circulate it orally, in writing or in any form of expression or art, with due consideration to the provisions of the law.

While paragraphs 1 and 2 of Article 19 of the ICCPR deal with the freedom of opinion and expression, paragraph

2 relates to the restrictions that might be imposed on such freedoms. We will first look at the right then touch upon its exception.[69]

The primary legislation that regulates the freedom of opinion and expression in Palestine is the Press and Publication Law No 9 of 25 June 1995.[70] This 'law' was enacted by the President Y Arafat before the parliamentary election that took place for the first time in Palestine in January 1996. Thus the law can be considered as rather an executive order as it has never been adopted by the Palestinian Legislative Council.[71]

Article 2 of this law draws the framework for the freedom: 'Journalism and press are free. The freedom of opinion is guaranteed. Every Palestinian may express his opinion freely by speaking, writing, filming and painting in all expression and media outlets'. The law continues by prescribing the freedom of expression for political parties, non-governmental organizations, newspapers, professional syndicates;[72] the right to own media or publishing institutions;[73] and obligation of official bodies to facilitate the missions of journalists.[74] These stipulations can be viewed as concrete materialisation of the principles outlined in Articles 19 of both the ICCPR and the Basic Law.[75]

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69 J Raz, 'Free Expression and Personal Identification' (1991) 11 *Ox JL Studies* 303; P Horwitz, 'Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law' (2000) 38 *Osg Hall LJ* 101; D Meyerson, 'The Legitimate Extent of Freedom of Expression' (2002) 52 *Univ Toronto LJ* 331; D Pretorius, 'Freedom of Expression and the Regulation of Broadcasting' (2006) 22 *S Afr J Hum Rts* 47; D Iancu, 'Freedom of the Press - A Component of Freedom of Expression' (2010) *Acta Universitatis Danubius Juridica* 57.

70 Palestine Gazette No 6, 29 August 1995, 11.

71 For a history on legislative process in Palestine, see: M Qafisheh, 'Legislative Drafting in Transitional States: The Case of Palestine' (2013) 2 *Int J Legis Draf & L Reform* (forthcoming).

72 Art 4.

73 Art 5.

74 Art 6.

75 The copyright in the country is guaranteed by the English Copyright

In subsequent articles, however, the Press and Publication Law retracted by imposing restrictions on the freedom of opinion. Certain restrictions can be viewed as a reasonable application of paragraph 2 of Article 19 of the ICCPR. Others are controversial.

The first category of restrictions incorporates a number of reasonable constrains. For example, no publication that targets children or adolescents may contain photos comprising immoral images or stories.[76] Journalists' code of conduct should comprise the principles of respecting the rights and privacy of others (see section 1 above).[77] Journalists should behave in balanced, objective, accurate manner and avoid propaganda for violence, sectarian divide or racism.[78] Publishing houses are under an obligation to pursue transparent funding

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Act of 16 December 1911, which was extended to Palestine by Royal Order on 21 March 1924 (Drayton, above n 56, 3204). The Act, which is still applicable in both the Gaza Strip and the West Bank, protects various authors' rights pertaining to literature, music, drama, artistic works, including books, novels, maps, charts, engineering drawings, oil paintings, cartoons, animations, movie direction, statues, photos, carvings, songs, inscriptions, dance tunes and plays. Such protection includes publishing or re-publishing, lecturing, performing, translating, recording, broadcasting, playing in the cinema or the theatre, selling, renting, distributing, granting as a gift or in the form of a will, and passing rights to heirs. For details on the cultural life as a means for expressing tradition and art, see M Qafisheh, 'The Human Rights Obligations of the State of Palestine: The Case of the International Covenant on Economic, Social and Cultural Rights' in Qafisheh (ed), *Palestine Membership,* above n 4, 229-234.

[76] Art 7, para 2. Cf I Cram, 'Criminalising Child Pornography - A Canadian Study in Freedom of Expression and Charter-led Judicial Review of Legislative Policy-Making' (2002) 66 *J Crim L* 359; M Storrow & R Millen, 'Child Pornography and Freedom of Expression in Canada and the U.S.A.' (2003) 61 *Adv (Vancouver B Asso)* 825.

[77] S Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26 *Am Univ Int LR* 183; B Quistgaard, 'Pornography, Harm, and Censorship: A Feminist Re(Vision) of the Right to Freedom of Expression' (1993) 52 *Univ Toronto Faculty LR* 132.

[78] Art 8.

channels, clear management structure, and valid legal status.[79] Obviously, the purpose of such restrictions is to 'respect of the rights or reputations of others' or to preserve 'public order (*ordre public*), or of public health or morals', as enshrined in paragraph 2 of Article 19 of the ICCPR.[80]

Rules that impose restrictions on the freedom of expression are many. It suffices to mention the following instances:

(I) the series of approvals that one should acquire from the Ministry of Information, such as
  (a) approval for any foreign financing, without specifying what 'finance' means,[81]
  (b) approval and notification of the Ministry for importing periodicals two weeks in advance,[82]
  (c) approval for anyone who wants to sell publications,[83] and
  (d) personal approval of the Minister of Information for importing any 'prohibited materials' by governmental bodies, universities and research institutions;[84]

(II) the prohibition to work with any foreign news agency without obtaining a permission based on executive regulation;[85]

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79 Arts 11-16.

80 J Moses, 'Hate Speech: Competing Rights to Freedom of Expression' (1996) 8 *Auck Univ LR* 185; A Reichman, 'The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law' (2007) 31 *Fordham Int LJ* 76; O Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 *Tulsa J Comp & Int L* 1.

81 Art 9.

82 Arts 34-35.

83 Art 36.

84 Art 38.

85 Art 10. The said regulation has not been issued yet.

(III) widening the types of 'banned items', by using vague language, that would lead to a series of works that cannot be published;[86] and

(IV) prescribing a number of strict penalties for the so called 'publishing crimes'.[87]

The said law requires any media agency to own minimum capital of about 35,000 United States Dollars.[88] This sum is relatively huge and poses difficulties on low income journalists to initiate private media business. Being enacted in 1995, the law has not taken electronic evolutions into account, whereby any individual might initiate media outlet at low or no cost. That is particularly clear regarding the constrains imposed on permitting foreign media agencies and distributing foreign publications;[89] as if publishers would need permissions to enter the country at this age of open media through the internet, digital communicants and satellite stations. Such restrictions do not only contradict Article 19 of the ICCPR but they are also out of touch and cannot be effectively enforced. Such senseless measures ought to be legally removed.[90]

Penal codes punish what is called 'state security crimes', as depicted in the 1960 Code,[91] or 'offences against public

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86 Art 37.

87 Arts 44-48.

88 Art 21, para 1.

89 Arts 27-29.

90 R Dawkins, 'Online Liberty: Freedom of Expression in the Information Age' (2001) 10 *Dal JL Studies* 102; D Collier, 'Freedom of Expression in Cyberspace: Real Limits in a Virtual Domain' (2005) 16 *Stellenbosch LR* 21; A Marsoof, 'Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression' (2011) 19 *Int JL & Info Tech* 110; N Lucchi, 'Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression' (2011) 19 *Cardozo J Int & Comp L* 645.

91 Arts 107-153.

order', as referred to by the 1936 Ordinance,[92] posing serious derogation from the freedom of opinion. The problem arises from the broad drafting, in both substantive provisions and terminology, in a number of articles that might be interpreted in conflicting ways whereby the accused person may receive different penalties depending on the authority that exercises judicial power in certain contexts.[93] Certain 'security crimes' are harshly punished, often by death sentence. Instances of vague language in the Jordanian 1960 Code of the West Bank include a provision that states that 'any person who commits acts, writings or plans that are not permitted by the government' which 'endangers' the country or 'damages its relations with a foreign States' would be jailed for five years.[94] Examples of vague terms comprise 'conspiracy',[95] 'weakening national feeling',[96] and 'incitement'.[97] Some of these terms were not defined at all, such as passing 'information to a foreign State',[98] 'changing the constitution through illegal means',[99] or preventing the 'authorities from exercising constitutional powers'.[100] Similar instances can be found in the British-enacted 1936 Criminal Code Ordinance, currently valid in Gaza. This legislation used a number of vague words to describe crimes that would be sanctioned by death, such as 'conspiring' and 'treason'.[101] The Code regulated what it called 'seditious intention';[102] criminalized individuals who 'conspire' with others to do any act in furtherance of any seditious

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92 Arts 49-105.

93 Cf R Atkey, 'Reconciling Freedom of Expression and National Security' (1991) 41 *Univ Toronto LJ*38 .

94 Art 118, para 2.

95 Art 107.

96 Art 130.

97 Art 145.

98 Art 111.

99 Art 136.

100 Art 138.

101 Art 49.

102 Arts 59-61.

intention, or 'publish' any words or document with a seditious intention, or is found in possession of a document containing a seditious intention.[103] 'Seditious' is 'an intention to bring into hatred or contempt or to excite disaffection' against the head of the state, 'to rise discontent or disaffection amongst inhabitants of Palestine', or 'to promote feelings of ill-will and hostility between different sections of the population'.[104] The Ordinance, furthermore, jails with a three-year term anyone who disseminates statements that 'disturb public peace'.[105]

Other types of legislation restrict the freedom of opinion in a violation of Article 19 of the ICCPR, including the following: Political Parties Law No 15 of 30 March 1955,[106] which gives the government an absolute right to issue or withhold permission or to dissolve any political party without a right for that party to challenge such dissolution at courts;[107] Resistance of Communism Law No 91 of 8 December 1953,[108] which criminalize any person who affiliates with 'communism', publish or assist in publishing or distribution of any 'pro-communist publication'; and Regulation No 182 of 14 December 2004 on Licensing of the Radio, Television, Satellite and Wireless Stations,[109] which gives the government an ultimate power to permit and to oversee the media. It retains for the government an exclusive right to run religious channels.

In order to be consistent with Article 19 of the ICCPR, Palestine needs to abolish or modify the legislative stipulations that restrict the freedom of opinion and to replace them with enactments that maintain the restrictions, if any, as exceptional measures for specific situations referred to in paragraph 2 of the said ICCPR article.

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[103] Art 59.
[104] Art 60.
[105] Art 62.
[106] Jordan Official Gazette No 1223, 3 April 1955, 278.
[107] Arts 5-6 and 10.
[108] Jordan Official Gazette No 1164, 16 December 1953, 785.
[109] Palestine Gazette No 54, 23 April 2005, 90.

## 5. Peaceful assembly

Article 21 of the ICCPR stated:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

The 2003 Amended Palestinian Basic Law endorsed the principle of freedom of peaceful assembly in its Article 26, paragraph 5, which gives Palestinian citizens the right to 'conduct private meetings without the presence of police and to organize public meetings, gatherings and demonstration, *within the limits of the law*'.[110]

In Palestinian legislation, the right of peaceful assembly has been recognized by the Public Meetings Law No 12 of 28 December 1998.[111] Article 2 of this legislation stipulates that:

> 'Citizens shall have the right to feely hold public meetings, seminars and demonstrations. No restrictions may be placed on holding of such meetings except in accordance with this law'.

Restrictions on such meetings include the 'notification' of the police by the assembly's organizers forty-eight hours before the convention of the meeting.[112] The police,

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[110] Emphasis added.

[111] Palestine Gazette No 28, 13 March 1999, 6.

[112] Art 3.

> 'without prejudice to the right of meeting, may place restrictions on the duration or route of the meeting [...] for the object of organizing the traffic'.[113]

The notification does not mean approval. Thus if the organizers do not receive a response from the police, they 'may hold the public meeting at the fixed time in the manner stated in the notice'.[114] The police may

> 'upon the organizer's request, take precautionary measures, provided that such measures shall not cause any infringement upon the freedom of the attendees and the proceedings of the meeting'.

This shows that the local law does recognize the right of peaceful assembly with limits within the scope of Article 21 of the ICCPR.

On 30 April 2000, however, the Palestinian Minister of Interior enacted Rules to implement the Public Meeting Law.[115] The Rules reaffirmed the provisions of the said law, adding certain stipulations that might be deemed as part of the public order purposes, such as organizing the meeting away from places of tension;[116] assigning police officers to protect the meeting;[117] the power of the police to end the meeting if it exceeds its purposes;[118] the possibility for the police to intervene if the meeting turned violent or if the personal safety or property of individuals is endangered;[119]

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113 Art 4, para C.

114 Art 4, para D.

115 Decision of the Minister of Interior Relating to Issuance of the Executive Rules of the Public Meetings Law No 12 of 1998 No 1 of 2000, Palestine Gazette No 33, 30 June 2000, 68.

116 Art 4.

117 Art 5.

118 Art 6.

119 Art 7.

and the prohibition of those participating in the meeting to wear masks or carry guns.[120]

Yet two provisions of the Rules are problematic.

Article 9 of the Rules made any public meeting subject to the limitations of the Presidential Decree Relating to the Consolidation of National Unity and the Prevention of Incitement No 3 of 19 November 1998.[121] This Decree comprised vague terms that can be interpreted by the police in various ways and might be used as a pretext to restrict the organization of public meetings. Such terms include 'incitement for violence that harms the relations with brother or foreign States', 'disturbing the life', 'provoking people's emotions', 'incitement for sedition' and 'incitement to break treaties signed between the Palestine Liberation Organization and other brother or foreign States'. By using such terms in the context of Public Meetings Law, the Rules imply that any meeting suspected, in the view of the police, of being motivated by any of the aforementioned purposes might be banned.

The preceding conclusion holds particularly true since Article 10 of the said Rules turned the 'notification' by the organizers into 'application'. It likewise turned the response of the police to that notification into 'permission'. This article provided:

> 'The response of the police to the notification [...] shall take the form of written *permission* according to the formula that can be decided by the Director-General of the Police which may include the following [...] (f) any other conditions'.[122]

Obviously, the Rules give the police an absolute discretion to decide upon the limitations on public meetings which might

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[120] Art 8.

[121] Palestine Gazette No 26, 26 November 1998, 11.

[122] Emphasis added.

lead to the actual denial of the right of peaceful assembly. Such derogation, in turn, runs contrary to not only Article 21 of the ICCPR but also to the provisions of the 1998 Public Meetings Law.

Lastly, a note might be made on the right of peaceful assembly for non-citizens. The Public Meetings Law refereed only to the right of 'citizens' to hold meetings, a derogation clause that does not exist in Article 21 of the ICCPR.[123] The Palestinian legislator might, in order to harmonize its legislation with the Covenant, consider modifying this condition and give the right of peaceful assembly to 'everyone' regardless of nationality.

In order to conform to the ICCPR, the Palestinian legislator needs to contemplate revoking the Minister of Interior Rules of 2000. The 1998 Law by itself is self sufficient and does not need executive rules that undermine its provisions.[124]

## 6. Freedom of association

Article 22 of the ICCPR relates to the freedom of association, or the formation of non-governmental organizations (NGOs). It reads as follows:

> (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in

[123] Human Rights Committee, General Comment No 15, 11 April 1986, 'The Position of Aliens under the Covenant', para 7, UN Doc. HRI/GEN/1/Rev.7 ('Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', 12 May 2004), 140.

[124] See, in general, M MacGuigan, 'Hate Control and Freedom of Assembly' (1966) 31 *Sask B Rev* 232; D Barnum, 'Freedom of Assembly and the

> the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The freedom of association in Palestine is a constitutional right referred to twice in the Basic Law.[125] Article 26 gives the 'Palestinians', *inter alia*, the right to 'form, establish and join political parties in accordance with the law';[126] and to 'form and establish unions, associations, societies, clubs and popular institutions in accordance with the law'.[127] Article 25, paragraph 2, added that the 'organization of unions is a

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Hostile Audience in Anglo-American Law' (1981) 29 *Am J Comp L* 59; M Hamilton, 'Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-Limiting Principles in the Context of Transition' (2007) 27 *Ox JL Studies* 75; C Pakozdy, 'The Power of State versus Freedom of Assembly in the Light of the Case-Law of the European Court of Human Rights and the Hungarian Jurisprudence' (2007) 4 *Miskolc J Int L* 46.

[125] See, as a background, L Welchman, 'In the Interim: Civil Society, the Shar'i Judiciary and Palestinian Personal Status Law in the Transitional Period' (2003) 10 *Islamic L & Society* 34; A Schwartz, 'The Leadership Role of Palestinian Non-Governmental Organizations: Managing Chaos, Creating Civil Society' (2004) 2 *Int J Civ Society L* 63; R Nicholson, 'Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts' (2012) 39 *Syracuse J Int L & Comm* 381.

[126] Para 1.

[127] Para 2.

right that shall be regulated by the law'. Whereas Article 26 mentioned the 'Palestinians', implying a *citizen's right*, Article 25 used more neutral language, indicating a *human right*. It can be, from the outset, recommended that the Palestinian legislator to recognize the right to associate for all peoples in Palestine, citizens and aliens alike, if it wishes to be fully consistent with Article 22 of the ICCPR.[128] We will explore the status of foreign associations in some detail below.

On these details, the regularization of the status of associations has been set forth in Law No 1 concerning Charitable Associations and Civil Society Organizations of 16 January 2000.[129] This law gives civil society organizations the right to operate freely.[130] It prescribes rules on the registration of an NGO at the Ministry of Interior,[131] the formation of the association's standing order,[132] NGO's administration (its board of managers and general assembly),[133] its financial resources,[134] programmes, activities, and the right to establish branches.[135] The law recognizes an independent juridical personality for each association,[136] whereby an NGO may own property,[137] establish networks and unions and affiliate with global bodies,[138] and to have separate budget.[139] The NGOs law exempts associations from taxation, customs and allows them to raise funds.[140]

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[128] Human Rights Committee General Comment No 15, above n 123, para 7.
[129] Palestine Gazette No 32, 29 February 2000, 71; hereinafter referred to as 'NGOs law'.
[130] Art 1.
[131] Art 3.
[132] Art 5.
[133] Arts 16-25.
[134] Arts 32-33.
[135] Art 15.
[136] Art 7.
[137] Art 9.
[138] Arts 26-27 and 29.
[139] Arts 30-31.
[140] Art 14.

The NGOs law comprises measures to ensure the freedom of association. Although it gives the Ministry of Interior the power to license associations, it obliges the Ministry to approve the NGO's foundation within two months starting from the date of application by the founders. If no response from the Ministry is communicated to the applicants, or if the refusal of the Ministry does not contain specific reasons exclusively enumerated in Article 21 of the Bylaws No 9 of 29 November 2003 of the Law concerning Charitable Associations and Civil Society Organizations,[141] the association would be *ipso facto* considered as being licensed.[142] In case the Ministry rejects the NGO's establishment, the founders can appeal to the High Court of Justice which reserves the final decision on the association's fate.

The law fixed a number of specific instances upon which the association might be dissolved by the Ministry of Interior, such as the cessation of the NGO's activities in its first year of opening.[143] In case of the NGO's dissolution by the Minister which should be, by the virtue of the law, reasoned; the association may appeal to the High Court of Justice. While awaiting the Court's decision on its destiny, the NGO has the right to continue operating until rendering the Court's final judgment.[144]

To remove any doubt on the possibility for non-Palestinians to establish associations in the country, Article 34 of the NGOs law permitted the establishment of 'foreign' associations. Such associations and their status have been set up by the aforementioned 2003 NGO Bylaws.[145] Accordingly, a 'foreign association' has been defined as any NGO that 'its headquarters is located outside Palestine or if the majority of

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[141] Palestine Gazette No 49, 17 June 2004, 102.

[142] Art 4.

[143] Art 37.

[144] Art 38.

[145] Arts 24-35.

its members are non-Palestinians'.[146] With a few procedural exceptions pertaining to the required documentations relating to the evidence of the NGO's status in its country of origin, the establishment procedures of foreign NGOs are rather similar to the steps concerning Palestinian NGOs.

The NGOs law and its bylaws referred to professional associations to which additional rules may apply.[147] The legislation relating to these professional associations include, for example, Journalists Syndicate Law No 17 of 29 December 1952;[148] Medical Association Law No 14 of 4 April 1954, which sets rules relating to the rights of those practicing medical profession;[149] Engineers Association Law No 18 of 10 February 1958;[150] Legal Profession Law No 3 of 24 June 1999,[151] which regulates the work of the Palestine Bar Association;[152] and Law of General Union of Palestinian Industries and the Specialized Industries Unions No 2 of 21 January 2006.[153] Moreover, one may consider chambers of commerce as unions, or NGOs, of business people operating at districts' levels, as it appears from the Decree-Law No 9 of 4 August 2011 concerning Champers of Commerce and Industries.[154] These professional associations or unions depend almost exclusively on their own laws which are self-sufficient and operate independently from the NGOs law. Each of these NGOs is overseen by a given ministry and report to its general assembly.[155]

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146 Art 24, para 1.

147 Art 40 of the Law; Art 68 of the Bylaws.

148 Jordan Official Gazette No 1131, 17 January 1953, 477.

149 Jordan Official Gazette No 1179, 17 April 1954, 322.

150 Jordan Official Gazette No 1373, 13 March 1958, 310.

151 Palestine Gazette No 30, 10 October 1999, 5.

152 See also Bar Association Bylaws of 22 September 2000, Palestine Gazette No 34, 30 September 2000, 117.

153 Palestine Gazette, Special Ed, 14 February 2006, 18.

154 Palestine Gazette No 92, 25 December 2011, 5.

155 Cf J Nicod, 'Freedom of Association and Trade Unionism: An Introductory Survey' (1924) 9 *Int Lab R* 467; E Daya, 'Freedom of Association and Industrial Relations in Asian Countries: II' (1955) 71 *Int Lab R* 467;

Most associations are admissible for citizens only.[156] When open for aliens, the membership is made conditional to the principle of reciprocity. Such restriction might contradict Article 22 of the ICCPR. It ought to be modified to allow aliens who meet professional requirements of a given association to obtain its membership without the condition of reciprocity. People with professional capacities should be judged based on the merits of their technical capacities and not be held captive to their governments' politics to which, by and large, they have nothing to do.

It might be relevant to point out that the majority of legislation that govern associations have been developed during the Jordanian rule and apply in the West Bank only, i.e. not in the Gaza Strip. Such laws are not only outdated and need update in the light of universal standards but also contradict the fact that the State of Palestine would be established in both Gaza and the West Bank; setting up modern and unified laws for these associations would strengthen Palestinian national unity.

There is a legislative gap regarding political parties in Palestine.[157] As mentioned above, the 1955 Political Parties

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R Vernengo, 'Freedom of Association and Industrial Relations in Latin America: II' (1956) 73 *Int Lab R* 592; J Hallsworth, 'Freedom of Association and Industrial Relations in the Countries of the Near and Middle East: I' (1954) 70 *Int Lab R* 363; T Madima, 'Freedom of Association and the Concept of Compulsory Trade Union Membership' [1994] 3 *J S Afr L* 545.

156 Journalists Syndicate Law No 17 of 29 December 1952, Jordan Official Gazette No 1131, 17 January 1953, 477, Art 25; Engineers Association Law No. 18 of 10 February 1958, Jordan Official Gazette No 1373, 13 March 1958, 310, Art 7; Legal Profession Law of 1999, Art 3; Pharmaceutical Association Law No 10 of 18 February 1957, Jordan Official Gazette No 1323, 17 March 1957, 283, Art 6; Dentists Association Law No 11 of 27 February 1956, Jordan Official Gazette No 1265, 17 March 1956, 1350, Art 8.

157 Cf O Akbulut, 'Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties' (2010) 34 *Fordham Int LJ* 46.

Law is still enforced in the West Bank; no law on political parties exists in the Gaza Strip. Although it is effectively impracticable due the lapse of time since its adoption and the subsequent developments that occurred since then, this law might be used to suppress political opponents as it gives the government a power to permit or dissolve any political party. The law provides no right for the dissolved party to challenge such dissolution at any court.[158] As the Palestinian constitutional system has become 'democratic parliamentary system based on political and party pluralism',[159] the *raison d'être* of the Political Parties Law, which was set to suit a regime of absolute monarchy, has ended.

Moreover, the legislative gap with regard to political parties is probably a positive sign. It implies that people are free to form political parties as they wish based on the rule 'everything which is not forbidden is allowed', an uncontested principle in the Palestinian legal system. The freedom of forming political parties can be understood from the said Article 5 of the 2003 Basic Law and from the election legislation that has been applied since the establishment of the Palestinian Authority that based election on multi-party system. In fact, no one is now allowed to run for parliamentary election except if he or she is affiliated with an 'electoral list',[160] i.e. political party.

The foregoing discussion reveals that the freedom of association as it relates to the formation of political parties is effectively guaranteed in Palestine.

Ambiguity surrounds the freedom of association in both the 1960 Penal Code,[161] in the West Bank, and the 1936 Penal Code Ordinance of Gaza.[162] Both codes are almost identical regarding the formation of 'unlawful associations'. Without setting a clear definition of such associations, the codes

[158] Arts 5-6 and 10.

[159] Amended Basic Law of 2003, Art 5.

[160] Decree-Law of 2007 concerning General Elections, above n 61.

[161] Arts 159-163.

[162] Arts 69-73.

penalize members affiliated with organizations that intend, for example, to overthrow the constitution 'by revolution or sabotage'.[163] This may justify attacks on NGOs and on political parties that criticize official policies. In particular, Article 161 of the 1960 Code imposes further penalties on any

> 'person who speaks, writes, advocates, or encourages any act declared to be unlawful under Article 159 [i.e. 'overthrowing the constitution by revolution']'.[164]

The latter article considers 'unlawful association' any

> 'organization that continues to operate despite failing to notify its rules to the government or having been dissolved'.

It also outlaws

> 'any branch, centre, committee, group or faction of an unlawful association and any institution or school operate under the instruction of an unlawful association'.[165]

Such provisions undermine the freedoms of association and expression as enshrined in Articles 22 and 19 of the ICCPR.

After defining the status of non-governmental organizations in the 2000 NGO law, there is no reason to maintain the rules of penal codes relating to associations. One could even conclude that, despite the fact that freedom of association stipulations were not explicitly repealed by the 2000 law; the latter law had implicitly (by introducing rules on identical issues) repealed the older stipulations and may prevail in cases of conflict. Yet it is significant to explicitly revoke the

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[163] Art 159 of the Code; Art 69 of the Ordinance. Both articles are identical, *mutatis mutandis*.

[164] See the identical Art 71 of the 1936 Criminal Ordinance.

[165] See also Art 69(c) of the 1936 Ordinance.

above articles of penal codes to avoid potential confusion and to secure greater freedom of association.[166]

A word must be said about paragraph 3 of Article 22 of the ICCPR concerning labour unions.[167] Assuming that it would be interested in becoming party to the Convention concerning Freedom of Association and Protection of the Right to organize of 9 July 1948,[168] mentioned in the said paragraph 3, Palestine will be obliged to give specific rights for labour unions in accordance with the Convention. Palestine should give

> '[w]orkers and employers [...] the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'.[169]

'Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority'.[170] Nothing in the Palestinian Labour Law No 7 of 30 April 2000[171] prevents workers' or employers' associations to form unions. Article 53, paragraph 3, of the Labour Law on collective

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166 M Qafisheh, 'Human Rights Gaps in Palestinian Criminal System: A United Nations Role?' (2012) 16 *Int J Hum Rts* 358, 366.

167 See, in general, J Servais, 'ILO Standards of Freedom of Association and Their Implementation' (1984) 123 *Int Lab R* 765; L Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Indus LJ* 1; C Albertyn, 'Freedom of Association' (1990) 1 *S Afr Hum Rts YB* 297; L Pawluk, 'Freedom of Association in Labour Relations' (1991) 49 *Adv (Vancouver B Asso)* 905; K Norman, 'ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep' (2004) 67 *Sask LR* 591.

168 ILO No 87. See H Dunning, 'The Origins of Convention No 87 on Freedom of Association and the Right to Organize' (1998) 137 *Int Lab R* 149; L Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1998) 137 *Int Lab R* 169.

169 Convention concerning Freedom of Association and Protection of the Right to Organize, Art 2.

170 *Ibid*, Art 4.

171 Palestine Gazette No 39, 25 November 2001, 7.

bargaining between the union of employers' associations and the union of workers' associations, implies that workers as well as employers may establish such unions.

The Labour Law defined 'association' as 'any professional organization established in accordance with the law of unions'.[172] This law of unions has not been enacted yet. Paragraph 3 of Article 22 of the ICCPR would be most suitably linked to this to-be-enacted 'law of unions'. If it interested to conform to universal human rights and labour standards, the legislator may not subject labor unions to the general stipulations of the 2000 NGO law, as elaborated above. Unions should be ruled based on the said 1948 Convention that does not allow any authority to intervene in labour unions' affairs, including the no need to obtain governmental permission for unions' operations and the inability of authorities to dissolve unions.

It is to be finally noticed that the 2000 Labour Law has repealed the Jordanian Labour Law No 21 of 14 May 1960,[173] which was applicable in the West Bank. The latter law included detailed provisions on the workers' and employers' unions.[174] As just explained, the 2000 law came silent regarding such unions. It merely referred to a law that was projected to be endorsed but it has not been adopted yet. This left labour unions without clear legal basis, a backward step in comparison with the forty-year older Jordanian law. In the Gaza Strip, however, labour unions are regulated by the Labour Unions Order No 331 of 24 October 1954,[175] which has been enacted under the Egyptian rule. This order is still applicable in Gaza as its provisions were not included in the Gazan Labour Law No 16 of 14 November 1964[176] that has been applicable under

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[172] Art 1.

[173] Jordan Official Gazette No 1491, 21 May 1960, 511.

[174] Arts 68-89.

[175] Palestine Gazette No 41, 15 November 1954, 1039.

[176] Palestine Gazette, 15 December 1964, 1859.

Egyptian administration and therefore escaped being repealed by the 2000 Labour Law that revoked the said Gazan labour law. This situation led to different applicable rules on labour unions in Gaza and the West Bank. Such anomalous situation should be changed by adopting a modern Palestinian law on labour unions based on the aforesaid 1948 ILO Convention.

## 7. Conclusion

Notwithstanding the positive aspects embedded in the applicable local law in the West Bank and Gaza presented above, the lack of clear and comprehensive regulation of the freedom of expression does not only contradict international law, but also give rise to abuses of various components of such freedom.[177] Thus, Palestinian authorities (police, intelligence, ministries, and even courts) do not fully adhere to the law freedom of expression. Crackdown on political parties, notably since the takeover of Gaza by Hamas movement in June 2007,[178] is an ongoing phenomenon.[179] Invading and searching homes without observing even local laws is a standard practice by Palestinian security forces.[180] Attacks on associations and shutting down media stations are practiced.[181] Peaceful

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[177] The term 'authorities' refers to the two existing Palestinian governments: the government in the West Bank led by Fatah party, and the Gaza Strip government led by Hamas party.

[178] M Qafisheh, 'The State of Emergency in Palestine in Light of the International Covenant on Civil and Political Rights' (2013) *Hebron University Research Journal* (forthcoming).

[179] See, for example, Palestinian Independent Commission for Human Rights, *Report on the Human Rights and Freedoms in the Palestinian National Authority Territory for the Month of January 2013*, 5 February 2013, 6-8.

[180] See, for instance, Amnesty International, 'Fear of torture or other ill-treatment,' AI Index: MDE 21/004/2008, 6 August 2008; *Haaretz*, 'Palestinian Authority arrests more than 100 following death of Jenin governor', 25 June 2012.

[181] Qafisheh, above n 166, 366.

assembly (public meetings, demonstrations) are often denied or forcibly confronted.[182] Arbitrary detaining and torturing activists over political views have been repeatedly reported by local and international human rights groups.[183]

Worse yet, Palestinian courts do violate the freedom of expression by endorsing the arrest of journalists who criticize senior officials. The judgment of the Bethlehem Court of Appeal on 28 March 2013, which upheld the Decision of the Bethlehem Magistrate Court to imprison Journalist M Hamamrah who was accused of depicting on his Facebook page President M Abbas through an image that presents Abbas as a collaborator,[184] is a case in point.[185] Although President Abbas exercised his constitutional power to pardon Mr Hamamrah on the same day of the court's ruling, such judgment manifests the gap that exists in the legislative and judicial guarantees that effectively safeguard the freedom of expression in Palestine.[186]

Much legislation in the West Bank differs from that of Gaza, threatening the geographical integrity of the Palestine's territory.[187] Significant number of laws relating to the freedom of expression, for example the English Copyright Law of 1911 and the Jordanian 1955 Political Parties Law, are outdated and do not, by their very nature as old instruments, take into

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182 See, *inter alia*, Maan News, '[Palestinian] security forces arrest four while forcibly storming Liberation Party's Demonstration', 4 May 2013.

183 See, e.g., Human Rights Watch, *Palestinian Authority: Hold Police Accountable for Ramallah Beatings*, **27 August 2012.**

184 Cf A Mal & J Parikh, 'Facebook and the Right to Privacy: Walking a Tight Rope' (2011) 4 *NUJS L R* 299.

185 Palestine: Bethlehem Court of First Instance in its capacity as Court of Appeal, Judgment No 128/2012, 28 March 2013; *Al-Hayat*, No 6251, 28 March 2013, 1 and 19.

186 Cf R Segev, 'Freedom of Expression: Criticising Public Officials' (2009) 2 *Amst L Forum* 77.

187 See, in general, F Milhem, *The Origins and Evolution of the Palestinian Sources of Law* (Brussel: Vrije Universiteit, Faculty of Law, 2004 – unpublished PhD dissertation).

account subsequent international human rights standards nor the modern evolution of the electronic and digital world.[188] Current problems and needs cannot be solved by legislative tools that were drafted to suit past generations. With the recognition of Palestine as a state by the United Nations General Assembly on 29 November 2012,[189] an opportunity has arisen to unify and upgrade the legal system and corresponding practices. After its recognition, Palestine has acquired the right to become party to all human rights conventions.[190] If it seeks modernization and democratization, as it repeatedly clamed in various settings, the state of Palestine needs to embrace a reform process that should be based on universal human rights law. This mission can be accomplished if the political will towards change is available. Such will, in turn, should be translated into a parallel comprehensive strategy that must be formulated towards achieving that end.[191]

A shorter version of this article was presented at an international conference on the Legal Tradition in a Diverse World that took place at the Faculty of Law, University of Cambridge, 18-19 May 2013.

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[188] W Rothnie, 'Idea and Expression in a Digital World' (1998) 9 *JL & Info Science* 59; A Cunningham, 'Rights Expression on Digital Communication Networks: Some Implications for Copyright' (2005) 13 *Int JL & Info Tech* 1.

[189] GA Res A/67/L.28, 29 November 2012.

[190] B Al-Zoughbi, 'The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations', in Qafisheh, above n 4, 163-187.

[191] The Palestinian Authority is currently formulating its national development strategy for the years 2014-2016. In parallel, the United Nations Office of the High Commissioner for Human Rights, Ramallah, is assisting the Authority on the development of a National Plan of Action for Human rights to be integrated in the wider development plan. It is to be hoped that such a human rights plan would come up with realistic measures that may forge significant legislative and institutional reform.

# IN PRAISE OF SOVEREIGNTY

TOMMASO EDOARDO FROSINI

This article analyzes the concept of Sovereignty, that is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms.

1. For some time there has been talk of sovereignty in decline, or even of sovereignty eroded by supranationality or smashed on the rocks of globalisation (or by "walled" states[1]). The long-standing concept of sovereignty has been placed under stress by the demands of new sovereign powers, which have not yet been well defined but are located outwith the territory of each individual state. These assertions are made in the conviction that certain elements of state sovereignty are currently being detached in favour of other institutions, from supranational bodies through to the global capital markets. The crisis of sovereignty may also be discerned in the economic and financial crisis of nation states, or in the loss of control over the management of national accounts. Thus,

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[1] See, W. BROWN, *Walled States, Waning Sovereignty*, Zone Books, New York 2010

an already established sovereignty of the European Union is invoked, along with the relative loss of decision-making powers by the Member States. This process is legitimised by the Treaties which abolished national currencies in favour of a single European currency, or created the figure (and status) of the European citizen, vested with fundamental rights and judicial guarantees. Whilst all of this may be sustainable from a factual and legal perspective, does it really mean the end of sovereignty? Moreover – and above all – which sovereignty do we mean here?

2. Sovereignty is a difficult concept, which has its roots in a demanding and closely-argued theoretical debate starting from Thomas Hobbes and Jean Bodin.[2] The characteristics of sovereignty may be identified in the following terms, albeit in summary form: supremacy, perpetuity, decision-making power, absoluteness and completeness, non-transferability and the determinacy of jurisdiction.

The concept of sovereignty is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. The 20th Century demonstrated the Janus face of sovereignty, as initially state sovereignty and subsequently popular sovereignty. Whilst state sovereignty characterised a political doctrine rooted in totalitarianism (Fascism conceptualised solely and exclusively State sovereignty), popular sovereignty allowed for a re-expansion of the rights and freedoms of the sovereign individual through institutional pluralism. The Constitutions created in the latter part of the 20th Century, which were rooted in liberal democracy, place the principle of popular sovereignty at the apex of their constitutional architecture

[2] The debate in D. QUAGLIONI, *La sovranità*, Laterza, Roma-Bari 2004

(as a kind of *Grundnorm*), because a democratic and liberal constitution cannot have any meaning unless it draws upon the source of sovereignty, which lies with the people: all powers emanate from the people and are exercised in the forms and subject to the limits of the constitution and of laws. Thus, *popular sovereignty is interrelated with constitutionalism.*[3]

3. In order to appreciate the decline of sovereignty and its resurgence, it is necessary to look back into the past and revisit the classic contributions to legal thinking from the 20th Century. Hans Kelsen concluded his magnum opus, *The Problem of Sovereignty and the Theory of International Law*[4], with a suffered invitation to renew the concept of sovereignty at root because «this is the resolution within our cultural conscience which we need first and foremost!». However, the removal of the concept of sovereignty was a consequence of the assertion of the Kelsenien theory of the pure theory of law, under which the only sovereign is the legal system as a whole, as a logically coherent single unit. Kelsen writes that «sovereignty cannot mean – whether consciously or not – anything other than the fact that the coercive order which is known through law and which is customarily personified as the State is premised as the supreme autonomous being». However, it should be pointed out that it was subsequently Kelsen himself, more than forty years later, who ended up asserting in a paper prepared by him for the second *Oesterreichischen Juristentag* in 1964 entitled *Die Funktion der Verfassung*[5] that the Constitution is the genuine *Grundnorm* of a legal order, and therefore that sovereignty is vested not in the legal

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[3] See, T.E. FROSINI, *Souranità popolare e costituzionalismo*, Milan, 1997

[4] H. KELSEN, *Il problema della souranità e la teoria del diritto internazionale* [1920], tr.it., Giuffrè, Milano 1989; ID., *The Principle of Sovereigny Equality of State as a bases for international organization*, in *The Yale Law Journal*, vol. 53, 1944

[5] H. KELSEN, *Die Funktion der Verfassung*, in *Forum*, Heft 132, 1964

order as a whole, but in the Constitution, from which the legal system emanates through the *Stufenbau* system.

Kelsen's initial theory – i.e. that from 1920 – was opposed, as is known, by Carl Schmitt with his claim that the «sovereign is the body which decides on a state of exception», and the doctrine of decisionism. It is not the intention of this paper – and it would indeed not be possible – to provide an account of the stages of Schmittian thinking, which has now moreover been enriched by a vast literature; however, the renowned and famous phrase that the «sovereign is the body which decides on a state of exception» – which appeared in the Schmittian volume on *Political Theology* from 1922[6] – must in my view be read in conjunction with the equally renowned and famous Article 48 of the Weimar Constitution, which provided for the issue of presidential *Reichsgebiete-Verordnungen*, the abuse of which led to Germany's "shaky democracy", as it has been most effectively defined.[7] Thus, whilst Kelsen called for the twilight of sovereignty, Schmitt by contrast discerned a decisionist revival. Within these countervailing *Weltanschauungen*, the matter under discussion regained its force, specifically the concept of sovereignty, or its theoretical and political nature and its place within constitutional theory.

4. It may indeed be asserted that the concept of sovereignty revived precisely with the Weimar Constitution and through the works of scholars from the "Weimar laboratory" (including, in addition to Kelsen and Schmitt, Smend, Preuss, Triepel, Fraenkel and Kirchheimer). It revived because it drew strength from that dialectic between relativisation and

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6 C. SCHMITT, *Teologia politica, Quattro capitoli sulla dottrina della sovranità* [1922], tr.it. in Id., *Le categorie del "politico". Saggi di teoria politica*, a cura di G. Miglio e P. Schiera, il Mulino, Bologna 1972, 29 ss.

7 V. FROSINI, *La democrazia pericolante (Note sull'art. 48 della Costituzione di Weimar)*, in *Scritti in onore di Egidio Tosato*, vol. I, Giuffrè, Milano 1984

absolutisation which had strongly distinguished the history of the idea of sovereignty in one sense or the other[8]. In fact, the democratic Weimar Constitution asserted that "sovereignty emanates from the people", thus depriving sovereignty of its typical configuration as a power originating from above and rather vesting it, within the context of a State founded on a democratic and pluralist legal order, with the characteristic of legitimacy originating from below. Furthermore, the strong winds of totalitarianism which were blowing through Europe in the 1930s, and which culminated precisely in Germany, were able to bend this notion of sovereignty back towards the original concept, understood as a strong and absolute decision adopted by a single subject vested with that power. However, with the advent of the liberal democratic constitutions in the aftermath of the Second World War, it became necessary to move beyond – and thus to leave behind – this conception associated with a system of government in which there must in all cases be one individual who decides, or worse who commands, and who will therefore be the sole and only sovereign. Within liberal democratic constitutional systems, there is no space for absolute authority, for the myth of the sovereign decider who grasps the sceptre of power. In fact, liberal democracies are such precisely because they do not recognise one single power, but rather a multitude of mutually divided powers, which are structured and arranged within a pluralist society. Within this perspective, the meaning or semantic scope of the concept of sovereignty must be radically different; and it is for this reason that it is vested in the people, understood not as a politically unitary subject in whose will the general interest (which is destined to prevail over each

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[8] See, P. C. CALDWELL, *Popular Sovereignty and the crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism*, Duke University Press, Durham and London 1997; for a critical to "Weimar doctrine", M.S. GIANNINI, *Sovranità (diritto vigente)*, in *Enciclopedia del diritto*, vol. XLIII, Giuffrè, Milano 1990

individual desire) expresses itself, but rather as a subject comprised of a multiplicity of individuals, groups and small social bodies; moreover, it will retain this multi-faceted nature also after expressing a unitary position through elections. The recognition and assertion of popular sovereignty led to a significant reduction in the scope of State sovereignty, which remains only with regard to international relations with other states. However, at present this aspect too is on the wane.[9]

5. Whilst it is certain that sovereignty has entered a twilight age, this can only relate to one of its two "faces", namely state sovereignty. This therefore leaves us with popular sovereignty. This must be understood essentially as a general principle which determines the forms of legal, social and political participation of citizens in the consolidation of a liberal democratic State, and which renders participation effective through constitutional structures that enable the people to express their views in both individual and collective form. It is clear that this can only occur within the confines of the Constitution because, as Carlo Esposito writes, «outwith the Constitution there is no sovereignty, but popular arbitrariness, there is no sovereign people, but the masses with their passions and weaknesses».[10] It is therefore necessary to place the sovereign people within the Constitution, letting go of the original view of the people as the author of the Constitution, and grafting it onto the democratic principle of popular sovereignty as one of the fundamental principles of the Constitution located alongside the other

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[9] A. CHAYES AND A.H. CHAYES, *The New Sovereignty: Compilance with International Regulatory Agreements*, Harvard University Press 1998; for new prospective, G. DELLA CANANEA, *Al di là dei confini statuali*, il Mulino, Bologna 2009. With problematic approach, G. BARCELLONA, *Metaformosi della sovranità e strategia dei diritti*, Città aperta edizioni, Enna 2010

[10] C. ESPOSITO, *Commento all'art. 1 della Costituzione*, in ID., *La Costituzione italiana. Saggi*, Cedam, Padova 1954, 6 ss.

essential principle of the inviolability of fundamental rights. This means that the sovereignty of the people – understood as a multiplicity of individuals, groups and small social bodies – represents a form of pluralism reaching far beyond the sole framework of the structure of government and operating in a complex manner within various institutions – including specifically local bodies – in which the interests of citizens may be satisfied. This is because a complex society cannot and must not look for solutions to its legitimate needs solely and exclusively within the political and parliamentary circuit. To do so in fact would be tantamount to enshrining the primacy of politics, and even attributing to it a unity and centrality which appears to contrast with an open society acting within a constitutional State where it is the rights and freedoms of citizens which have genuine primary status.

6. The principle of popular sovereignty permeates the entire constitutional order and by is by no means exercised solely during elections of members of Parliament. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms. In fact, sovereignty cannot be encapsulated solely within representation: whilst it is certain that elections represent an essential moment within a democracy, they are only one of the manifestations of the process of the formation of the popular will, which is expressed spontaneously in elections, but the contents of which are nourished from the rights and freedoms according to which the citizen is sovereign of himself, the exercise of which constitutes a permanent expression of popular sovereignty. This is a vision which enables the people to be conceived of as sovereign *within* the Constitution, as the only addressee of its terms through a form of constitutional pluralism in which the people – either as individuals or as organised groups – take on a central role within the

constitutional system. Therefore, the content of popular sovereignty results from the overall body of constitutional legal interests which citizens are empowered to exercise either individually or in associate form. It is considered that, at the present moment in history, this is a model which provides a suitable basis upon which to revitalise the principle of popular sovereignty, and also to praise it in a convincing manner.

# LETSHOLATHEBE VS THE STATE: TOWARDS THE ABOLITION OF SPOUSAL EXEMPTION IN BOTSWANA?

OBONYE JONAS

Although many countries do not have laws against marital rape, there is an international movement led by feminist pressure groups that is assiduously and steadily gaining credence in advancing the view that the doctrine of marital exemption is unjust and has no place in a modern society. In response to this surging movement, numerous states around the world have taken legislative and judicial initiatives aimed at the abolition of marital immunity. The present article presents a critical analysis of the Botswana case of *Letsholathebe v The State*, where Kirby J stated that the doctrine of marital exemption is offensive to modern thinking as it no longer represents the position of the wife in latter-day society and that it needs to be abolished. This article shares Justice Kirby's sentiments that the doctrine of spousal exemption is anachronistic but argues that the legislature must lead the way ahead of courts in abolishing it to avoid the problem of retroactive application of criminal law. The central claim of this article is that the marital exemption doctrine is an antiquated legal doctrine that sits ill with all notions of human dignity and liberties of women. The article finally proffers suggestions on how Botswana should go about in achieving this desideratum.

## 1. Introduction

For numerous years husbands throughout the world were granted marital immunity.[1] It was not until the latter half

[1] Throughout This Article, The Terms 'Marital Exemption,' 'Marital Immunity,' 'Spousal Exemption,' AND 'spousal immunity' shall be variously used to mean one and the same thing.

of the twentieth century that marital rape was considered a legal aberration.[2] Prior to this period it was thought unthinkable that a man could rape his wife. The fact of the impossibility of a husband to rape his wife was predicated on at least three premises: the implied consent theory, the unities of person theory and the property theory. The most popular theory among the three is the implied consent theory which is modelled on principles of the law of contract.[3] This theory has been crisply articulated by Sir Matthew Hale in the following terms,

> the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[4]

In Hale's view, by virtue of marriage contract, the wife irrevocably consents to sex. Slight exceptions to Hale's doctrine are only permissible in a case where 'ordinary relations in a marriage are suspended'.[5] This is instanced in a case where the husband and the wife are in a separation.[6] Despite that Hale's view was stated without precedent, it became the Common Law of England until recently, in October 1991 when marital exemption was abolished in England by the House of Lords in *R v R*.[7] Hale did not invent the marital exempt principle, he

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2 F Theresa, 'Criminalising Marital Rape: a comparison of judicial and legislative approaches', Vanderbilt Journal of Transitional Law 1.

3 *Ibid.*

4 M Hale, The history of the pleas of the crown 629 (S. Emlyn ed. 1778), at 629.

5 See *R v Clark* (1949) 2 All ER 448 at 449 where an English court held that a separation order has the effect of revoking a wife's implied consent to sex and that upon its issue, a husband can be found guilty of rape.

6 *Ibid.*

7 [1991] 2 All ER at p. 264

subscribed to it as it has been accepted throughout history in the common law world.[8]

On the other hand, the unities of persons theory objectifies the woman because it does not recognise her as a person capable of being raped. It is based on the principle of uni-personality.[9] That is, it postulates that when two people marry, they become one – the husband, thus making it impossible both linguistically and practically for the husband to rape himself. It creates a legal fiction that a man cannot rape his wife, as in so doing he will be raping himself. In terms of this theory, during marriage, the personal being of a woman is suspended and incorporated into that of the man.[10] This theory also finds validity and legitimacy in the Bible. For instance, Ephesians 5:31 states that 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.'[11] Related to this theory is the property theory which holds that upon marriage, a woman becomes the property of her husband.[12] The rationale for this theory has been explained as being to 'inspire and perpetuate marital harmony.'[13] When viewed through the lens of this theory, marital rape can never be an offence since all manner of sexual intercourse between a man and his wife is simply viewed as the husband's appropriate use of his property.[14]

In addition to the above justifications, modern theorists have advanced secondary rationales that seek to explain

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8 S A Adamo 'The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries (2012) 4(3) American University International Law Review 558.

9 M J Anderson, note, Lawful wife, unlawful sex-examining the effect of the criminalization of marital rape in England and the republic of Ireland (1998) 27 GA journal of international and comparative law 139.

10 Adamo at 560.

11 T Nelson The Holy Bible: New King James Version (1970).

12 Anderson at 146-147.

13 Anderson at 147.

14 *See* Freeman, *'But If You Can't Rape Your Wife Who(m) Can You Rape? The Marital Rape Exemption Re-examined,* 15 FAM. L.Q. 1, 9 (1981).

the impracticability and undesirability of criminalising marital rape. The first class of these secondary reasons can be conveniently described as 'evidentiary' in form and character. Adherents of the evidentiary rationale argue that in a marriage, sexual intercourse is repetitive, and thus it will be difficult to prove that one act of sexual intercourse among many was without the consent of the wife.[15] The other secondary rationale that has been set forth is that a vengeful wife can cry rape to blackmail an innocent husband to secure a more favourable divorce settlement.[16] Another argument advanced by proponents of the 'evidentiary' rationale is that criminalising marital rape would heighten or accentuate discord in the family and make reconciliation between spouses impossible.[17] Lastly, it is argued by others that allowing a wife to stake a claim of rape against her husband would allow the state to intrude into the privacy of the marriage through the devise of criminal law – an arrangement that should not be permitted.[18] This line of argument is in *tandem* with the views expressed by Justice Kennedy of the US Supreme Court in *Lawrence v Texas* when he stated that, '[i]n our tradition the State is not omnipresent in the home.'[19] While many other arguments have been marshalled against criminalising marital rape, the above are widely and predominantly referenced with frequency. Together, these theories created a false doctrinal outlook that marital rape was impossible to commit or that even if we acknowledge the possibility of committing it, proof of it having occurred would create a legal conundrum. On the basis of these rationales, as far back as the mid-twentieth century, no country viewed marital rape as an offence.[20] However as the

[15] Adamo at 561.
[16] *Ibid.*
[17] *Ibid.*
[18] Anderson at 148.
[19] See also *Lawrence v Texas* US, (2003) 570.
[20] Theresa at 56.

women's movement for gender parity steadfastly pervaded all structural aspects of the law and society, the validity of the marital exemption doctrine was severely contested if not doubted in many countries in the globe. While the majority of countries still retain laws that guarantee the marital exemption doctrine, numerous others have abolished it. In Botswana, flickers of the abolition of this doctrine can be found in the High Court decision of *Letsholathebe v The State (*the *Letsholathebe* case)[21] per Kirby J. In this case, the court stated that the doctrine of spousal exempt was 'totally unacceptable, and an historic aberration'.[22] We turn to briefly discuss this case.

## 2. A brief excursus on the *Letsholathebe* case

The facts of this case are fairly straight and forward. One would have ordinarily not thought that the judge would proceed to deal with the marital exemption in this case because it is not a typical marital rape case where the husband is accused to have raped his wife. In that case, the appellant then a 22 year old boy was charged with rape of a 15 year old school girl. He was convicted by the magistrate and sentenced to 12 years in prison. In convicting the accused, the magistrate court placed reliance on the fact that appellant and the complainant were not married, and held that this rendered sexual intercourse between them unlawful.[23] The learned magistrate reasoned that any such sexual intercourse would of course be unlawful unless it is sanctioned by marriage between the parties.'[24] The learned magistrate added: '[of importance here however, is that the parties say nothing about marriage and from their evidence it is made amply clear that they were not married,

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[21] 2008 (3) BLR 1 (HC).

[22] *Letsholathebe* case, p. 4.

[23] *Ibid.* page 3

[24] Quoted in *Lestsholathebe* case, Ibid.

and I so find. The sexual intercourse of 2 January 2002 between them was therefore unlawful, and I still so find.'[25]

In other words, the learned magistrate perceived the law to be that there cannot be spousal rape in terms of the criminal law of Botswana. The High Court trenchantly criticised the legal expositions of the learned magistrate and described them as 'surprising' and 'incorrect'. The following are the comments of the High Court on the reasoning of the magistrate:

> This is a surprising statement of the law, and in my view an incorrect one, in modern society, where not every couple chooses marriage. State counsel explained it as a reference to the rule that marital rape is not unlawful. This, he submitted was why the offence of rape was constituted by 'unlawful carnal knowledge of the complainant without her consent' (my emphasis). Virtually all sexual offences in the Penal Code (Cap 08:01) involving rape, incest, defilement and indecent assault, preface either the words 'carnal knowledge' or the words 'indecent assault' with the word 'unlawful'. These offences may be rendered unlawful in a number of ways or in a number of cases, such as having carnal knowledge of infants, or imbeciles, or of close relatives, or by fraud.
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> It may be that historically, since our Penal Code was based upon the English criminal law, the use of the word 'unlawful' in addition to the words 'without her consent' in the offence of rape may have been intended to embrace as well the old notion that there can be no rape within marriage, but certainly that is not, in my judgment, the case today.
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> Rape is a most serious, humiliating and invasive assault against a person, whether male or female, and to

[25] *Ibid.*

> suggest that it should be permitted if the perpetrator is a spouse, is, in my view, totally C unacceptable, and an historic aberration. By s 217 of the Criminal Procedure and Evidence Act (Cap 08:02):
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> "(1) The wife or husband of an accused person is competent and compellable to give evidence for the prosecution without the consent of the accused person where such person is prosecuted for any offence against the person of either of them..."
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> Just as assault or murder are offences against the person, so is rape, and the section is a strong indicator that marital rape is an indictable offence, although it may in some cases be difficult to prove. I would respectfully endorse the findings of Lord Lane CJ in R v R [1991] 2 All ER 257 (HL) at p 266, where he held that the rule that a husband could not be guilty of raping his wife was an anachronistic and offensive common law fiction, and since it no longer represented the position of a wife in modern day society it should no longer be applied. Instead the principle to be applied was that a rapist remained a rapist irrespective of his relationship with his victim. This case dealt at length with the meaning of the word 'unlawful' and the history of that rule and it finally buried the fiction of the marital exemption. It is not necessary to comment upon it further, since this case is not one between spouses, but suffice it to say that the magistrate misdirected himself in giving weight to the fact that the appellant and the complainant were not married when assessing the unlawfulness of the appellant's actions.

## 3. Comments on the *Letsholathebe* case

It is quite apparent from the reading of the case that the above comments by the High Court were made *obiter*. This is so because the statement by the judge is based on the facts

which were not before the court for decision.[26] In other words, the question of marital exemption was not arising from the case before court because the complainant and the appellant were not married. One other issue that makes the statement of the judge *obiter* and less authoritative is the fact that the court did not have the benefit of a full argument on the issue before stating its opinion. Clearly, the question as to the judicial abolition of the marital exemption doctrine is by no measure a minor one. It has far-reaching social and legal implications. At a social level, it requires moral adjustments on sexuality on the part of husbands towards their wives. On the legal front, it has the effect of altering the existing common law as presently obtaining in Botswana. Thus, before a court makes such a fundamental law-changing decision, such as would be required the abolition of the marital exempt doctrine, it is very apt that the presiding officer must have had a benefit of argument on the point. It is also important to enquire whether or not the Court's views as captured above are in line with the laws of Botswana governing rape. The relevant provision is section 141 of the Penal Code. It states:

> Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such other person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretences as to the nature of the act, or, in the case of a married person, by personating that person's spouse, is guilty of the offence termed rape.

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[26] See CM Fombad & EK Quansah *The Botswana Legal System* (2006) Pula Press, at p. 74.

Three words are critical in the above provision. They are 'unlawful carnal knowledge'. What is their interpretational significance? To answer this question, a few preliminary observations are apposite to provide a proper background and context for discussion. In 1976, the British Parliament passed the Sexual Offences (Amendment) Act which had the effect of stalling the erosion of the marital exempt doctrine. The Act codified the common law of rape and included the words 'unlawful sexual intercourse with a woman' within its definition of rape.[27] Because the Act did not define the word 'unlawful', rape continued to be understood in common law terms and the word 'unlawful' was defined to mean 'outside of marriage'.[28] Under this definition marital rape was perfectly legal and marital immunity persisted unabated. For purposes of this discussion, the meaning of 'unlawful carnal knowledge' as used in the Penal Code of Botswana shall be treated as being substantively similarly to the meaning annexed by the courts of England to the phrase 'unlawful sexual intercourse' as it appears in the aforesaid Sexual Offenses (Amendment) Act of 1976. Thus it is important to analyse how the courts of England dealt with this phrase to shed light on how the courts of Botswana should approach or unpack the phrase 'unlawful carnal knowledge' as used in the Penal Code of Botswana, should the need arise in future. Reliance on authorities from England is important for the chief reason that the criminal law of Botswana is based on English criminal law.

Both the English Sexual Offenses (Amendment) Act of 1976 and the Botswana Penal Code do not define the phrases 'unlawful sexual intercourse' and 'unlawful carnal knowledge' as used in their definitions for rape. In the English case of *R v Steele*[29] the court took the view that in the absence of

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[27] See section 1(1) thereof.

[28] P Rook and R Ward, Rook and Ward on sexual offences (1997) Sweet and Maxwell, at p. 51.

[29] R. v. Steele, 65 Crim. App. 22 (C.A. 1976).

the definition of 'unlawful sexual intercourse' in the Sexual Offenses (Amendment) Act, rape continued to be defined under the common law and was thus construed to mean 'outside of marriage.' In terms of this definition, marital rape would not be illegal and marital immunity would thus continue to exist. How then did the English Courts abolish the notorious doctrine of marital exemption?

## 4. How the courts of England killed the marital exemption rule

The abolition of the marital exemption in England has a long and chequered history. As indicated above, as far back as 1736 Sir Matthew Hale argued that at marriage under the Common Law, the wife irrevocably gives up her body to her husband and irrevocably consents to sexual intercourse, thus making it an illogicality for her to claim that she could be raped by her husband. Hale's view was accepted as the position of the common law for centuries. This is evidenced by the first edition of Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822), where the learned author simply states that: 'A husband also cannot be guilty of a rape upon his wife.'[30] In 1899, in *R v Clarence*,[31] Justice Field, filed a minority opinion deviating from Hale's logic and stated that the husband's marital immunity was not absolute and that there are instances where a husband could be found guilty of marital rape. Given the conservativeness and patriarchal nature of the English society at the time, Justice Field's view went without notice and the law remained unchanged for the intervening 150 years!

Although the correctness of Hale's marital immunity principle was doubted by Lord Field in *R v Clarence* as far

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30 Archbold *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) at p. 259 .

31 (1888) 22 QBD. 23, at 57.

back as 1888, it was not until 1949 that Byrne J held in *R v Clarke*[32] that the doctrine was not absolute and that it can be trumped in deserving cases such as where the spouses have been living apart. The facts in the *Clarke* case are briefly as follows. After being in marriage for slightly over a decade, the wife obtained a judicial separation order which contained a clause that stated that she was no longer bound to live with her husband.[33] Within two weeks after obtaining the order, the husband had non-consensual coition with his wife. At trial, the husband pleaded marital immunity. In relation to the defence of marital immunity, Justice Byrne stated that as a general rule, a husband cannot be guilty of raping his wife but that he may nonetheless be found guilty where the wife had been awarded a legal order for separation since such order revoked her consent to sexual intercourse.[34] This decision was clearly departing from Matthew Hale's view that the wife's consent to sex in marriage is irrevocable. But even Byrne J had to appreciate that:

> [a]s a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them.[35]

However, in *R v Miller*,[36] Judge Lynskey held that Hale's view of marital exemption was correct at law and that the husband had no case to answer, although she had prior to the 'wrongful' sexual intercourse petitioned the court for

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[32] *R. v. Clarke*, [1949] 2 All E.R. 448 (Leeds Assizes).
[33] *Ibid* 449.
[34] *Id.* at 448-49.
[35] *Ibid* 450.
[36] *R. v. Miller*, [1954] 2 Q.B. 282 (Winchester Assizes).

divorce, which court had not reached decree nisi stage.[37] However, Justice Lynskey proceeded to not only affirm that a separation order revokes prior consent but also that all the previous judicial pronouncements about the immutability of marital immunity were mere *dicta* without more.[38] The *Miller* case was followed by the decision of Justice Park in *R v O'Brien*[39] in 1974 in which the court widened the contours of the legal separation doctrine by holding that a decree nisi for separation terminates marriage and concurrently revokes the prior consent to sexual intercourse tendered by the wife at marriage.[40] A comment is warranted here: it is trite that a decree *nisi* for divorce is not absolute. By holding that a decree *nisi* for separation revokes consent of the wife to coitus, Justice Park actually lowered the threshold of criminal liability arising from marital rape. Around the same time, Lord Lane ruled in *R v Steele* (above) that a restraining order against the husband from molesting his wife had the effect of revoking her consent to sexual intercourse, but that merely seeking a protective order left the wives consent to sex intact.[41] As the last decade of the twentieth century drew to close, it became apparent that the doctrine of marital exemption was becoming indefensible by the day. Thus in 1989 the Scottish courts, per Lord Justice-General Emslie, ruled in *S v HM Advocate General*[42] that the whole notion of marital exemption within rape was misconceived.

Relying on the decision in *S v HM Advocate General*, among others, in 1991, the Supreme Court of England delivered its ruling in the case of *R v R*, above. The facts of this case can be summarised as follows. The parties contracted marriage in 1984 and separated in 1989, at which time the wife moved in

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37 *Ibid.* at 292.

38 *Ibid* at 293.

39 *R. v. O'Brien*, [1974] 3 All E.R. 663 (Crown Ct. Bristol).

40 *Ibid.* at 665.

41 *Ibid.* at 25.

42 1989 S.L.T. 469

with her parents, taking along the child of the marriage. Two days later, the husband called the wife and informed her that he was going to file divorce proceedings against her. A few weeks later, the husband broke into his wife's living house and forced or attempted to force his wife to sex. The question before court was whether the husband was guilty of raping his wife. The husband's defence was anchored on the statement by Hale that a husband cannot rape his wife and thus that his actions cannot be unlawful. Justice Owen rejected Hale's perception of the law as having been made at a time in history when 'marriage was indissoluble'.[43] After painstakingly analysing precedents in this area, Justice Owen delivered himself thus:

> I accept that it is not for me to make the law. However, it is for me to state the common law as I believe it to be. If that requires me to indicate a set of circumstances which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that when there has been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount to a revocation of that implicit consent. In those circumstances, it seems to me that there is ample here ... [that] would enable the prosecution to prove a charge of rape or attempted rape against this husband.[44]

The Court of Appeal added that the doctrine of marital exemption was antediluvian and starkly harsh and thus ought to be abolished. The question therefore was on the means or

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[43] *R v R* 748.

[44] As shall be shown anon, the husband appealed Justice Owen's decision to the House of Lords and it is the decision of the House of Lords that put the final nail on the coffin of marital exemption.

logic of attaining that *desideratum*. According to Lord Lane who penned the decision of the court:

> The ... radical solution is said to disregard the statutory provisions of the Act of 1976 and, even if it does not do that, it is said that it goes beyond the legitimate bounds of judge-made law and trespasses on the province of Parliament. In other words the abolition of a rule of such long standing, despite its emasculation by later decisions, is a task for the legislature and not the courts ... Ever since the decision of Byrne J in *R v Clarke*, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes. There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour ... It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment.[45]

The Court of Appeal was however constrained by the doctrine of *stare decisis*. It was not available to it to say Hale's proposition was wrong in his perception of the Common Law. They cleverly found a way of by-passing the *stare decisis* hurdle. Rather than ruling that Sir Hale was in error in his proposition, they wittily decided that Sir Hale's proposition was never law and therefore, 'it can never have been other

[45] *R v R* 264

than a fiction, and fiction is a poor basis for the criminal law.'[46] That was how the court dealt with the position at common law, but the Sexual Offences Act remained, with marital exemption boldly ingrained in it. On the statutory position, the court remarked:

> ... in the end [it] comes down to consideration of the word 'unlawful' in the Act of 1976 ... The only realistic explanations seem to us to be that the draftsman either intended to leave the matter open for the common law to develop in that way ... or, perhaps more likely, that no satisfactory meaning at all can be ascribed to the word and that it is indeed surplusage. In either event, we do not consider that we are inhibited by the Act of 1976 from declaring that the husband's immunity as expounded by Hale no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.[47]

Despite that this judgment departs from Hale's concept of irrevocable consent to sex by the wife, it indirectly endorses Hale's view that the wife implicitly consents to sex with her husband during the currency of the marriage. It has been observed that what made Justice Owen deviate from Hale's proposition of the law in this regard was the amount of violence that was deployed by the husband to force his wife to sex and not necessarily that he perceived Hale's view of marital immunity to be wrong *per se*. This argument becomes potent when one considers the statement by Justice Owen when he says he

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[46] *Ibid* at 270.

[47] *Ibid* at 273.

> found] it hard ... to believe that it ever was common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse.[48]

Thus, in that way, rather than abolishing the principle of marital exemption, Judge Owen sliced out another exemption to the principle, albeit a major one. The Supreme Court decision in *R v R* was followed by two conflicting decisions of courts of first instance. The first was *R v C (Rape: Marital Exemption)*[49] in 1991 where Justice Simon Brown radically declared that Hale's proposition was no longer representative of the law. He opined that:

> Were it not for the deeply unsatisfactory consequences of reaching any other conclusion upon the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape.[50]

Before the ink in Justice Simon Brown's judgment could dry, still in 1991, the case of *R v J (Rape: Marital Exemption)*[51] was brought to court. It dealt with the interpretation of section 1(1) of the Sexual Offences (Amendment) Act 1976 which provided that:

> For the purposes of section 1 of the Sexual Offences Act 1956 a man commits rape if – (a) he has *unlawful* sexual intercourse with a woman who at the time of the intercourse does not consent to it...

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48 *Ibid* at 753.

49 [1991] 1All ER 755

50 *Ibid.*

51 [1991] 1 All ER 759.

The argument for the accused was that the Act provided a definition for rape and that the only sensible meaning that could be annexed to the word 'unlawful' is 'illicit' – effectively meaning outside the purview or domain of matrimony. This meant that the legislature had now codified the doctrine of marital exemption. Rougier J not only accepted this view, but went further and sought to prevent further future attempts at whittling down Hale's marital immunity proposition. He said:

> Once Parliament has transferred the offence from the realm of common law to that of statute and, as I believe, had defined the common law position as it stood at the time of the passing of the Act, then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallised as at the making of the Act and only Parliament can alter it.[52]

Meanwhile the Court of Appeal decision in *R v R* was appealed to the House of Lords and before the Appeal was heard, the English Law Commission completed the Report on marital rape – 'Rape Within Marriage.'[53] The Commission stated in this Report that as a general rule a husband cannot be convicted for raping his wife but that this rule is subject to exceptions.[54] These exceptions were derived from decisions of courts. In terms of the Commission, the husband would lose his immunity:

(a) where there exists an order of the court proving that the wife is not bound to cohabit with her husband. (*R v Clarke* [1949] 33 Criminal Appeal Reports 216);

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[52] *Ibid* 767.

[53] Law commission, rape within marriage, (Working paper no 116) 1990.

[54] *Ibid* at para 5.1.

(b) where the court has granted the wife a decree nisi for judicial separation or a decree *nisi* for divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (*R v O'Brien* [1974] 3 All England Law Reports 663);
(c) where a court has issued an interdict against the husband, restraining him from molesting the wife or where the husband given an undertaking to the court that he will desist from molesting her (*R v Steele* [1976] 65 Criminal Appeal Reports 22);
(d) in terms of the decision in *R v Roberts* ([1986] Criminal Law Reports 188), where a non-molestation order has been issued in favour of the wife, her deemed consent to sexual intercourse does not automatically revive upon the lapse of time.
(e) in *R v Miller* (1954] 2 Queen's Bench Division 282) Mr Justice Lynskey, remarked, obiter, that a wife's consent to sexual intercourse would be annulled by an agreement between the parties to separate, especially where such agreement contains a non-molestation clause;
(f) in *R v Steele*, Lord Justice Geoffrey Lane stated, *obiter*, that a separation agreement containing a non-cohabitation clause would have a similar effect.

In the end the Report recommended that

> the present marital immunity be abolished in all cases' since it was out of sync with the legal values governing modern marriages which seek to make spouses equal partners.[55]

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[55] *Ibid* at para 5.2.

In October 1991, the House of Lords delivered their seminal and ground-breaking opinion in *R v R*,[56] wherein the learned Law Lords unanimously adopted the reasoning and decision of the court *a quo* (Court of Appeal) and held that marital exemption had no place in modern society. The House of Lords concurred to the decision of the Court of Appeal that Hale's proposition has always been fiction that infiltrated the common law. The court further held that *R v R* only served to revert the common law to its true and correct position. As for the interpretation of the English Offences Act of 1976, the court took the view that the inclusion of the word 'unlawful' in its section 1(1) was mere 'surplusage.' The English Parliament acquiesced to the enduring urge by courts to abolish the doctrine of spousal exempt, and the word 'unlawful' was removed from the definition of rape under the Criminal Justice and Public Order Act of 1994: effectively and statutorily criminalising marital rape. Thus the doctrine of marital exempt was dead and buried: perhaps not so in lived reality. By the time law-makers criminalised marital rape in England, many countries had already legislatively prohibited it. These include: Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia.[57] As at the time of writing this article, in Africa marital rape had been criminalised in only three countries: Zimbabwe, Angola and Democratic Republic of Congo.[58] The decision in *R v R* is extremely important to Botswana for at least three chief ways:

It was handed down by the most respected and superior court in the common law jurisdiction: The House of Lords

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[56] [1966] A.C. 591.

[57] See the list of the countries that criminalise marital rape at: http: // www. conservapedia. com/Marital_rapehttp://www.conservapedia.com/ Marital_rape (accessed 26 June 2013).

[58] See the Website for Women for Peace 'Africa: Women Body Lobbies foe Law on Marital Rape' (2012) http://www.peacewomen.org/news_article. php?id=5554&type=news (accessed 24 June 2013).

and thus the decision is highly persuasive and cannot be arbitrarily ignored. Second, the court extensively dealt with the common law of England, which is also the common law of Botswana. Third and more importantly, the court considered a criminal statute: the Sexual Offences (Amendment) Act of 1976, whose provisions dealing with rape are in *pari materia* with equivalent provisions under the Penal Code of Botswana. To this end, the courts of Botswana do not need to re-invent the wheel and deal with the Common Law position since the House of Lords has already held that the common law rule of marital exemption was a legal fiction that had infiltrated the common law. This effectively means that at common law, marital exemption is and was never unknown and that rape is rape whether in or outside marriage.

However, it will be rather simplistic and mechanical for Courts of Botswana, indeed as Kirby J sought to do in the *Letsholathebe* case, to simply hold that the word 'unlawful' as used in section 141 of the Penal Code of Botswana is 'surplusage' thereby making marital rape an offence. It is submitted that it would be inadvisable for a judge to simply expunge the word 'unlawful' in section 141 of the Penal Code by way of interpretation. This would amount to the creation of a new and retroactive criminal liability, thus offending the venerable criminal law principle that there must be no crime or punishment save in accordance with fixed, predetermined law. This principle is expressed in the Latin maxim: *nullum crimen sine, nulla poena sine lege.*[59] The legal significance of the word 'unlawful' in section 141 of Botswana's Penal Code presents the Gordian Knot as it did in England. What is its import? Does it perpetuate the common law position as perceived by Sir Hale or it is simply superfluous as the House of Lords believed in *R v R*? Clearly, in the light of this

[59] For a comprehensive discussion on this principle see A Mokhtar nullum crimen sine, nulla poena sine lege: Aspects and Prospects *Statute (2005) 26 1 Statute Law Review* 41- 55.

ambiguity, a Botswana court cannot say to a marital rape accused person:

> you should have known that the word "unlawful" as used by the lawgiver in section 141 of the Penal Code is surplusage. You therefore ought to have known that the marital exemption doctrine is not part of our law.

This will be an extremely dangerous and austere approach which will work to undermine the criminal principles of due notice and lenity which principles are hallowed by long standing judicial tradition. The lack of preciseness in section 141 can also be gleaned from the words of Judge Kirby in the *Letsholathebe* case when he said:

> the use of the word "unlawful" in addition to the words 'without her consent' in the offence of rape *may* have been intended to embrace as well the old notion that there can be no rape within marriage, but certainly that is not, in my judgment, the case today[60] [emphasis mine].

The judge's use of the word 'may' shows that he is also not clear in his mind about the legal significance of the word 'unlawful' as used in section 141. If the court, which is presumed to be the fountain of legal knowledge, is not clear on the significance of the word 'unlawful', an ordinary man in the street will, *a fortiori*, be clueless on the position of the law in this regard so as to conduct himself in manner consistent with the dictates of the law. It should be remembered that the proposition by the House of Lords in *R v R* that the word 'unlawful' as used in the English Sexual Offences Act was 'surplusage' was not enunciated in *vacuo*. The court took into consideration the sustained and arduous evolution of rape

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[60] Letsholathebe case p .4.

law in England and related developments between the time of Hale's codification of the principle of marital exempt in 1736 to the time of the decision in *R v R* in 1990, and concluded that it no longer lies in the mouth of a reasonable man to say that marital rape is permissible or legal. In this connection, the court delivered itself thus:

> There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.[61]

The above sentiments expressed by the court are clearly contextual. They were uttered within the context and setting of England and no other place. In the *dictum* above, the judge talks of various exceptions carved out by courts of England and the 'evident evolution' of the law in that country which when taken together would serve as advance notice to a subject that the spousal exempt rule has been abolished in England. In Botswana, no case has ever come before courts directly dealing with the marital exempt doctrine. There is also no 'evident evolution' respecting marital rape law that the House of Lords talked about in *R v R* in Botswana. These observations negative the principle of advance notice and lenity as argued above. It is trite law that '... a criminal defendant [must] be given notice of the precise consequences that accompany

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[61] *R v R* at p. 43.

his criminal activity.'[62] Further, if Parliament of Botswana had intended to abolish marital rape, it would have done so in an explicit language that admits of no interpretational ambiguities.

It may also be argued that to read abolition of marital exemption in section 141 of the Penal Code, when the said section is silent on the matter is to go overboard. This broad interpretation goes against the basic rule of interpretation of criminal statutes, namely that criminal statutes are supposed to be interpreted strictly against the state.[63] It has been argued that the interpretation of criminal statutes is constrained by 'fair notice and separation of powers that would appear to make lenity a more appropriate approach than dynamism.'[64] Unsurprisingly therefore, Eskridge's theory of dynamic and organic interpretation of statutes is limited to regulatory statutes and civil cases and does not foray into the domain of criminal law.[65] The basic rule is that laws that seek to limit the full reach of liberties of individuals, such as criminal statutes, must be interpreted restrictively.[66] Relatedly, as pointed out above, a provision in a criminal statute must be comprehensively formulated to enable a person to regulate their conduct. In other words, subjects must know what is legal and what is illegal, what is permissible and what is

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62 Criminal Law. Statutory Interpretation. Ninth Circuit Holds That 18 U.S.C. §924(C)(I)(A)Defines a Single Firearm Offense. United States v. Arreola, 446 F.3d 926 (9th Cir.), superseded on denial of reh'g and reh'g en banc, 467 F.3d 1153 (9th Cir. 2006), cert. denied, 127 S. Ct.3002 121(2) (2007) Harvard Law Review 675.

63 See *United States v. Halseth*, 342 U.S. 277 (1952); State v. Hansen, 55 N.W.2d 923 (Iowa 1952); State v. Waite, 156 Kan. 143, 131 P.2d 708 (1942); Wanzer v. State, 97A.2d 914 (Md. 1953).

64 L M Solan 'Should criminal statutes be interpreted dynamically' (2002) Brooklyn Law Review 1.

65 *Ibid.*

66 See Marumo J in *Otlhomile v. The State* 2002 (2) BLR 295 (HC) at p. 305. See also *Petrus and Another v. The State* [1984] B.L.R. 14, CA) *R v Milne and Erleigh* 1951 (1) S.A. 791 (A.D.) at p. 823B-D.

impermissible under the law in order to conduct themselves in line with the script of law. This is to say, a provision in a criminal statute must be plain beyond reasonable question.[67] In this connection, Justice Clark of the Supreme Court of the US has stated that:

> [a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.[68]

Where a criminal statute is not couched with definitiveness and doubts arise as to its true import, such doubts must benefit the accused person. The rule in this regard is elementary and it is this: '[w]here there is ambiguity in a criminal statute, doubts are resolved in favour of the defendant'.[69] There can be no debate that section 141 of the Penal Code as presently cast creates ambiguities on the question as to whether a husband can be found guilty of raping his wife or not and these ambiguities must operate in favour of the accused in a marital rape case.

Thus, if Kirby J in the *Letsholathebe* case wanted to be understood as making the Penal Code to be read as a complete reversal, thereby creating a new offence of marital rape, then the judge was in error. He would have forayed into law-making - a prohibited territory for him, especially legislating in a criminal law domain, where the result would retroactive application of criminal law. He certainly would have gone 'beyond the legitimate bounds of judge-made law.'[70]

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67 Q Johnstone An Evaluation of the Rules of Statutory Interpretation(1954) Kansas Law Review 13.

68 Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

69 *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (quoting with approval the decsion in United States v. Bass, 404 U.S. 336, 348 (197 1).

70 R v R [2] 1991] 2 All ER at p. 264

It is impermissible for courts of law to fundamentally alter the constituent elements of an offence to the prejudice of an accused person.[71] In this connection, the European Human Rights Court stated in *C.R v United Kingdom*[72] that:

> [T]he law must be adequately accessible--an individual must have an indication of the legal rules applicable in a given case--and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of criminal law.[73]

In the case of *Public Prosecutor v Manogaran*,[74] the Court of Appeal of Singapore correctly stated that a reversal of interpretation that truly creates a new criminal liability is prohibited by the principle of legality.[75] Reversal of interpretation undermines the principle of non-retroactivity of criminal law. However, common law courts are at large to adapt and modify the common law to reflect society's changing circumstances. In the premises, it is submitted that the law on marital rape in Botswana is unsettled and thus cannot found criminal liability. Judge Kirby's opinions in the *Letsholathebe* case amount to more than *dicta*. It is therefore important that Parliament of Botswana must step to the plate and clarify the position by expressly abolishing marital exemption in a clear and unambiguous language in the manner that the British Parliament did through the Public Order Act of 1994.

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71 Ser A (1995) European Court of Human Rights 335.

72 *Ibid* at 390.

73 *Ibid*.

74 [1997] 2 L.R.C. 288 (Ct. of App. of Singapore).

75 *Ibid*.

## 5. Public reactions on and the significance of abolition of marital rape in England and Botswana

At a general level, views are widely divided over the question whether to abolish marital exempt or not. Even in England, people had mixed reactions to the House of Lords' decision in *R v R* despite that the law in that country had constantly evolved over time towards the direction of abolition. Theresa writes that of the many people who were opposed to the elimination of spousal exemption were women.[76] For instance she recites the views of Barbra Amiel, a columnist for the London Times when the latter wrote:

> I do not know of a single successful case in those countries that allow charges of marital rape. Juries see how ludicrous it is to be faced with husbands and wives living together who had lovely sexual intercourse on Monday, an OK time on Tuesday, but on Wednesday the husband raped the wife. Sexual intercourse can be a moment of ecstasy or a nightmare of utter humiliation, depending on such intangibles as mood, timing and one's subjective appreciation of the partner's characteristics. The law cannot protect us from intercourse that is simply inconvenient, untimely or a weapon within a marriage.

Some scholars have also criticised the abolition of the marital exempt doctrine. For instance, Richard White argued in the aftermath of the decision in *R v R* that to permit women to press charges of rape against their husbands will work to destabilise family life.[77] In his view, the question is not whether 'a wife should ... be permitted to put her own interests before those of her family,' but rather what would be the effect of the abolition of marital exemption on family life.[78]

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[76] Quoted in Theresa, p. 16.

[77] R White, Marital Rape (1990) 140 New Law Journal 1727.

[78] *Ibid.*

He asked rhetorically:

> [g]iven the alleged reluctance of many women to consent to intercourse without some degree of persuasion, what would be the effect on the attitude of men of the threat of rape?[79]

Williams weighed in with an even more trenchant criticism against the abolition of marital exemption principle.[80] While conceding that rape laws within the context of marriage needed some modifications, he argued that the 'charge of rape [was too] powerful (and even self-destructive) a weapon to be placed in the wife's hands.'[81] In Williams's view, marital rape was best dealt with under the regime of assault laws.[82] He also argued that cohabitation must be the determining factor on whether a man was liable to be prosecuted for rape. He argued that if a husband was cohabiting with the wife, then he must be exempted from prosecution for rape, but that if they were not cohabiting, then the husband is subject to the full might of rape laws.[83] Williams also objected to the use of the term 'rape' to describe non-consensual sexual intercourse within marriage because in his view, it stigmatises the accused husband and opens doors to sentences that are harsher than reasonably necessary to be meted against a convicted husband.[84]

In other quarters, the abolition of marital immunity was received with much fanfare and zeal. For instance Claire Glasman, spokeswoman for Women Against Rape, had this to say about the abolition:

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79 *Ibid* 1728.

80 G Williams 'The problem of rape' (1991)141 New Law Journal 205.

81 *Ibid* at 206

82 *Ibid.*

83 *Ibid.* at 247.

84 *Ibid.*

> This is a fantastic day for women everywhere. The law lords have finally nailed a legal lie which has somehow survived for nearly three centuries. This is really a step towards making it clear legally that women have the right to say 'no' to sex, even if they are married. It overturns 250 years of legal sexual slavery based not on a court case but on an 18th century judge's decision that a husband could not rape his wife.[85]

The then British Home Office Minister, John Pattern also commended the abolition of marital immunity arguing that rape is rape regardless of the relationship between the rapist and the victim.[86]

Views on the subject are equally divided in Botswana between conservatives and reformists. A gender activist and sociology lecturer in Botswana, Dr Onalenna Selolwane holds the view that marital rape must be viewed as criminal just like any other form of rape that occurs outside marriage.[87] She is reported to have argued at a Botswana Police Service (BPS) national symposium on the development of an effective law enforcement response to violence against women and children, that as a husband '...you have no right to beat your wife and force sexual intercourse with her.' adding '... where violence is used, it is unlawful.' She rhetorically asked: 'What happened to a woman's free will? Is it chained; added weight and dunked in the village well when she gets married?'[88] *Ditshwanelo*, a local Human Rights Organisation (NGO), has also argued in favour of abolition of marital exemption, pointing out that, 'consent must be given voluntarily, even in the case where the people are married to each other...' and that 'marital rape' should be specifically written into the laws

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85 Quoted in Theresa at 18.

86 Quoted in Theresa at 19.

87 T Kala Spousal rape, the debate re-born, Mmegi Newspaper. Available at: www.mmegi.bw/index.php?sid=6&aid=1284&dir=2012/JuneMonday25 (accessed 21 June 2013).

88 *Ibid.*

of Botswana.'[89] Other local Organisations such as Botswana Network on Ethics, Law and AIDS (Bonela), Women Against Rape (WAR) and *Emang Basadi* are all backing the cause for the criminalisation of marital rape.[90]

However, like Professor Williams referred to above, Kgomotso Jongman, a family welfare officer, shuns the notion of marital rape and prefers to view it as abuse.[91] In his view:

> I would say there is abuse in marriage - abuse in different forms - sexual exploitation - where someone doesn't feel like engaging in sexual intercourse and they are forced.[92]

He adds that giving this abuse a criminal label like rape would not solve the problem. A deacon at a local church in Gaborone, World Prayer Centre, Mmoloki John is utterly dismissive of the whole concept of marital rape. In his own view:

> [t]he woman will be playing a dirty game because biblically how do you explain that a man has raped his own wife?' adding '[i]t's a new phenomenon - there has never been such a thing in the past.[93]

President of Tati Town Customary court, gender activist and wife to retired High Court Judge, Justice John Mosojane is also reported to have stated at a gender violence workshop in Francistown that there is nothing such as marital rape, arguing that if the woman cannot acquiesce to the husband's

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89 Ditshwanelo statement on marital rape (2003). Available at: http://www.ditshwanelo.org.bw/aug18pres.html.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

sex demands, then she must approach courts of law for divorce.[94]

Despite the conflict in public opinion, the elimination of marital exemption doctrine is long overdue. Its abolition will underline the important fact that women have separate and exclusive legal existence and rights independent from their husbands'. Marital rape violates the woman's right to body integrity, self-determination, freedom and the harm is not alleviated or assuaged by the fact that marriage exists between the parties or that the harm occurred in the comfort of the marriage bed.[95] Thus, the abolition of marital exemption doctrine will give life and meaning to the profound affirmations of human rights of women contained in numerous international instruments such as the Convention on the Elimination of All forms of Discrimination Against Women,[96] African Charter on Human and Peoples' Rights[97] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[98] among others. It is submitted that the abolition of marital exemption doctrine is a vital step towards the achievement of gender equality as envisaged by the many international human rights instruments referred to above. As Mutua rightfully argues,

> '[h]uman rights is today the single, paramount virtue to which vice pays homage, that governments today do not feel free to preach what they may persist in practicing.'

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94 L Mooketsi Botswana: 'Give It Up,' Says Mosojane, 'That's Rape,' Cries WAR (2009) available at: http://allafrica.com/stories/200903301724.html (accessed 24 June 2013).

95 Adamo at 555.

96 Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and came into force on 03 September 1981.

97 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

98 Adopted in Maputo in July 2003 and entered into force in November 2005.

In other words, international human rights law is real, effective, and an obligatory regime of global civilisation today.[99]

## 6. Conclusion

The views of Kirby J in the *Letsholathebe* case on criminalisation of marital rape, though *obiter*, signal a fundamental judicial awakening to notions of women's rights in the country. As indicated above, rape is morally abominable and legally repugnant whether committed within the framework of marriage or outside matrimony. As Magdeline Madibela, Head of the Gender Unit at the secretariat of the Southern African Development Community (SADC), puts it,

> [n]on-consensual sex and where the perpetrator is the victim's spouse. As such it is a form of domestic violence and or sexual abuse.[100]

Rape despoils women of their dignity and self-worth. Worse, marital rape is more traumatic than rape committed by a stranger.[101] It demeans and objectifies women and portrays them as man's chattels of sex. It renders the notion of gender equality nugatory. Spousal exemption to rape denies married women timely protection of the law since they must wait for the divorce process to run and complete before securing relief, during which time they remain exposed to danger.[102] Finkelhor and Yllo correctly argue that married women are

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[99] Makau Matua, Book Review, 95 AM. J. INT'L L. 255, 255 (2001) (quoting L. Henkin, the age of rights, at ix-x (1990). Contra J. S Watson, Theory And Reality In The International Protection of Human Rights (1991).

[100] R Kedikilwe 'when a man rapes his wife' Sunday Standard Newspaper available at: www.sundaystandard.info/print_article.php?NewsID=13154 (accessed 24 June 2013).

[101] D. Russell, Rape In Marriage 198 (1982).

[102] Adamo 559.

more exposed to the danger of marital rape when the parties are estranged because during this period the husband senses anger and resentment.[103] During estrangement, the husband is likely to retaliate against his wife through forced sex and the wife will have no legal remedy against him until the divorce is final.[104]

Thus, in order to give meaning and expand the reach of human rights of women, it is important to abolish repugnant practices that undermine their basic dignity such as marital rape. It must be acknowledged that even if a man is married to a woman, it does not mean that he has untrammelled sexual rights over her. Marital rape expresses the power and dominance of men and the subjugation of women in marital set-ups. Sir Hale's marital immutability doctrine reflects societal ethos and values of the ancient times it was enunciated and has no applicability in modern times. As Lord Kinkel argues in *R v R*, since the enunciation of Hale's proposition in 1736, 'the status of women, and particularly of married women, has changed' ... 'in the light of changing social, economic and cultural developments.'[105] It is within this context and spirit that the views of Kirby J in the *Letsholathebe* case are received. It is thus keenly hoped that with time these views will be crystallised in the jurisprudence of the country and codified in relevant statutes by the legislature. In concluding, it is important to emphasize, as pointed out above, that in Botswana, the abolition of spousal exemption to rape cannot be left to courts of law. Leaving it to courts may create the problem of reversal interpretation of the penal statutes thereby creating a new criminal liability. It is thus more desirable for the legislature to step to the plate and pass a law that clearly outlaws marital exemption. This law will teach the Botswana society that marital rape is not the husband's sexual privilege

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[103] D. Finkelhor & K. Yllo, License to rape: sexual abuse of wives (1985)141.
[104] Ibid.
[105] *R v R* p. 770.

but a dehumanising, unjust and criminal act. The common law rule of spousal exemption, if it ever was a good law, no longer applies today. Purely on grounds of principle, marital exemption is no longer defensible.

# NON-STATE ACTORS AND HUMAN RIGHTS VIOLATIONS IN NIGERIA: AN APPRAISAL OF THE ACTIVITIES OF TRANSNATIONAL OIL CORPORATIONS IN THE NIGER DELTA REGION

MICHAEL C OGWEZZY

Non-state actors are categorized as entities that are participating or acting in the sphere of international relations. They do not hold the characteristics of a legal sovereign but do have some measures of control over a country's people and territories. Transnational Corporations (TNCs) are examples of non states actors with profit motives that operate in different sovereign states and continents in the world and deriving their powers most times from the laws of these states. Economists, lawyers and social scientists alike have for a number of years agreed that foreign investments like TNCs have the potential to act as a catalyst for the enjoyment or violation of human rights, particularly in developing countries. This is even more so considering that corporate investors are often not explicitly obliged under investment agreements to observe human rights even though they exert considerable power over individuals, communities and indigenous populations. Such assertions have strengthened the normative link between human rights law violations and the activities of transnational corporations like the oil companies. It is on this premise that this paper discusses how the activities of transnational oil corporations in the Niger Delta Region have led to violations of human rights and to examine how the federal government of Nigeria through legislation have empowered these transnational oil companies to engage in activities that lead directly to such flagrant human rights violations.

**Keywords:** Non-States Actors, Transnational Corporations, Human Rights, Violations, Nigeria

## 1. Introduction

It has been acknowledged that one of the most important aspects of the rise of post-1945 global capitalism has been the call for transnational corporations to conform to basic human rights principles. In November 1993, a Philadelphia law firm filed a $1.5 billion class action suit with 46 plaintiffs from the oil-producing Orient region of Ecuador, on behalf of 30,000 Ecuadorian citizens, against Texaco Inc. The heart of the suit turned on allegations of corporate irresponsibility associated with the company's oil operations. Serious illnesses, water contamination, and ecological destruction attributed to the oil company the consequences of 20 years of drilling had.[1]

Large natural resource TNCs, including oil giants like Enron,[2] Unocal,[3] and Shell,[4] have been dogged for years by allegations of illegal violence, forced labour, and support of armed conflicts in pursuit of their corporate interests. Similarly, private, for profit military actors, like Executive

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1 Michael J. Watts, "Righteous Oil? Human Rights, the Oil Complex and Corporate Social Responsibility" *Annual Review of Environmental Resource*. 18 July, 2005, at 9.1-9.2.

2 See, Human Rights Watch, The Enron Corporation: Corporate Complicity in Human Rights Violations (1999), *available at* < http://www.hrw.org/reports/1999/enron/> accessed 29 July, 2012.

3 See Unocal's relationship to the Burmese military and its culpability in human rights violations associated with efforts to build the Yadana oil pipeline have been subject to a long-running Alien Tort Claims Act case in California. *Doe v. Unocal Corp* 1., 963 F. Supp. 880 (C.D. Cal. 1997) ; *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part by Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 18 September, 2002), *vacated by Doe v. Unocal Corp* II., 2003 WL 359787 (9th Cir. Feb. 14, 2003).

4 *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) (finding that plaintiffs' allegations that Shell participated in deportation, forced exile and torture of the Ogoni people in Nigeria, as part of a widespread attack, satisfied a claim for crimes against humanity under the Alien Tort Claims Act).

Outcomes and Sandline International, have participated in bloody conflicts around the world, and have often been paid through swap transactions involving mineral concessions. As private armies and as managers of mineral concessions, TNCs assume powers resembling those of states. Many of these TNCs activities have been the source of substantial allegations of human rights abuses. At other times, various TNCs have supported, funded and benefited from human rights violations perpetrated by the state. Rumour, anecdote and verified instances of sensational abuses have combined to create an impression that TNCs are beyond the reach of human rights law.[5] The above situations at one time or the other have been experienced in the Niger Delta Region of Nigeria.

## 2. Definition of Transnational Corporations (TNCs)

The term "transnational corporation"[6] refers to an economic entity or a group of economic entities operating in two or more countries, whatever the legal framework, the country of origin or the country or countries of activity, whether its activity is considered individually or collectively. Transnational corporations are legal persons in private law with multiple territorial implantations but with a single center for strategic decision making.[7] "They can operate through

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5 Rebecca M. Bratspies "Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities" 13 *Michigan State Journal of International Law*, 9, at 4-6 (2005).

6 Note that the terns "Transnational Corporations" and "Multinational Corporations" will be used interchangeably in the course of this paper. Both phrases means one and the same thing except for semantics.

7 Melik Özden, "Transnational Corporations and Human Rights: What is at stake in the United Nations debate over The Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights", Brochure prepared for the CETIM's Human Rights Program and Permanent Representative of the

a parent corporation with subsidiaries; can set up groups within a single economic sector, conglomerates, or alliances having diverse activities; can consolidate through mergers or acquisitions or can create financial holding companies. These holding companies possess only financial capital invested in stock shares through which they control companies or groups of companies. In all cases (parent company with subsidiaries, groups, conglomerates, alliances and holding company), the decision-making process for the most important matters is centralized.[8] These corporations can establish domicile in one or several countries: in the country of the actual headquarters of the parent company, in the country where its principal activities are located and/or in the country where the company is chartered. "Transnational corporations are active in oil production services, as could be found in Niger Delta region of Nigeria, finance, communications, basic and applied research, culture, leisure etc. They operate in these areas simultaneously, successively or alternately. They can segment their activities across various territories, acting through *de*

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CETIM to the United Nations in Geneva Part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM) at 8-9 Available online at <http://www.cetim.ch/en/documents/bro2-stn-an.pdf> accessed 29 July, 2012.

[8] Multinational Corporation (MNCs) by which is meant corporations with affiliated business in more than one country. They have become important actors in the international arena. While corporations is deemed to have the nationality of the state where it is incorporated, the activities of MNC (or TNCs) can be global in scope, and provide significant benefits by creating wealth in states where they operate. Through their investments and trade, MNCs create jobs, produce goods and services, introduce technologies, and develop markets. While much of the increased MNCs activities since the 1990's has been among states of the developed world, a portion of that activity includes the movement of MNCs operations to the developing world to take advantage of a cheaper supply of labour and lax environmental and human rights laws. See., Sead D. Murry, Principles of International Law, St Paul MN: Thompson West, 2006 at 62. See also Barcelona Traction, Light & Power Co. (*Belgium v. Spain*), 1979 I.C.J. 3, 168 (February, 5th).

*facto* or *de jure* subsidiaries and/or suppliers, subcontractors or licensees.[9]

## 3. The Niger Delta Region

The Niger Delta area in Nigeria is situated in the Gulf of Guinea between longitude 50E to 80E and latitudes 40N to 60N. It is the largest wetland in Africa and the third largest in the world consisting of flat low lying swampy terrain that is criss-crossed by meandering and anastomosing streams, rivers and creeks. It covers 20,000 km² within wetlands of 70,000 km² formed primarily by sediment deposition. It has an equatorial monsoon climate influenced by the south west monsoonal winds (maritime tropical) MT airmass coming from the South Atlantic Ocean. It is home to 20 million people drawn from nine states namely Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers states with 40 different ethnic groups. This floodplain makes up 7.5% of Nigeria's total land mass. The Delta's environment can be broken down into four ecological zones: coastal barrier islands, mangrove swamp forests, freshwater swamps, and lowland rainforests. This incredibly well-endowed ecosystem contains one of the highest concentrations of biodiversity on the planet, in addition to supporting abundant flora and fauna, arable terrain that can sustain a wide variety of crops, lumber or agricultural trees, and more species of freshwater fish than any ecosystem in West Africa. The vegetation of the Niger Delta consists mainly of forest swamps. The forests are of two types, nearest the sea is a belt of saline/brackish Mangrove swamp separated from the sea by sand beach ridges. Numerous sandy islands occur with fresh water vegetation. Fresh water

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[9] Development and International Economic Co-operation: Transnational Corporations Annexe: Proposed Text of the Draft Code of Conduct of Transnational Corporations", at 5, E/1990/94 in *Economic and Social Council*, Official Records, 1990, Supplement No. 1, United Nations, New York, 1991.

swamps gradually supersede the mangrove on the landward side. More than 70% of Nigeria's crude oil and gas production is from the area. The region produces over 90% of Nigeria's foreign earnings through oil exploration activities. It plays host to most of the upstream and downstream oil related industries and non oil related industries that release tons of pollutants into the ecosystems. The pollution from the Niger Delta on a scale could be regarded as one of the worst among similar delta areas in the world.[10]

## 4. Origin of the Activities of TNCs in Niger Delta Region

The origin of the activities of TNCs in Niger Delta region of Nigeria can be effectively traced to 1956. In that year, Shell British Petroleum (now Royal Dutch Shell)[11] discovered crude oil at Oloibiri, a village in the Niger Delta, and commercial production began in 1958.[12] Today, there are over 606 oil

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[10] Godson Rowland Ana, "Air Pollution in the Niger Delta Area: Scope, Challenges and Remedies" at 181-182.

[11] The Royal-Dutch/Shell groups of companies is an Anglo-Dutch group, the holding companies who own the group being The Shell Transport and Trading Company PLC (UK) and Koninklijke Nederland (Royal Dutch Petroleum Company: Netherlands). These two holding companies own 40 per-cent and 60 per-cent respectively of the following three subsidiaries, which are themselves holding companies for further operating subsidiaries: - Shell Petroleum NV (Netherlands) - Shell Petroleum Company LTD (UK) - Shell Petroleum Inc. (USA).

[12] The discovery of oil in commercial quantities by this company kindled the interests of other oil companies in the late 1950s including Mobil Exploration Nigeria Limited, an affiliate of the American Socony-Mobil Oil Company. Other MNCs were to join with the independence of the country in 1960. These included Tennessee Nigeria Inc. (1960), an affiliate of the American Tennessee Gas Transmission; Nigerian Gulf Oil Company (1962), an affiliate of American Gulf Oil Company; and Nigerian AGIP Oil Company (1962), an affiliate of the Italian government-owned ENI. The Nigerian oil industry is dominated by the major oil multinationals operating a joint venture with the state through the Nigerian National Petroleum Corporation (NNPC). These multinational companies are Shell Petroleum Development Company (SPDC), Chevron

fields in the Niger Delta, of which 360 are on-shore and 246 off-shore. Nigeria is rated as one of the largest oil producer in Africa and the sixth largest in the world, averaging 2.7 million barrels per day (bbl/d) in 2006. Nigeria's economy is heavily dependent on earnings from the oil sector, which provides 20% of GDP, 95% of foreign exchange earnings, and about 65% of budgetary revenues.[13] Claims against Royal Dutch/Shell reveal a broad range of human rights problems perpetuated by a Transnational Oil corporation. Whereas the first set of claims involves abuses committed by security forces that are either contracted, requested by, or otherwise acting with the awareness of the corporation, the second set of cases pertains to more general allegations of corporate insensitivity to environmental pollution, and welfare of the indigenous communities where they carry out their exploration and support of repressive policies in the host country.[14]

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Nigeria Limited (CNL), Mobil Producing Nigeria Unlimited (MPNU), Nigerian Agip Oil Company Limited (NAOC), Elf Petroleum Nigeria Limited (EPNL), and Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON). Apart from these oil companies that operate joint ventures with the Nigerian National Petroleum Corporation (NNPC) there are others that also operate in Nigeria's oil industry. These include Pan Ocean Oil, British Gas, Tenneco, Deminex, Sun Oil, Total and Statoil, all of which operate alongside numerous other local firms. (See Victor Ojakorotu and Ayo Whetho., "Multinational Corporations and Human Rights Abuses: A case study of the Movement for the Survival of Ogoni People and Ijaw Youth Council of Nigeria". Available online at., <http://rsmag.org/wp-content/uploads/2008/06/multinational200802.html> accessed on 6th August, 2012).

13 P.C., Nwilo and O.T, Badejo., "Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas". p.4 Available online at <http://fig.net/pub/figpub/pub36/chapters/chapter_8.pdf> accessed 6th August, 2012.

14 Though, according to Onosode, oil exploitation in Nigeria dates back to 1903 when the colonial government set up the Mineral Survey Corporation. In 1907, the Nigerian Bitumen Corporation was formed and it drilled 15 shallow wells in the old Abeokuta Province between 1908 and 1910, but no discoveries were made. In 1937, Shell d'Arcy had the whole country as a concession block and between 1937 and 1939 it

## 5. Transnational Corporations: Its Dominance on Host States and the Human Rights Implications

Although the modern TNCs has its roots in the East and West Indies traders of the mercantilist era of 16th to 20th centuries,[15] the term *Transnational Corporation* first appeared in 1960. Distinguishing between portfolio and direct investment, Lilienthal first used the term to refer to "such corporations...which have their home in one country but which operate and live under the laws of other countries as well".[16] Two major features are associated with TNCs: first, their activities involve more than one nation; second they are responsible for most foreign direct investment (FDI). For Dunning[17], therefore, any corporation that engages in FDI and owns or controls value-adding activities in more than one country is a multinational corporation[18] or transnational

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carried out preliminary subsurface geological investigations. After the interruption caused by the Second World War, the first well (Imo-1) was drilled in 1951 to a depth of 3,422 metres without oil. It was in 1956 that the first successful well, Oloibiri-1 was drilled with production capacity of 4,000 bbls/day in 1958, which put the Niger Delta firmly on the path of oil production. See., Tari Dadiowei., "Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarain Oil Field Experience", Niger Delta Economies of Violence., Working Paper No. 24 of 2009 6:49, (See also O. Onosode, Selected Speeches and Presentations (1995 – 2001) in B.A., Chokor (ed). *Environmental Issues and Challenges of the Niger Delta: Perspectives from the Niger Delta Environmental Survey process.* Lagos: CIBN Press Limited, 2003 at 74-77, 86).

15 UNCTAD., *World Investment Report 2000: Cross-Border Mergers and Acquisition and Development* New York and Geneva: United Nations, 2002 at 2.

16 S. J., Kobrin, "Sovereignty at Bay: Globalization, Multinational Enterprise and International Political System" in A. Rugman, and T. Brewer, (eds)., *The Oxford Handbook of International Business,* Oxford: Oxford University Press., 2001 at 1.

17 J.H. Dunning, *Multinational Enterprises and the Global Economy* Addison Wesley New York 1996 at 34.

18 Abdulai Abdul-Gafaru, "Are Multinational Corporations Compatible With Sustainable Development?" The Experience of Developing

corporation. The period 1970-2000 saw an enormous growth of activity by transnational corporations. While only 7,000 TNCs existed in 1970,[19] there were as many as 63,000 parent firms with around 690,000 foreign affiliates by the year 2000[20]. TNCs have been expanding not only numerically but also financially. In 1998, the annual revenues of the top five corporations more than doubled the gross domestic product (GDP) of the 100 poorest countries in the world.[21]

The sheer size and enormous economic power of TNCs means they have the capacity to influence development policy. Due to the perceived benefits associated with them, political and economic decisions by elected governments are increasingly made to provide favourable environments for the investment and marketing needs of TNCs. Consequently, corporations are sometimes able to influence the domestic policy outcomes of host developing countries by threatening to move jobs overseas. This often raises questions about whether corporate power enables TNCs to effectively undermine human rights by circumventing domestic environmental standards and statutory laws. Moreover, the fear that firms will move jobs overseas and the calculation of the effect that this could have on the economy, can influence the degree to which developing countries will impose environmental regulations on multinational enterprises thereby giving way

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Countries Georgia Tech Centre for International Business Education and Research Working Paper Series 2007-2008 Working Paper 001-07/08. Paper Prepared for the Conference on Multinational Corporations and Sustainable Development: Strategic Tool for Competitiveness – Atlanta, October 19 - 20, 2006 at 6-8., Available online at <http://www.ciber.gatech.edu> accessed 30 July. 2012

19 E. Kolodner, "Transnational Corporations: Impediments or Catalysts of Social Development?" *Occasional Paper No. 5, World Summit for Social Development*, Geneva 1994 at 2.

20 UNCTAD *World Investment Report 2000: Cross-Border Mergers and Acquisition and Development* New York and Geneva: United Nations 2000 at 37.

21 *Id.*, at 3.

to free heaven for the operations of TNCs and subsequently unchallenged violations by them.[22]

Again, as trade liberalization, privatization, and deregulation have fostered the expansion of business worldwide, experts have lamented that the nation-state as an organizational entity is declining in power[23] and that future international legal efforts to increase human rights protection should attempt to bypass the state altogether.[24] The nature of businesses with operations spanning more than one country (called "Transnational Corporations," or "TNCs"), consists of more than 60,000 firms and more than 800,000 subsidiaries, not including the millions of suppliers, subcontractors, and distributors that constitute their production chains.[25] For these entities, "territory is not the cardinal organizing principle or national interests the core driver." Yet traditional state methods of regulating corporate activity remain largely territorial, leading many to believe that domestic law's ability to enforce human rights norms has been effectively thwarted.[26] However, the increasing power and mobility of corporations is hardly a phenomenon that state actors are powerless to

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22 J. Clapp, "Transnational Corporations and Global Environmental Governance", in P. Dauvergne, (ed.), *Handbook of Global Environmental Politics* (Northampton, MA: Edward Elgar). 2005 at 1.

23 Christen Broecker., "Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability", *International Law And Politics* (Vol. 41:159) 165-167 (2008).

24 *See* David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", 44 *Vermont Journal of International Law* 931, 933 (2004) (arguing that the current state-based framework of international human rights law is inadequate to regulate powerful non-state actors, and proposing direct international legal regulation of transnational corporations).

25 See John Ruggie, *American Exceptionalism and Global Governance* 14 (John F. Kennedy School of Government, Working Paper No. RWP04-006, 2004).

26 Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights", 20 *Berkeley Journal of International Law* 54 (2002)

address. While the structure of TNCs does allow them to move their operations between worldwide facilities, making them slippery regulatory targets,[27] their innovative structure is not the sole factor contributing to their substantial freedom from state regulation. Rather, domestic political systems have either chosen to relinquish their control over businesses that operate in a global space or have simply neglected to exert control beyond their borders in the first place. Many business leaders have enormous economic and political power, allowing them to exercise political influence that is disproportionate to their numbers and to lobby for favourable regulatory schemes in the states that would otherwise be best positioned to control them.[28] Certainly, such business interests profoundly affect the behaviour of host states as well as home states, as the leaders of the host states often face considerable pressure to create an attractive environment for foreign investment.[29] Yet business actors also exert powerful influences over home states, incentivizing them to structure the relations between their domestic investors and their foreign hosts in ways that

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[27] Claudio Grossman & Daniel D. Bradlow, "Are We Being Propelled Towards a People-Centered Transnational Legal Order?", 9 *American University Journal of International Law and Policy* 1, 8 (1993) ("The fact that they have multiple production facilities means that TNCs can evade State power and the constraints of national regulatory schemes by moving their operations between their different facilities and the world."). Again, apart from using the armed forces to maintain peace in the Niger Delta, the Nigerian government uses the oil pipeline Act of 1956, the Petroleum Act of 1969 and the Land Use Act of 1978, the Treason and Treasonable offences Decree of 1993 (now an Act of the National assembly) to intimidate and harass the Niger Delta peoples.

[28] Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?", 5 *Melbourne Journal of International Law* 37 (2004) (discussing the use of extraterritorial laws to regulate multinational corporations in the context of human rights).

[29] Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 *Minnesota Journal of Global Trade* 101, 103-4 (2002).

heavily favour the former.[30] The influence of business actors on state policies is similarly reflected at the international level, where states are often unwilling to support mechanisms that would constrain the actions of their own nationals abroad.[31] As a result of the political and economic power of business actors, TNCs operating in capital-importing countries are frequently able to infringe upon the human rights of the citizens of their host states with virtual impunity.[32]

## 6. Transnational Corporations and Human Rights

Although the term "human rights" is generally understood in reference to states, all human rights can potentially be violated by non-state actors, i.e. corporations.[33] By human

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30 Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights", 20 *Berkeley Journal of International Law*, 54 (2002), at 58 ("Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy".)

31 *Id.*, at 81.

32 Jana Silverman and Alvaro Orsatti., "Holding Transnational Corporations Accountable for Human Rights Obligations: The Role of Civil Society", *Social Watch* 31. Available online at <http://www.socialwatch.org/sites/default/files/silverman-orsatti2009_eng.pdf>, accessed 30th July, 2012. Business enterprises, particularly transnational companies, are typically private, non-governmental entities subject only to national laws in either the country where the company has its headquarters or in the host countries where the company has investments. Even though these companies may have significant presence in multiple countries, they are not technically considered to have international legal status, which is limited to states and certain intergovernmental organizations such as the European Union and the UN. This means that by and large they have not been subject to the rights and obligations of international law, including international human rights law.

33 Ratner , R. Steven, "Corporations and Human Rights: A Theory of Legal Responsibility," *Yale Law Journal*, Vol. 111, (2001), at 509. Ratner gives examples of how TNCs may violate or contribute to violations of human rights which create duties exclusively on states, such as civil and political rights.

rights we refer to those human rights recognized by customary international law and international treaties.[34]

In recent years, greater attention has been paid to the role of commercial entities in violent contexts whose activities may, directly or indirectly, implicate issues of human rights or international humanitarian law.[35] International human rights law establishes a set of norms and obligations that are mainly enforced in relations among states or between states and their citizens.[36] Unlike states, private commercial corporations are generally not treated as bearing direct human rights obligations under international law; human rights law applies only in a limited way to these corporations.[37] Similarly, international humanitarian law, although increasingly applied to non-state actors, has yet to be applied directly to privately-owned companies.[38] At the domestic level, most countries do not have national legislation establishing the extra-territorial duties of corporations with respect to human rights. Domestic

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[34] Natalya S. Pak and James P. Nussbaumer, " Beyond Impunity: Strengthening The Legal Accountability Of Transnational Corporations For Human Rights Abuses"., *Hertie School of Governance, Berlin*, Working Papers No. 45 October, 2009 at 9.

[35] Dana Weiss & Ronen Shamir., "Corporate Accountability to Human Rights: The Case of the Gaza Strip", *Harvard Human Rights Journal / Vol. 24*, 2011 at 155-157.

[36] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010); Andrew Clapham, "Human Rights Obligations of Non-State Actors" 96 (2006); Mark Gibney *et al.*, "Transnational State Responsibility for Violations of Human Rights", 12 *Harvard Human Rights Journal* 267, 295 (1999); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 *Columbia Journal of Transnational Law* 927, 932–33 (2005).

[37] David Kinley & Junko Tadaki, *above*, note 24, at 931, 934–35.

[38] *See Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995); *see*; Nils Rosemann, "The Privatization of Human Rights Violations Business Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", 5 *Non States Actors and International Law*. 77, 89 (2005); See also Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", 5 *Chicago Journal of International Law* 511, 519 (2005).

laws that apply to corporations in their home states do not ordinarily regulate corporate activities in host states.[39] At thesame time, human rights norms in host countries, especially in developing ones, "may be heavily compromised by the economic considerations of the host state's unbalanced relationships with transnational corporations." As a result, there is a relative legal vacuum concerning corporate human rights obligations in host countries in general... This vacuum and potential ways of addressing it have been at the heart of the recently proliferating literature on the human rights obligations of corporations.[40]

## 7. Human Rights Violations in Niger Delta Region

Violations of the human rights of the local populace can be seen as one of the major undoing of the people of Niger Delta region. Oil companies like Chevron, Shell, Agip, Mobil and the other Western Oil Companies have been very unfair

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[39] The term "home state" here refers to the country where the corporation is incorporated, whereas "host state" refers to any other country where the corporation operates. The commercial activities of corporations beyond the boundaries of their home-states raise the issue of the extraterritorial application of human rights treaties. *See generally* Theodor Meron, "Extraterritoriality of Human Rights Treaties", 89 *American Journal of International Law* 78 (1995). For an analysis of states' human rights responsibilities incurred as a result of extraterritorial violations by corporations, See Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", 70 *Modern Law Review* 598 (2007).

[40] Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges", 6 *Northwestern University Journal of International Human Rights* 228 (2008); See also David Weissbrodt, *Business and Human Rights*, 74 U. R CIN. L. REV. 55, 55 (2005); *see also* Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 *Columbia Journal of Transnational Law* 521 (2004).

to the people of the region. The human rights of the people are constantly violated by the oil companies acting in tandem with the government with their repressive security forces or machinery. Perhaps, examples of military and security activities carried out in the past might help to buttress this assertion. For instance, in attempt to suppress the Isaac Boro rebellion in 1966 which started as a campaign for fair deal or control of the oil wells by the people of Niger Delta. Nigerian government reacted by deploying troops which terrorized entire communities including raping of innocent women. Boro was considered to be a threat to the free exploitation of the petroleum resources in the Niger Delta.[41] Boro himself, along with his lieutenants: Nottingham Dick and Samuel Owonanu were tried for treason and sentenced to death, but the Nigerian civil war broke out before they were to be executed. Instead of execution, the trio were conscripted into the Nigerian army where Isaac Adaka Boro met his death.[42]

In 1987, the Iko Community in Akwa Ibom State was extensively brutalized by a team of Nigerian Mobile Police Force, at the request of Shell. In 1992, at the insistent of Shell, some youth were killed in Bonny during a peaceful demonstration against the activities of the oil company.[43] In January 1993, the crisis over environmental pollution and economic marginalization from the oil industry reached its peak when 300,000 Ogoni led by Ken Saro-Wiwa protested against Shell Oil. In no time, Saro-Wiwa was falsely accused

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41 ICE., "Case Study: Ogonis and Conflict; Factsheet on the Ogoni Struggle" at 5 available online at <http://www.insular.com/~tmc/politics/africa/ogoni.fact.html> accessed on 23 July, 2012.

42 Atakpu. L., "Resource-Based Conflicts: Challenges of oil Extraction in Nigeria"., Paper Presented at Benin City, Nigeria on a European Conference Hosted by the German EU Council Presidency 2007 Berlin, between 29 and 30 March, 2007, at 9.

43 A. A., Brisibe, "African Tradition "The Identity of a People: With special Focus on Globalization & Its Impact in the Niger Delta" C.O.O.L Conference, Boston, U.S.A, March 18, 2001, at 5.

of inciting members of MOSOP to kill four Ogoni elders. He and eight other fellow compatriots were arranged for trial, by a kangaroo military tribunal, set up by the despotic and repressive government of General Sanni Abacha, for the murder of the Ogoni four, convicted, and hanged in November 1995. However, "his more likely "crime" is his effort to organize the Ogoni ethnic minority to stop destruction of their homeland caused by operations of Shell and Chevron, the multinational oil companies, and seek compensation for his people's lost farmland and fisheries".[44]

On January 11, 1999, Ijaw women who were engaged in a peaceful demonstration and marginalization of their people in Port Harcourt were violently tear-gassed, beaten, stripped, and detained by a combined team of policemen and soldiers.

The event of September 9 and 11, 1999, in which about 100 soldiers deployed from Elele Barracks and joined hands with the police saw to the destruction of the Black Market area of Yenagoa, Bayelsa State. They had their marching orders to shoot at sight. The combined team of police and soldiers went from house-to house in search of people to arrest. Anyone found running was shot-on-sight. People who jumped into the river to escape were sprayed with bullets. "A group of soldiers and police in violation of the law they swore to protect, "the life and properties of Nigerian citizens", jumped into three speed-boats, cornered the young boys who were trying to swim to safety, to avoid the venomous assault and sprayed them with bullets.[45] Also, the Warri wars of 2003 were allegedly instigated by the activities of some oil companies and Nigerian Naval officers.[46]

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[44] ICE *above*, note 41, See also International Herald Tribune: "Oil Companies in Niger Delta Facing Growing List of Dangers" available online at www.iht.com/articles/2007/04/22/news/oil.php accessed on 2nd August, 2012.

[45] Atakpu. L., *above*, note 42 at 9.

[46] A.A., Brisibe, *above*, note 43 at 6.

In these circumstances, a lot of local communities in the Niger Delta have been sacked. Fire has consumed thousands of innocent people in the course of instigated communal conflicts. Life has become caustic at best since the coming of the oil companies who have wrought pains, massive destruction and death of unqualified magnitude on the Niger Deltans.[47] The people of the region viewed all these violations, assaults and marginalization because they belonged to ethnic minority groups in the Nigerian Federation, too negligible to be protected by the constitution.[48]

## 8. Environmental Rights Problems Associated with TNCs

The social and environmental costs of oil production by transnational oil corporations have been very extensive. They include destruction of wildlife and biodiversity, loss of fertile soil, pollution of air and drinking water, degradation of farmland and damage to aquatic ecosystems, all of which have caused serious health problems for the inhabitants of areas surrounding oil production. It is ironical that environmental regulations which are common practice in developed nations are often not followed due to the lack of power, wealth and equity of the affected communities. As a result, oil companies often evacuate inhabitants from their homelands, further marginalizing them. The system of oil production in Nigeria is skewed in favour of the multi-nationals and government elite who are the direct recipients of oil production revenue. As a result of environmental damage brought about by the activities of the oil companies, environmental problems like erosion; flooding; land degradation; destruction of natural ecosystem;

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[47] Atakpu. L., *above*, note 42 at 10.

[48] H.T., Ejibunu, "Nigeria's Niger Delta Crisis: Root Causes of Peacelessness", EPU Research Papers, Issue 07/07 *European University Center for Peace Studies (EPU)*, Stadtschlaining/Austria 2007) Presentation of 2007, at 9-20.

fisheries depletion caused by dredging ; toxic waste into the rivers etc, etc are common phenomenon in the region. The local people can no longer take to farming and fishing which are their major occupations. As a result of the impact of oil activities on the environment and the ecosystem of the region, the United Nations warned in a report that "the degree and rate of degradation are pushing the Delta towards ecological disaster".[49] The oil multinationals contributes significantly to the environmental destruction of the Niger Delta through the following ways:

a. Oil Spillage: Oil spillage is a major problem in the region. The indigenes and the environment suffer from oil spillage and lack of coordinated efforts by the oil companies and the federal government to clean up as soon as oil spillage takes place. According to Etim,[50] a spillage from a pipeline owned by the Shell Petroleum Development Company (SPDC) in the Karama Community of Okordia/Zarama Local Government Area of Bayelsa State in June 2003 caused enormous economic and environmental damage and hardship to the area. The spillage was not properly cleaned and the indigenes were not evacuated by the oil company. Community leaders in the area alleged that SPDC awarded the contract for cleaning the spillage to a company that did not do an effective job, thereby resulting in fires and destruction of the ecosystem. According to Cayford as quoted in Abdulai Abdul-Gafaru., "the incidence of oil spills in the Niger Delta is exceptionally high; 40% of all of Shell's oil spills between 1982 and 1992 occurred in the Niger Delta despite the fact that Shell drilled for oil in twenty-eight different countries during the same

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[49] Nigerian Oil, "Curse of the Black Gold" Available online at <http:// www7.nationalgeographic.com> accessed on 29 July, 2012.

[50] ICE *above*, note 41.

period". One significant consequence of the numerous oil spills has been the lost of mangrove trees. Once a major source of soil stability, Nigeria's mangrove forests now find it difficult to survive the oil toxicity due to Shell's operations. The increasing oil leaks have largely destroyed the breathing roots of the mangroves, killing off parts of the forest.[51]

b. Gas Flaring: Just as the Western oil corporations are inflicting untold hardship on the citizens of the Niger Delta by engaging in oil exploratory activities with total disregard for the political and economic sensibilities of the people, they are also wrecking the fragile ecosystem of the region through uncontrollable gas flaring. Gases flaring takes place 24 hours and some have been burning for over 50 years, thereby resulting in the release of hydrogen sulphide (sour gas). Hydrogen sulphide produces sulfur oxides and when sulfur oxides mix with oxygen and water in the atmosphere, they produce acid rain. Acid rain causes innumerable negative effects on the world, particularly the people and the environment. Gas flaring is a frequent occurrence in the Niger Delta. In the year 2000, 95% of extracted natural gas was flared in Ogoniland, a section of the Niger Delta, compared to a mere 0.4% flared in the entire US.[52] The consequences of

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[51] See Abdulai Abdul-Gafaru., *above*, note 18 at 17. See also., Jonathan Sagay; Zephaniah Osuyi Edo; and Lucky Avweromre., "Environmental Degradation and the Dilemma of Sustainable Development: Implication for Environmental Security in the Niger Delta Region". *Journal of Environmental Sciences and Resource Management*, Volume 3, Cenresin Publications of March 201, at 22. Available online at <http://www.cenresinpub.org/pub/ENVIRONMENTAL%20DEGRADATION%20AND%20THE.pdf> accessed on 8th August, 2012.

[52] Abdulai Abdul-Gafaru., *above*, note 18 at 16. See also Shinsato, A. L., "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", *Northwestern University Journal Human Rights Law*, Vol. 4:1, 2005 at

gas flares on the ecology, climate and local inhabitants are alarming. Gas flaring contributes to acid rain which poisons potable water, stunts crop growth, and damages the ecosystem.[53] Moreover, the extremely high levels of carbon dioxide and methane gases that are released into the atmosphere is a significant source of global warming.

A Report by the American Central Intelligence Agency (CIA) indicated that "everyday, eight million cubic feet of natural gas are burned off in flares that light the skies across the Delta, not only driving off 5 cms, hunting the fishing and poisoning the agriculture, but contributing to global warming". Thus, the oil companies are not only destroying the Niger Delta, they are also contributing to global warming. A statement by MOSOP on the effect of gas flaring on the people of Ogoni would show how it has negatively affected the life of the people. It reads: "The once beautiful Ogoni country side is no more a source of fresh air and green vegetation. All one sees and feels around is death."[54]

## 9. How Land and Oil Mineral Legislation in Nigeria Laid Foundations for Human Rights Violations in the Niger Delta by TNCs

Under Nigerian law, local communities have no legal rights to oil and gas reserves in their territory.[55] Moreover, their

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7., See also Essential Action and Global Exchange., "Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta" 2000, Section 1., Available online at <http://www.essentialaction.org/shell/Final_ Report.pdf> accessed: 27 July, 2012.

53 Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta" Available online at: <http://www.essentialaction.org/shell/Final_Report.pdf> accessed on 27th July, 2012

54 Factsheet on the Ogoni Struggle <http://www.insular.com/~tmc/politics/africa/ogoni.fact.htm> accessed 1st August, 2012.

55 Constitution of Federal Republic of Nigeria, 1999, Chapter 4, Section

security of tenure and the protection of the right to an adequate standard of living, including housing, food and water, have been compromised by both Constitutional provisions and a number of laws that give precedence to oil operations in terms of access to land.[56]

Section 44 of the 1999 Constitution states that "the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly." Under the 1978 Land Use Act, all land is vested in the Governor of the State and it is lawful for the Governor "to revoke a right of occupancy for overriding public interest". Overriding public interest includes "the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith."[57] Communities living on the land cannot prevent this from occurring, and there is no provision in the law for consultation. Provisions within the Petroleum Act and the Oil Pipelines Act empower the Federal Government to grant access and use rights in relation to land for the purposes of oil prospecting and mining. Once a company has been given a permit, licence or lease the state government has to give access to the land. The communities are compensated according to a formula that primarily assesses value based on "surface goods"

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44 (3) states: "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly".

56 Amnesty International., "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" Amnesty International Publication, June, 2009 AFR 44/017/2009, at 24.

57 See, the Land Use Act 1978, Cap. L.5 Laws of the Federation of Nigeria (LFN) 2004, which regulates ownership rights and tenure system of landholding; (Sections 28 (1) and 28 (2) (c) and 28 (3) (b)).

lost.[58] These are buildings, crops, economic trees and access to fishing grounds. The compensation calculations do not appear to consider the long term implications of loss of access to critical livelihood resources.

Moreover, the Land Use Act bars courts from addressing any concerns about the amount or adequacy of compensation paid to people who lose access to their land under the terms of the Act.[59] The combination of the Constitutional Provisions on oil and gas, the Land Use Act and aspects dealing with the oil laws of Nigeria has given sweeping powers to the government to expropriate land for use by the oil industry without due process or adequate compensation, in contravention of its international human rights obligations, in particular the right to an adequate standard of living.[60] The provisions of these laws, which significantly undermine communities' security of

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[58] Under the Land Use Act, 1978: if a right of occupancy is revoked for purposes related to mining and oil, the occupier is entitled to compensation under the appropriate provisions of the relevant Mining or Oil laws. Section 36 of the Petroleum Act states: "holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands." Section 20 of the Oil Pipelines Act, 1959 (Cap O7, LFN 2004) states: "If a claim is made under subsection (3) of section of 6 of this Act, the court shall award such compensation as it considers just in respect of any damage done to any buildings, lion crops or profitable trees by the holder of the permit in the exercise of his rights there under and in addition may award such sum in respect of disturbance (if any) as it may consider just." In practice the tendency has been to focus compensation calculations on the surface goods lost under the headings of crops, economic trees and buildings.

[59] Section 47 (2) states: "No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act."

[60] Article 11 of the UN International Covenant on Economic, Social and Cultural Rights GAR 220A of 16 December, 1966, entered into Force on 3rd January, 1976.

tenure, also create the legal foundations for oil companies to operate without due regard for the impacts of their operations on human rights. For example, holders of leases and licenses and permits to survey under the Petroleum Act, Oil Pipelines Act and subsidiary legislation are entitled to engage in a range of activities-from cutting down trees and other vegetation, to dredging without any adequate safeguards in terms of the impact of these activities on the environment and associated livelihoods of the communities.[61] The result is conflict between

[61] Oil Pipelines Act 1959 (Cap O7, LFN 2004), Section 5(1): "A permit to survey shall entitle the holder, subject to the section 6 of this Act, to enter together with his officers, agents, workmen and other servants and with any necessary equipment or vehicles, on any land upon the route specified in the permit or reasonably close to such route for the following purposes –
(a) to survey and take levels of the land;
(b) to dig and bore into the soil and subsoil;
(c) to cut and remove such trees and other vegetation as may impede the purposes specified in this subsection; and
(d) to do all other acts necessary to ascertain the suitability of establishment of an oil pipeline or ancillary installations, and shall entitle the holder, with such persons, equipment or vehicles as aforesaid to pass over land adjacent to such route to the extent that such may be necessary or convenient for the purpose of obtaining access to land upon the route specified." Section 6(3) of the same Act states: "The holder of a permit to survey acting under the authority of section 5 of this Act shall take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage done under such authority and not made good." Section 11 states: "A licence shall entitle the holder, his officers, agents, workmen servants with any necessary equipment or vehicles, subject to the provisions of sections 14, 15 and 16 of this Act, to enter upon, take possession of or use a strip of land of a width not exceeding two hundred feet or of such other width or widths as may be specified in the licence and upon the specified in the licence, and thereon there over or there under construct, maintain and operate an oil pipeline and ancillary installations. A right to object is provided under Section 9 of the Act: "Any person whose land or interest in land may be injuriously affected by the grant of a licence may within the period specified for objections lodge verbally or in writing at one of the specified addresses notice of objection stating the interest of the objector and the grounds of objection."

the communities and the oil companies over land. Companies depend on land because the oil is beneath it, while communities depend on land for farming and fishing.[62] However, in almost every respect; the human rights of the people of the Niger Delta have been undermined by the laws enacted to allow oil and gas extraction to occur.

## 10. Constitutional Guarantees of Rights Violated by Transnational Oil Corporations in Nigeria

It is an irony that some of the rights violated by the TNCs in connivance with the Federal Government of Nigeria as part of their oil operation activities in the Niger Delta Region are rights constitutionally guaranteed by thesame Government of Nigeria for which the operators of this constitution have vowed to protect in taking their oath of office. For example, the right to life is enshrined under section 33 of the constitution and it provides that, "Every person has a right to life, and no one shall be deprived intentionally of his right, save in execution of the sentence of a court in respect of criminal offence of which he has been found guilty in Nigeria".[63] Again Section 34 provides that; "every individual is entitles to respect for the dignity of his person, and accordingly- no person shall be subjected to torture, or to inhuman or degrading treatment, no person shall be held in slavery, or servitude; and no person shall be required to perform forced or compulsory labour".[64] Section 35 stipulated that, "every person shall be entitled to his personal liberty and no person shall be deprived of such liberty... except in accordance with a procedure permitted by law,[65] while section 43 and 44 made provisions for the right to

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[62] G. F. Frynas., Oil *in Nigeria: Conflict and Litigation between Oil Companies and Village Communities*, Transaction Publishers, 2000, at 170.

[63] Constitution of the Federal Republic of Nigeria, 1999, Section 33(1)

[64] *Id.*, Section 34 (1).

[65] *Id.*, Section 35 (1).

acquire and own immovable property anywhere in Nigeria,[66] and "no movable property or any interest in an immovable property shall be acquired compulsorily in any part of Nigeria except in the manner for the purpose prescribed by law that, among other things:

a. requires the prompt payment of adequate compensation, therefore, and

b. gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria".[67]

These provisions of the Nigerian constitution should be married with the series of human rights violations perpetuated by the government security forces and security agents contracted by the transnational oil corporations from the when Nigeria army crushed the Adaka Boro rebellion in 1966 which was a campaign among his kinsmen for fair deal or control of the oil wells by the people of Niger Delta till the killing of Ken Saro Wiwa in November, 1995 for campaigning for the environmental rights of the Ogoni's and further stopping the continued destruction of their homeland caused by operations of Shell and Chevron among others. Over these years, the government has engaged in wanton killing, rape, brutality, forced exile and torture, unlawful arrest and detention of community youths in the Niger Delta for peacefully challenging the unhealthy operations of transnational oil corporations in the region. Furthermore, a lot of local communities in the Niger Delta have been sacked and buildings destroyed by security forces in either reprisal attacks or deliberate action based on

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[66] *Id.*, Section 43.

[67] *Id.*, Section 44 (1).

the command operations of top security officers working for the government and the oil companies in violation of Section 43(1) of the Nigerian Constitution, 1999. Section 44(1) of same constitution prohibits compulsory acquisition of property but this section continues to be violated by oil companies by virtue of the combined provisions of Section 5 (1) and 6 of the Oil Pipelines Act and section 47(2) of the Land Use Act, 1978 which states that: "No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act."

Section 20 of the Constitution of Nigeria provides for environmental objectives and it states that, "the state shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria".[68] So the state is under responsibility to protect the environment of Nigeria in the face of violation of the rights to decent environment by the transnational oil corporations. It is not an excuse that this responsibility is not under Fundamental Human rights provisions of the constitution which are enforceable in the courts of law. States which have given each other undertakings to respect, protect and promote human rights in the form of international human rights conventions must implement this self-imposed obligation in national legislation. In 1986 a group of human rights experts in the United Nations specified this responsibility of states in the so-called Limburg principles. These specify that states have: a duty of respect: the state is obliged to refrain from infringement of rights; a duty of protection: the state must protect rights against infringements by third parties (like TNCs); a duty of implementation: the state must ensure complete realisation of human rights where this is not already the case.[69]

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[68] *Id.*, Section 20.

[69] Confederation of German Employers' Associations (BDA)., "Human Rights and Multinational Enterprises Possibilities and Limits of What Business Can Do"(BDA: Berlin, May 2008) at 10.

Notwithstanding, states responsibility to promote and protect human rights, companies clearly also have a role to play in supporting and disseminating human rights. The Universal Declaration of Human Rights calls on every individual and every organ of society, which obviously includes Transnational Corporations and other business players, to contribute to the realisation of human rights.[70] The Universal Declaration of Human Rights, in which the obligation to promote respect for human rights and to secure their universal and effective recognition and observance is addressed not only to states but also to 'every individual and every organ of society', a formulation wide enough to encompass private corporations.[71] By so doing, multinational enterprises are meeting their moral and economic obligation to promote worldwide realisation of human rights and to contribute to their recognition through observance. Hence in April 2008, the UN special representative John Ruggie proposes a concept for human rights and companies which he broke down into three principles: protect, respect and remedy: Protect:[72] it is the duty of the state to protect the people within its borders against human rights infringements by non-state players.

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[70] *Id.*, See also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Session, 1st Plenary Meeting., U.N. Doc. A/810 (Dec. 12, 1948), Article 29(1). Although not legally binding at the time it was adopted, many argue that "subsequent state practice has transformed it into a document considered by many to be a statement of customary international law."

[71] Peter T. Muchlinski., Human Rights and Multinationals: Is there a Problem? *International Affairs* 77, 1 (2001) 31:48 at 40. See also Amnesty International Dutch Section and Pax Christi International, *Multinational Enterprises and Human Rights* (Utrecht, November 1998), at 33–34.

[72] UN. Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises., UN doc. A/HRC/8/5, April 7, 2008, available online at <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm.> accessed on 5th August, 2012.

Respect: it is the duty of companies to respect human rights and to put in place the management structures necessary to this end. Remedy: judicial and non-judicial grievance mechanisms need to be developed and reinforced in order to improve defence against human rights infringements.[73]

Though section 20 of the Constitution of Nigeria, 1999, is under fundamental objectives and directive principles of state policy and thus not justiciable and enforceable by courts of law but judicial pronouncement on matters of environmental pollution due to oil spillage and gas flaring in the Niger Delta region abound and has become judge made laws that could be argued as enforceable like provisions of the extant constitution of Nigeria. A classical for illustration is the case of *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and Ors.*,[74] in which a strong judicial precedence was established. This case was brought by Jonah Gbemre on behalf of himself and the Iwhereken Community in Delta State, in the Niger Delta area of Nigeria against Shell Petroleum Development Company Nigeria Ltd, the NNPC and the Attorney General of the federation. The case was brought under the fundamental rights enforcement procedure in the Nigerian constitution, alleging violations of both constitutional provisions and the African Charter. The plaintiffs claimed that the oil exploration and production activities of Shell, which led to incessant

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[73] Confederation of German Employers' Associations (BDA)., *above*, note 69 at 12. See also John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 4 (John F. Kennedy School of Government Working Paper RWP07-029, June 2007), *available online at* <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-029> accessed on 6th August, 2012. John Ruggie, Standards and Practices- Guiding Principles for Business and Human Rights, Ethical Corporation (Oct. 2007), www.ethicalcorp.com/content.asp?ContentID=5353> accessed 6th August, 2012.

[74] *Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Or.*, (Suit No FHC/ B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005).

gas flaring, had violated their rights to life and the dignity of the human person under Sections 33(1) and 34(1) of the Constitution of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter.[75] The plaintiffs alleged that the continuous gas flaring by the company had led to poisoning and pollution of the environment which exposed the community to the risk of premature death, respiratory illnesses, asthma and cancer. They also alleged that the pollution had affected their crop production thereby adversely affecting their food security. They claimed that many of the natives had died and many more were suffering from various illnesses. The community was therefore left in a state of gross underdevelopment. The defendants opposed the case on several grounds, including that those articles of the African Charter do not create enforceable rights under the Nigerian fundamental rights enforcement procedure. However they failed to follow up their arguments during the proceedings due to procedural issues.

The judge therefore proceeded to judgment without any findings of fact... In its judgment, the court held that the constitutionally protected rights include rights to a clean, poison-free, pollution-free environment and that the actions of Shell in continuing to flare gas in the course of its oil exploration and production activities in the plaintiffs' community violated their right to life and/or the dignity of the human person under the constitution and the African Charter. Even though there is no apparent justiciable right to a "clean poison-free, pollution-free and healthy environment" under the Nigerian constitution, the court relied on a cumulative use of constitutional provisions with the provisions of the African Charter (especially Article 24) to recognize and apply a fundamental right to a "clean poison-free, pollution-

[75] African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U Doc CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October, 1986. Articles: 4, 16 and 24.

free and healthy environment"... The implication of this decision is that there is a possibility of resorting to the African Charter for rights which are not available under national law. The plaintiffs' counsel further argued that the provisions of the Associated Gas Re-injection Act (Continued Flaring of Gas Regulations) 1984 and The Associated Gas Re-Injection (Amendment) Decree No 7 of 1985 which allow for continuation of gas flaring are inconsistent with the right to life (which includes the right to a healthy environment) guaranteed under the constitution. The court agreed with this argument and held that legislation permitting flaring of gas in Nigeria, with or without permission, is inconsistent with the Nigerian constitution and, therefore, unconstitutional. The court therefore directed the Attorney General of the federation and the minister of justice to take steps to amend relevant legislations governing gas flaring to bring them in line with provisions on fundamental rights under the Nigerian constitution. The significance of this is that fundamental rights protection is held as an objective which other regulations must meet in order to be valid under the law. This clearly invalidates the discretion given by extant legislation to the government to permit gas flaring as it deems fit. The court consequently restrained the company from further gas flaring in the plaintiffs' community.[76]

## 11. Conclusion

In the face of weak regulatory framework to check the activities of transnational corporation for human rights violations in the Niger Delta region of Nigeria, The Government of Nigeria should strengthened it regulatory

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[76] See also Olufemi O Amao., "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States", *Journal of African Law*, 52, 1 School of Oriental and African Studies. (2008), 89–113, at 110-111.

mechanism by enacting effective human rights laws to curb human rights violations this is because business enterprises, particularly transnational companies, are typically private, non-governmental entities subject only to national laws in either the country where the company has its headquarters or in the host countries where the company has investments. Even though these companies may have significant presence in multiple countries, they are not technically considered to have international legal status, which is limited to states and certain intergovernmental organizations such as the European Union and the UN. This means that they are not subject to the rights and obligations of international law, including international human rights law.[77] Oil companies in Nigeria are under Federal jurisdiction. The Federal government is both a partner in all oil activities through NNPC, and is required by Federal law to enforce environmental compliance of oil operations through the Department of Petroleum Resources. This situation has resulted in the government inadequately regulating oil pollution while at the same time being part to much of the Delta... The major constraints impending reduced oil pollution are

(i) the conflict of interest for the Federal government being both a partner in oil activities and the regulatory body.

(ii) no requirement for community participation in planning and development of oil activities.

(iii) very limited ability of regulatory institutions to monitor pollution.

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[77] Jana Silverman and Alvaro Orsatti., "Holding Transnational Corporations Accountable for Human Rights Obligations: The Role of Civil Society", *Social Watch* 31 at 1:3.

[78] Tari Dadiowei., *above*, note 14 at 33:49, see also, World Bank, "*Defining an Environmental Development Strategy for the Niger Delta* Industry

(iv) low compensation rates for damage to property; and

(v) lack of enforcement of environmental regulations.[78] There is a practical need for home states to control the activities of their corporations when host states like Nigeria prove unwilling or unable to do so because of lax laws or revenue accrue from the operations of these TNCs .

The transnational oil corporations in the Nigeria should be made accountable for human rights violations committed by them, their subsidiaries or contractors in their operational bids in the Niger Delta. Extraterritorial avenues such as the Alien Tort Claims Act should be invoked where the action is a grave violation of customary international law.[79] This was exemplified in the case of *Wiwa v. Royal Dutch Petroleum Co.*[80] where it was held that TNCs are liable for human rights abuses occurring in the context of their business activities abroad.

The Home governments of TNCs should become proactively engaged in compelling their oil companies to change their

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and Energy Operations Division West Central Africa Department. World Bank Report Vol 1. 1995 at 53.

79 ATCA cases are pursued under customary international law. Under customary international law, natural persons (individuals) have a duty not to violate fundamental or peremptory norms (including piracy, aircraft hijacking, forced labour, genocide, war crimes and crimes against humanity). This has led some to conclude that: 'To the extent that individuals have rights and duties under customary international law and international humanitarian law, multinational corporations as legal persons have the same set of rights and duties. ATCA is an example of a national jurisdiction treating corporations in the same way as natural persons with regard to international customary law. (See Ramasastry "Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations", 20 *Berkeley Journal of International Law* (2002) 91, 96, 101).

80 *Wiwa v. Royal Dutch Petroleum., above*, note 5.

corruptible, exploitative, destabilizing, intimidating, instigating, brutalizing, and destructive business practices in Niger Delta. While the Government of Nigeria and the Transnational Oil Corporations should use their diplomatic and economic leverage to persuade Niger Deltans or the host communities in the event of conflict with the business practices of the oil companies without using military means to solve problems which eventually result in fatal casualties involving loss of lives and properties. Efforts should be made by Nigerian government to end gas flaring by oil companies, through legislation, In Europe and America, gas flaring has been eliminated. It is, therefore, recommended that the directive that gas flaring should stop in Nigeria by 2008 should hold or be complied with by all the stakeholders.[81]

Observing the provisions of Universal Declaration of Human Rights, and the International Covenants on Human Rights[82] as the set standards in operations of the TNCs in Niger Delta is greatly recommended. There is a need to spell out clearly for transnational corporations in Nigeria what these human rights instruments require of their firms. The United Nations (UN) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the UN Sub-Commission on Human Rights in 2003, set out with some degree of specificity the human rights responsibilities of companies. Transnational Oil companies should actively promote the realisation

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[81] H.T., Ejibunu, "Nigeria's Niger Delta Crisis: Root Causes of Peacelessness", EPU Research Papers, Issue 07/07 *European University Center for Peace Studies (EPU)*, Stadtschlaining/Austria 2007) Presentation of 2007, pp.33-34.

[82] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Article 6(1), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *opened for signature* 16 December, 1966 and the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 UNT.S. 3, *opened for signature* Dec. 16, 1966.

of human rights in business transactions. In the context of the corporate social responsibility (CSR), they accept responsibility for implementation of human rights. With their own voluntary initiatives, multinational enterprises try to make a contribution to better implementation of human rights partly in the framework of public-private partnerships or jointly with non-governmental organisations. TNCs should create platforms to give all employees the possibility to set out their views on how human rights policy, including compliance with social standards within the undertaking, can be better implemented. Oil companies in Niger Delta should engage in dialogue with governments for better implementation of human rights and work locally in contact with national administrative agencies for more effective enforcement of

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[83] The OECD Guidelines for Multinational Enterprises recommends that firms "respect the human rights of those affected by their activities consistent with the host government's obligations and commitments." OECD Guidelines for Multinational Enterprises 19 (2000), *available online at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf.> accessed 7th of August, 2012. For example, the OECD created complaint mechanisms called "National Contact Points" to which individuals may bring complaints against businesses subscribing to the OECD Guidelines, and tasked its Investment Committee with overseeing National Contact Points (NCP) performance.

[84] The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy proclaims that all parties, including multinational enterprises, "should respect the Universal Declaration of Human Rights and the corresponding international Covenants." International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy 3, 8 (2000), available online at <http://www.ilo.org/public/english/ employment/ multi/download/english.pdf.> accessed 7th August, 2012.

[85] Confederation of German Employers' Associations (BDA), *above*, note 69 at 13-14. The UN Global Compact, is a voluntary initiative established in 2000 with over 2,300 participating businesses. The Global Compact encourages its members to implement ten principles touching on human rights, labour standards, environmental, and anti-corruption practices within their "spheres of influence" by sharing and adopting good practices. The Global Compact asks businesses to "respect the protection

social standards in their spheres of activity. Finally, oil companies operating in Nigeria should align their actions on voluntary commitments to a range of internationally agreed principles and instruments dealing with human rights.

Examples are the OECD guidelines for multinational enterprises,[83] the ILO tripartite declaration concerning multinational enterprises and social policy[84] and the Global Compact.[85]

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of internationally proclaimed human rights" within their sphere of influence, "make sure that they are not complicit in human rights abuses," and to respect the four fundamental labour rights principles adopted by the ILO. See the U.N. Global Compact, Available online at <http://www.unglobalcompact.org/ AboutTheGC/ heTenPrinciples/ index.html> accessed 7th August, 2012. (See also., Christen Broecker., *above*, note 23., at 169-170).

# PRISON INMATE HUMAN RIGHTS, NETWORKING AND SOCIAL INCLUSION

TIZIANA RAMACI

A starting point of this study is to note the impossibility of initiating any kind of policies supporting prisoners' rights starting at social and working resettlement without referring to a significant contextual basis able to organize premises, alternative actions, and project aims. For this reason, we can understand the necessity of improving levels of the reading and language comprehension skills of staff aimed at the resolution of prison inmates needs. Also, there must be an organizing model of inclusion able to enter into a tacit, not necessarily expressed pact between prisoners and society apart from each individuals personal sense of obligations. In fact, all actions implicitly "carry" an inherent "spectrum of meanings", facilitating aims such as to understand, to make explicit, to explain and eventually to effect both change and functionality in observed results. This is already represents a good beginning to assure necessary competence in the proposals that are undertaken.

## 1. Introduction

«Overcrowded prisons» criminal and recidivist Italy. The Court of Human Rights condemns the Italian State for inhuman and degrading treatment of the prisoners» (09-01-2013).

Sociological literature makes reference to the family in a social and scholastic context to better understand the meaning of deviant behaviour. That is, within these

circumstances we can observe the responsibilities deriving from the structures which have been activated and support the integration processes, avoiding recidivism and prison overcrowding.

Certainly, the idea of attaching a label criminalizing any form of diversity does not help the course of social integration, nor reduce the factors of alienation factors in social deviation and crime; on the contrary, operating in this context it is important to give value priority to a higher level of civil values and social responsibility aiding in preventing the occurrence of structural and systematic problems of prison overcrowding that we find presently in Italy. The consequences of misinterpreting deviant behaviour and impositions of different points of view - civic, judicial and social - are represented in both old and new crimes by stigmatisation and tagging in the "chaos" of non-assumed responsibility[1] that confronts the country in extremes: either able to direct itself towards the protection of human rights or, vice versa, towards the absolute lack of respect for these rights considered as a kind of "refuse" of the legally constituted state. This is true, since the sphere context of human rights issues become more and more important over time, and for this reason we should improve our ability for better reading aptitudes and fuller comprehension capabilities, but above all be more sensitized to a universal sensibility comprehensive of the smallest inviolable limits of human dignity.[2]

The fundamental elements characterizing a healthy modern and civil society are, of course, full employment, security, democracy, freedom, fair standards of justice and qualities of life. Unfortunately, our society has not always been able to assure these fundamental values of life, because it has eluded assuming acceptance of the affirmation of the

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1 Strogatz, S. (1994) *Nonlinear Dynamics and Chaos.* Cambridge: Perseus.

2 Garofalo, P.(2009) *Diritti Umani e tortura.* Troina: CittaAperta.

Universal Declaration of Human Rights[3], approved by the General Assembly of the United Nations on 10th December, 1948; those rights which create a modern, free, pacific and noble cohabitation for the world's citizens.

Job resettlement for prisoners is important for parallel social resettlement, and hence the definitive abandonment of the criminal circuit that had co-existed previously in the inmates lives. Legislation, from the penitentiary reform bill, 1975, to the Gozzini Law, 1986, and, later, the Smuraglia law of 2000[4] – regarding fiscal relief for companies who employ prisoners- moved in this direction. However the real problem is not having had enough institutional funding, and it this has blocked opportunities to achieve employment either inside or outside Italian prisons, creating problems for prisoners obliged to stay in overcrowded structures, in unsafe hygienic conditions, and in stressful inactivity.[5] A mortifying confirmation of the incapacity of our State to assure prisoners' main rights.

## 2. The network: a proposal towards change

Emerging, in the field of psychology, the NET concept has opened, without any doubts, new prospects in the analysis of social phenomena. The NET seen as a new instrument of observation, can guarantee respect for human rights but also bring to mind a sense of one's obligations. Through a critical interpretation of NET derived reality. This instrument introduces an innovative sample of analysis in the field of research, making us more aware of some aspects that rarely can be explained, according to the model of traditional

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3 www.senato.it/documenti/repository/commissioni/dirittiumani/Rapporto *carceri.pdf*

4 Ordinamento penitenziario -legge 354/75 e succ mod. e integrazioni

5 Scalia, V. (2011) "Carcere e lavoro" in Associazione Antigone (ed), *Rapporto sulle condizioni di Detenzione in Italia.* Roma: Edizioni Ediesse, pp. 166-174.

psychology, since the NET works against an "ordinary" conception of society, and suggests the representation

> «of a social world also organized from the social and changing groups, depending on the circumstances, with limits not identifiable in a definitive way».[6]

In particular, the NET concept gives a certain importance to the role played by interpersonal relationships, giving innovative solutions to explain human behaviour, social structures, their transformation and operational strategies.

In the conditions of imprisonment, an inmates' human rights are considered as a mere "projection" of values pertaining to human dignity and all citizens. Therefore, these rights must be absolutely recognized. In these extreme conditions, prisoners' rights are inevitably compromised, including rights to personal freedoms, privacy, sexuality and family unions. The time served in penitentiary should not compromise the inmates' dignity but rather afford them respect for their fundamental rights, permitting the prisoner to be reinstated into society upon release, and avoiding imposed isolation (Article 3 of the European Convention of Human Rights).

However, the legislative initiatives - having recognized these rights - have not been immune to problems and discussions, but have nonetheless succeeded in being concluded recently. In fact, until only a few years ago, prisoners, as a category, were "labeled" as only criminals, totally excluding their innate human nature, conferring on them legitimate rights referring to the thesis by Kant according to whom men can be assigned

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[6] Huguet, J.(1994) "Reti di relazione e realizzazione dell'identità individuale" in *Quaderni di animazione e formazione*. Torino: Gruppo Abele, p.17.

natural rights only as long as they respect humanity. This idea represents a totally unrealistic condition for prisoners who are arbitrarily excluded from the legal and civil protection their human rights situation should offer them.

This negation of one's humanity has been shown not only by the excluded affirmation of prisoners' rights but, in a particular way, also by an absolute lack of legal provisions curtailing the abuse of power prisoners must succumb to.

Therefore, working towards an objective of encouraging change, territorial institutions are presently involved on "the ground floor up", in comparison with the more "politicized" actions taken to promote change in the judicial system, in general, and now involving different kinds of participants implementing these strategies: individuals, ad hoc groups and, social institutions. So this "contextual logic" obligates one to take into consideration the functions and rules of single services and services offering full representation, both sectorially and nation wide, whose most evident offerings we can call, "jobs". Obviously, an operative condition which is absolutely important in this regard is the activation of an integrated NET system for each country which is consonant with the country's political, social and economic characteristics.

The NET is not only a way to work but above all embodies a mental attitude[7], a point of view and thanks to it we can understand its relevance and applications. Many citizens presently are living in discomfort, ties with others have been either compromised or rendered difficult. If connections between services and operators were to be interrupted, it is evident participants would have difficulty in re-activating their part of such connections.

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[7] Platania, S., Ramaci, T., Santisi, G..(2008). Valori e dimensioni lavorative: un confronto tra pubblico e privato. In S. Di Nuovo (a cura di), *Riscoprire i Valori: Ricerche nel territorio siciliano.* Enna: Edizioni Kore – Città Aperta 2008. pp.145-158.

## 3. NET working as a way of operation

In spite of the numerous steps accomplished in attempts to alleviate discrimination, we can easily understand there's much work to be done to avoid relegating the "rights of man" to the out-dated status as historic "relic" of the past.

Reading the daily chronicles we can see, in fact, that intolerance, abuses of power, racial, sexual or religious violence, are still so commonplace that the "horrors" of history evidently have not taught us anything at all, violating Article 3 of the European Convention of Human Rights, that forbids torture, inhuman and degrading treatment of prisoners.

So many men and women in history, even at the price of having sacrificed their lives, have bequeathed a hope to the following generations in obtaining fundamental human rights, such as compulsory school education, sexual equality, freedom of speech, opinion and religion.

Of course, in reference to societal "discomfort", we are invited to reflect on aspects of "individual-society" ties and their origins. It is fundamental in being able to identify the critical dimensions and influencing factors – with due recognition where appropriate – to coordinate involvement of the NET among territory, inmates, operators and sound adopted policies that represent strategic variables.

The territorial employment possibilities, and - above all - the offerings of jobs through the NET, become an important resource; making spaces available in the process for social and work resettlement of prisoners. In this case, who are the actors involved in this activation of the NET? They are the territorial offices of the penitentiary administrations, the employment services, the social services of our towns, the social cooperatives, the voluntary services, the organization of employers and workers; this integrated territorial system can represent an ideal way to coordinate institutions on affirming beneficial regional economic and social policies.

Instead, if we think about the kinds of activities and

approaches to be taken up in the process of social inclusion, we can understand that some job responsibilities regard specific professional preparation in which there are determinate forms of planning and integration; or also through studies concerning employment and social politics in the context of judging local competencies. It is through the activation of these strategies and policies of job resettlement that we can propose the social integration of people who have had or are presently having experiences as prison inmates. These strategies are important since they are aimed at reaching a target goal for improving occupational opportunities of those living in the midst of negative social conditions.

In conclusion, we cannot forget that for these inmates real problems usually come in multiplied form - not only that regarding the prisoner's detention condition but once released from prison, their occupational situation. Former inmates need a job, housing, integrative social relationships to enable them to leave their former "deviated state," of affairs, and return to an open, "collective" social inclusion. To achieve these ends, there must be a systematic organization of actions to undertake, and research on the most appropriate answers. One approach to studying these proposals is to open our minds to other channels of communication vis-a-vis the institutions, to compare projects for supporting processes of inclusion, initiatives of collaboration with relevant social institutions and with the subjects involved; strategies for arriving at a commonly-shared approach rendering specific actions congruent with others, and with the creation of inmate working/formative studies (even if the penitentiary work, normally sporadic and downgrading, is viewed often simply as an "ambiguous" instrument with the hypocritical aim of offering occasions for "distraction" to maintain security and order in overcrowded prisons near a state of administrative collapse). Furthermore, the intensification of migratory movements, that is today a reality with proportions unknown in the past, and the extension of human rights on international levels

have rendered inevitable a legislation-produced definition for an international system of guarantees for migrant workers, without any distinction (Article 1 of The European Convention on Human Rights (ECHR) (Formally the Convention for the Protection of Human Rights and Fundamental Freedoms).

These strategies can find a comparison in practice when the interlocutor, as an active protagonist, can express, through the NET made available to institutions and local services, the discomfort inmates may feel, expressed through this innovative NET able to open up new and different points of view, and thanks to this to help others in better understanding a prison inmate's experience.[8]

## 4. What barriers and what difficulties exist in the synergy process

A first barrier concerns the representations that the operators must deal with as regards their own and other organisations. We are often faced with prejudices built around concrete experiences which occur and we rationalize these prejudices because, they can be justified by a choice of values initially seen as a trustworthy, normative reference, but have later become arbitrarily the only way to read and to understand other institutions realities. Normally, these institutions operate a quite life, efficiently, even if they are tinged with a strong component of tendentiousness. But this is not the only danger when stereotyped acquisition of knowledge is used "ipso facto" to represent and then justify such often hypocritical attitudes. It's easy and convenient if priority is given to the behavioural aspect as related only to other cultures, but it is dangerous when imposing superficial affinities. All people have pre-established ideas, but how much does this attitude inhibit the real acquisition of knowledge? How many people can only express stereotyped

[8] Remotti F. (1996), *Contro l'identità*. Roma-Bari, Laterza.

views but there are others who have established criteria in mind and yet remain open to further elaboration of ideas. The main hypothesis of our study is that to develop firm *ties* it is important that each operator must try to free himself from too strong emotional attachment to his professional interests, to superficial modes of acquiring knowledge, and but rather, instead, initiate decisive action. In other words, an effort is to be made to understand the internet web's work possibilities as an innovative, new way of giving advantages both to operators and prison inmates, and benefits to their territories. This sign of professionalism would be transformed into "labs" of specific competences also of an emotional nature".[9] In this way, an attitude of professionalism will not run the risk of taking the road to institutional closure, but rather it will be ready for continuous re-elaboration and accommodation to an appropriate context. In this perspective, strategies promoting the initiation of determinate actions should be coherent with realities of the prison inmate's life, and with the cultural models operators are able to put into action.

A second "barrier" regards the influence of culture[10] that a determinate institution expresses in its wider significance, which regards all values, rules, directional orientations, infrastructures and the aims adopted by the institution; that is, the institition itself formulates the values and choices representing the way in which a person accomplishes his job (activity) inside its relative context, along with establishing what attitudes are considered appropriate, as long as they are shared and qualified.[11] Each institution has its own reference

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[9] Buunk B. P., Gibbons F.X., (1997) Heath, Coping, and Well-being: perspectives from Social Comparison Theory. Mahwah (NJ): Lawrence Erlbaum Associates.

[10] Santisi, G., Ramaci, T. (2007) "La cultura ed il clima nell'analisi organizzativa" in R. D'Amico ed., L'analisi della pubblica amministrazione. Teorie, concetti e metodi. Vol.3. Milano: FrancoAngeli.

[11] Schein, H. E. (1999) *The corporate culture Survival Guide*, San Francisco: John Wiley & Sons.

grid constructed over the years, its own operative ways that allow the identifying, analysing and dealing with problems. The orientations and the operative modes, achieved with great difficulty, create the relative conditions for participating in the workplace. Acceptance of these conditions renders the process easier and more convenient but, at the same time, it is still a challenge involving risks because it there is the chance of confusing the sense of one's own working goals, creating false ties and obstacles to accessing employment through the NET. The prejudices circulating in the Institutions and that their operators have about the prisoners, can lead to a false interpretation of reality, and an attribution of meanings in comparison with what happens actually occurs that is not coherent with enterprise realities as they guide the operation. In its operational set-up, rather, it concerns the infrastructures which form the basis for organizing one's life, based on aims and written objectives, from a social stereotypical sphere and controlling the collusive dynamics symbolizing the same[12]. Consider that this characteristic consists of combining rationality with emotional dynamics. Transforming the terms of a particular culture initiates can stem from a greater access to knowledge, and not only through a change in terms of social relations.

A third barrier regards the social process of "one meeting with the other". The work done by the staff in a prison setting still takes place within a wider social context, in which every day the skilled professional acts to reach his committed mission; doing his daily job means realizing it in its organizational context where the worker represents the most important element. Instead, collaborating with individuals belonging to other organisations forces the operator to define, to redefine, to reinterpret his organizing goal; in particular,

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[12] Kaneklin C., Scaratti, G. (eds) (1998), *Formazione e narrazione. Costruzione di significato e processi di cambiamento personale e organizzativo*. Milano: Cortina.

in front of new situations. The operator must ask himself what he can or cannot in reality accomplish, has made choices already adopted in the past (scripted) but who also finds himself having to make decisions with new, alternative choices. Contexts and scripts have got pragmatic significance since they direct the answers to the circumstances of life, they control life's interactions and, as we have seen, they serve for learning.

Therefore, the concept of meeting "the other" reintroduces the problem about ourselves, what we offer and what our point of view is. There may be a high price to pay for the single person, also from an emotional point of view, since he works as an individual, and he cannot make any reference to the technical elaborations shared with the team. The professional, in this process of definition and redefinition of the work goal (and to each his own responsibility on the bases of his assigned role) can be obliged to "reconstruct" a position and a legitimization in a context that is outside of his own organizational criteria. These situations bring again to mind the necessity to conceive a sense of *what we are doing*. At the moment, it is necessary to have a greater sensibility about the cognitive premises of human interaction. It is not possible to neglect the emotional aspect. The concept of context, for example, affords us a wide margin of comprehension of skills based on intuition or approaches guided by a logic of "adequacy" rather than "consequentiality." On the other hand, the assumption of procedural rationality implies that the protagonist must justify his own behaviour, considering that it is influenced by decisions aimed at obtaining the best result[13] and, this is difficult enough, above all, when facing the reality of exclusionary, institutionally-oriented cultures in situations where there is not easy availability of financing, or in which the organisations in the public eye are exposed to particular public scrutiny; situations in which

[13] Romano D.F. (2009) "*Conoscere e organizzare*", in P. Argento P. Cortese C.G Piccardo C. eds. Psicologia delle organizzazioni. Milano: Cortina.

we are generally more interested in assumed institutional positions rather than, say in the context of simply listening to prison inmates.[14]

For example, my theatrical experience that took place in the Brucoli House of detention (July 2012), above all shared with foreigners, encouraged paradoxically, the expression of a theatrical form of art as an instrument of mutual participation, as a higher form of communication, harmonious as virtual and expressive music. In my personal experience of having taken part in a theatrical group in prison, I can say that the theatre, sometimes, enters a state penal structure exclusively for entertaining and enjoyment; in fact, many shows had as a single aim of repeating jokes and doing physical animation, without expecting any real professionalism, or interest in obtaining such a level of expertise. Prison can be seen as a lab where the actors, seen as amateurs, are able to express an authenticity of expression at times rarely present in the professional, a spontaneity and immediateness visible in the lapsus, jokes and approaches - the same authenticity of "the man of the street", since the inmates are transformed into actors. In fact, even if a prisoner acts "inside", the acting role, it is emanating from the fruit stemming as an "outsider" to society " that cannot be dissolved just because the inmate is isolated and "hidden" from view. However, "the man of the street" and a man without freedom who transforms himself into a non-professional actor, are divided by an absolute condition: reclusion. This difference transforms itself into theatrical strength and magic as presented in prison, and it expresses itself in the "energy" reserved for reciting the scene, a condensed suffering and frustration, strongly compressed and imposed for this reason. It is possible to exploit theatre art since, from its inherent restrictions, it can bring a "modified" humanity to the forefront which searches and exalts diversity

[14] Hatch, M.J. (2006) *Organization Theory. Modern, Symbolic, and postmodern perspectives,* New York: Oxford University Press.

while simultaneously expressing a greater dramatic strength thanks to the involving qualities of this art. Acting on a theatrical text offers reinforced support for those inmates in prison paying for their penitence with visceral pain. It allows the free stream of emotions and feelings removed and repressed by the prison detention while at the same time it encourages human cooperation, and exchange with other people.

Reciting theatre dialogue offers sufficient means to "break up" the dreary, daily "routine" of the inmate, and the progressive corrosion of their human spirit. Whenever theatrical representation improves people's lives and their living dimensions, contrary characteristics to what they are accustomed to. Here we have a collective response rather than individual, inmates involved rather than isolated, inmate-actors enriched in an effective and artistic way compared to their life in prison. Doing theatre can mean that the "man of 'imprisoned' pain" temporarily redeems his "involuntary" isolation, stopping to mimic, starting to narrate, and to even narrate himself. But perhaps we should ask ourselves about the meaning of offering theatre in prison. Can the financial, logistical difficulties of recreating theatre in a correctional institution be met through the availability and the good intentions of various staff and/or the aid of collaborating administrators?

Doing theatre in prison lets us see the difference between abstract meaning and practical function, in order that theatre is not simply interpreted in handy "pragmatic terms" as a "utilitarian" service because theatre is also therapeutic, pedagogical, recreational. These humanistic values are integrally what theatre art offers.

It is evident - like in the endless debate on the prison and the penal, correctional institute system – that it is possible to discern some lacerating contradictions between what "should be" and what is really realised by the penal system. A most intelligent world is a best of all possible worlds, and in the struggle for a less unfair world we must recognise the plurality of the questions of justice, identifying in ethics its

basic value, and at the same time pose questions and answers as in debates regarding right and wrong; there is the ancient principle present in many famous "sayings", *«Don't do to other people what you do not want other people to do to you»* as the point of landing of an ultimately shared social habitat among people who, above all, listen to each other. Assume the ethics of personal responsibility, of taking care of others, all of which become an integral component in a relationship, a model to reintroduce a sense of dignity in society expressed through daily actions- and, at the same time- becomes a strong therapeutic factor, encouraging a process of change. Perhaps it is not necessary to love all mankind in general, but it is fundamentally important to encounter each other, to fully listen to each other. Often, the main characteristic of institutionalization, is the loss of one's sense of responsibility (that is also a loss of social and contractual power), and it is a process which deprives people of the most active parts of their own *ego*, as if people were only numbers instead of human presences. Again, in reference to inmate detention, the object of public service should be, in primis, the capability of the social institution to activate processes of responsibility assumed by the individual if the institution really wants to succeed in the aim of inmate rehabilitation.

## 5. The necessity to create true opportunities and multiplicity of actions

> *«The workers privy of their rights to freedom are treated with humanity and with the respect of dignity about their human and their cultural identity»* (Article 17, Comma 1, The European Convention on Human Rights (ECHR) (Formally the Convention for the Protection of Human Rights and Fundamental Freedoms).

The lack of resources cannot constitute a reason for the conditions of that prisons where the rights of the prisoners are violated (art.4 "Raccomandazioni", 2006 (2)).

What I have till now discussed, suggests a last consideration. Remembering that the a strong reading aptitude is a key to accessing the net (of relationships) with success, we can underline how in every action it is of fundamental importance to consider the point of view offered by the different main characters, encouraging a wider collective sensibility to the minimum inviolable limit of human dignity. Therefore, it becomes necessary to support ideas, perspectives and beliefs both of prisoners and prison officials. From the concept of the "other one", as from the active subject, comes out the possibility of moving closer to the other person, seen not as a unique holder of the truth and of a certain competence, but rather as a skilled worker able to stimulate a sense of contact creating together a negotiable process within their shared contexts. It's the richness of this comparison and the possibility, thanks to negotiations, of creating original and fresh points of view that, while respecting the rights of everyone, potentialities and competences of all concerned can be reinforced in the correctional institutional context. Among possible solutions, there exist also alternative punishments and a policy of rendering non-punishable certain crimes; aspects contradicting the assessment that most prisoners in Italy are drug-addicts or foreigners.

These attitudes do not occur by mere chance, and we must take this fact into consideration when we talk about the penitentiary system.

The problem of overcrowded prisons in Italy is of an inherent structural and systematic nature (the European court of Human Rights has already received more than 550 court appeals from inmates who declare they have only three square meters at disposal of living space); for this reason it is of great urgency to identify the best solutions to deal with the overcrowding emergency; it is important to qualify the activity of the service, creating goals for programming alternative kinds of punishments, and introducing new policies seriously dealing with the problem of re-analyzing

those legal normatives which have discouraged searching for alternative measures.

Definitely, the creation of an all-encompassing project is necessary in which legislator and penitentiary administration can "work together" but, to reach this goal, it is necessary to have a decisive contribution from external society. It is also absolutely important to make clear what kinds of prisons we want and what we want the prison to accomplish.

As the Italian Constitution confirms, imprisonment must be finalized into the re-socialization of the prisoner. Furthermore, great importance is directed at initiating a course of new activities. This work forms an important connection bridge between the moment of the execution of the sentence and the inmate's resettlement in the society. On the 30th of August, 1955, the United Nations already declared the importance of the re-education of condemned men/women. Article 65 of the resolution established that treatments of the prisoners (...) *«must encourage the subject in the respect for himself and must develop in the subject a sense of responsibility»*. A strong factor in realizing definitive inclusion is to change the way of thinking of all protagonists involved in this process. A new possibility could be represented by the improvement in the availability of informal resources (as volunteer work). The creation of new "actors," not only the formal "players" from public or private contexts but legitimate new participants who can make observations from new points of view. At the end, research analysis could offer another dimension but this must be insisted upon: the connecting Net in which knowledge - newly acquired - directs and supports innovative actions; actions which have an accumulating effect of forming themselves to produce knowledge supporting and processing each other.[15]

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[15] Olivetti Manoukian, F. (2002) "Il circolo virtuoso conoscenza azione. Il perno della ricerca azione", *Animazione sociale*, Vol.5. Torino.

## 6. Conclusion

Social networking can certainly promote, in a territorial context, support for citizens facing judicial difficulties, defending the respect for the dignity of all, also culturally more evoluted thanks to experimentation of innovative processes aimed at conceiving new methodologies. Unfortunately, the presumption to close one's minds in pre-conceived ideas for both processes of capital punishment and rehabilitation, blocks new venues for policies, without activating any beneficial approaches, which could assure positive results, reducing in a real way socially-inflicted wounds caused by crime.[16] Here we are making reference to an abstract pretence-unfortunately widely accepted in our country - that a prison term is simplistically considered only as a limited privation of freedom and often that of dignity too, but does not either represent a virtuous course of correction, in spite of the normative previsions, nor that of deterrent and of prevention. Nor does it facilitate social resettlement of inmates, even if the third clause of the art. 27 of the Italian Constitution states:

> «The pain inferred cannot consist in treatments opposed to the sense of humanity and punishment must re-educate the condemned».

Reality represents a kind of a social infrastructure accompanying an integral idea; a community can be also be constructed with ideas, today many miss the significance of this: that it is indeed possible to achieve these goals. There is the risk of appearing ingenuous, thinking of new perspectives of collaboration between those who have committed "wrong" and their relationship to the territory, but this is not an abstract concept, it is instead, taking into consideration how

[16] Fleres, S., Cammarata, G. (2012) L'afflittiivtà della pena detentiva. Catania: Metropolis.

a prisoner , if he really wants to, can later become a main protagonst in all facets of life in civil society.[17]

Instead, abstract are those actions which do not clarify, nor forsee that the person who once commited a crime may no longer be an "enemy" but rather a community participant who will not necessarily become a weight to society once he's out. Perhaps it's too easy to reject the possibility that the prisoners who are working can become, instead, a territorial resource. It is wrong thinking that the once penally condemned represent a sort of enemy to be eliminated, and rather not entertain the idea of inviting their collaboration in the form of an educational effort with to integrate inmates and their surrounding society.

Suggesting this, what I have tried to thematically unify together in this paper is a really positive *"quantum"*, I believe there is still much intense activity to accomplish – proposals to make- and there is the need to recognize that a formulation of policy only starts after some time given to reflection; then, following, one can propose initiatives, and follow-up actions not only limited to the work place, but also in the field. At the same time, we must accept the reality that there will be endless difficulties and numerous conflicts (institutional, professional experts and operators, and the usual conflicting interests) that, all in all, regard the possibility of implementing prisoner resettlement as the first priority of the of the social NET.

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[17] Ramaci, T., Santisi, G. (2012) "Le attività trattamentali per un sistema di servizi territorialmente efficace", *Psicologia di Comunità, Gruppi, ricerca-azione e modelli formativi. Ed.FrancoAngeli.* Fascicolo 1, anno 2012, pp. 103-114.

# HUMAN RIGHTS VIOLATION UNDER POLICE CUSTODY IN BANGLADESH: A LEGAL STUDY.

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This article is intended to examine the methods and practice of torture under police remand, and its justification from the Bangladesh perspective. It argues that human rights are violated with impunity to the government's law enforcing agencies from the moment of suspicious arrest until the end of the remand period in the name of extracting confessional statement. The police have consistently been misusing their power to arrest people without warrant and in most cases for illegal purposes on the excuse of maintaining law and order situations of the country. The arrested people are often subjected to brutal torture in order to extract information and confession. The police have lost public confidence and immediate reform measures are required to recover the trust of the people. In response to rising pressures and continuing criticisms from various quarters, a slow move towards reforming the law and procedures of police remand is under way. This article is intended to emphasize the urgency of such reform and lastly the article offers certain remedial measures with some highlighted recommendations to solve or minimize the torture at custody and violations of human rights in the name of remand for extracting confessional statements from a detained person.

## 1. Introduction

The Vienna declaration-1993 termed 'human rights' as Universal, Indivisible, Interdependent and Interrelated.[1]

[1] Article- 5, Vienna Declaration and Programme of Action-1993.

Human rights, therefore, are birth rights associated with the very birth of mankind, because these are fundamental requirements for existence of human beings. A human being is entitled to enjoy these rights equally, freely and without any arbitrary public or private interference. Human being deserve these rights from birth to death irrespective of race, color, sex, language, religion, political or other opinion, national or social organ, property, birth or other status.[2] Infringement of these august and auspicious human rights has been committed from the very birth of mankind. Ordinarily, it takes place by the civilians illegally on one hand and on the other hand by the executives by misusing powers. Hereby deep concerned for the latter i.e. police in Bangladesh by misusing sections 54, and 167 of the Code of Criminal Procedure -1898 who is one of the important part of our executive body. According to a report in the very front page of a national daily newspaper in Bangladesh that

> "Torture under police remand for extracting confession has increased by denying the ruling of the Higher Courts, arresting political leaders and doing business".[3]

And also another report of BBC Channel where four journalist recounts his personal experience of inhuman brutalities inflicted on him while in police custody in Bangladesh. His account also reveals that, of more than four thousand people arrested since October 2002 and among them 44 have died in custody as a result of torture.[4] So the common phenomenon of Bangladesh is a matter of deep concern about the torture under police remand and serious violation of human rights upon the mass people from top to bottom. Police remand in Bangladesh has become synonymous with violent

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2 Article -2, Universal Declaration of Human Rights-1948.

3 The Daily Naya Diganta, 26th December, 2012.

4 New York Time Magazine as circulated on 10 February 2003.

torture, degrading treatment and inhuman punishment. A survey on the role of the police and the lower judiciary reveals that only less than two percent of citizens are satisfied with the former, and eight per cent with the latter.[5] In this article, efforts are made to find out the nature of such abuse of laws in the name of remand under the guise of sections 54 and 167 mainly and other relevant sections of the Code of Criminal Procedure-1898 and tried to give suggestions accordingly to solve the problems.

## 2. Concept of remand

'Remanding means committing the accused into the custody or placing him in bail. In very simple terms, a remand is another name for an adjournment of a case.[6] However, in criminal justice system remand is known as having a particular meaning. When a case is adjourned, the court may have the power or duty to remand the accused in police custody or in jail, rather than simply adjourn the case for another day. It would be accurate to say that while all remands are adjournment, but not all adjournments are remands. The difference between 'remanding' a defendant and simply 'adjourning' the case is that when the court remands a defendant, it is under a duty to decide whether the defendant should be released on bail or kept in police custody or in jail custody. Thus remanding the defendant may be of **three** types:

a) remand on bail,
b) remand in police custody, and
c) remand in prison custody or jail.

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5 Editorial, "Police and judiciary", The New Nation, Dhaka, 28th May 2002, online; The US State Department Country reports on human rights practices in Bangladesh, 4 March 2002, p. 11.

6 Section-344 of the Code of Criminal Procedure1898.

The most objectionable remand in Bangladesh is remanding on police custody since police uses unlawful torture on the accused/defendant on the pretext of extracting information from the accused which is the violation of both the human and fundamental rights of an accused'.[7]

## 3. Assessment on the Role of police, Torture and violation of human rights in Bangladesh

If we do assessment on the role of police in Bangladesh then historically we can see that police along with all other law enforcing agencies had been using by the ruling parties upon the opponents from the very ancient period. So hereby the police personals are automatically empowered by the political parties to use them on their behalf in any situations. A political leader very often, experience says so, exert influence upon the magistrate or additional magistrates and even also on the police officer so that they can exercise subjective satisfactions for detaining political opponents.[8] We know that the police Act-1861 empower the police to act to prevent the violation of both human and fundamental rights. But it's a matter of great regret that police personals are involving themselves in the violation of both rights of the mass people of the country i.e. death under police custody, rape, physical and mental torture, bribe-taking, protection of terrorists and murders etc. socially torture in the police custody during remand has shaken the faith of the conscious citizens about the police of Bangladesh.[9] Though the police are meant for protecting the life, property and honor of the people but it is a reality that most of the police personnel themselves are involved in the commission of

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7 Halim Barrister Md. Abdul "(Police remand: Concept and procedure" The Daily Star; law and out rights, issue no-247. July 22nd 2006.

8 Dhaka Courier, 13th August, 1999 pages.16-17.

9 UD-DIN MD.FAIZ-"The Role of police in the administration of criminal justice: Bangladesh perspective", published in the Rajshahi University Studies vol-28, (2000).

crime directly or indirectly. In a report it has been seen that in Dhaka city that 40% crime has been committed directly or indirectly by police.[10] The serious natures of crimes are committed either by policemen themselves or by the terrorists with the direct collaboration by police personals not only in Dhaka but also in other parts of country. More than 90,000 (ninety thousands) complaints were brought against the police after the creation of Bangladesh, of which only 11,923 complaints were investigated and 2,020 policemen were sacked from job. From 1972-1996, about 18,911 persons died under police custody by torture; only 321 cases were lodged for such death and only 3 of them were disposed of. In the same period, 5,867 complaints of rape and torture of women by policemen were lodged, of which action has been taken against only 112 policemen.[11] So the present scenario of police is that they indiscriminately arrest innocent civilians merely on the basis of suspicion and without any warrant primarily for receiving bribes.[12] The arrestees who cannot afford to pay bribes for a quick release are being put in remand where they may be subjected to barbarous treatment resulting in death. In 2007 in (state vs Haroon &others) –this scenario of police can see in a criminal case of Chittagong court; where Haroon a ghee seller was arrested in 20th September 2007 with his some relatives under the allegation of selling ghee (only 20kg) as noxious for the public health. After that police taken him in the Hathazary Thana (Police Station) where police demanded 40,000 as bribes to release him but Haroon could not comply with the police demand because of his poverty and for that reason he was then mercilessly tortured in the Hathazary thana and forwarded to the court after one day of his arrest

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10 The Daily Ittafaq, 17th April 1999.

11 UD-DIN MD.FAIZ, Ayeen: Probandha Sankalon,(Compilation of articles on law) 1990 p 172.

12 "Reasonable suspicion vs. unreasonable impunity", The Daily Star, 8 December 2001, Dhaka, online, report by human rights organization Odhikar.

along with his relatives by a huge case under section 25(b) of the Special Powers Act-1974 where there is a clear provision in the section 272 and 273 of the penal code 1860 for the offence of adulated food.[13] The number of custodial deaths in jails and police stations surpasses 19,000 since 1972, of which barely three or four cases have so far been tried.[14] In Rubel Custodial Murder Case of 17 June 2002, the Court held that many innocent people have been subjected to harassment due to the abuse of the law and that legislators should examine the procedure used for interrogation in police custody.[15] This problem is now so serious and widespread that it has offended the Sense of propriety of civil society in Bangladesh. Members of the incumbent government many human right associations and members of civil society readily admit the abusive use of suspicious arrest and subsequent tortures by the police. So have the Chair of the Bangladesh Law Commission and a former Inspector of Police in a BBC interview on 20 June 2002.[16] The magnitude of the situation has outgrown its domestic sphere and intruded into the consciousness of various international and regional human rights organizations.[17] Bangladesh has 629 police stations. Torture is practiced as a routine in all of these police stations. It is an accepted means of maintaining law and order, investigation and extorting money by the

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13 Special Tribunal Case no 29/2009 still now in the stage of trial for (PW), in the Court of 2nd Addition District Session judge Chittagong.

14 Ain O Salish Kendro (ASK), Human Rights in Bangladesh 1998, Dhaka: The University Press Limited, 1999, p. 60.

15 "Restore confidence in cops, stop abuse of law", The Daily Star, 18th June 2002, online.

16 The Daily Janakantha, 23 June 2002 online.

17 Notably Amnesty International (AI) Reports on Bangladesh 2001 and 2002, the US State Department Report, Transparency International (TI), the World Organisation Against Torture, the Asian Human Rights Commission, American Association for the Advancement of Science, Physicians for Human Rights, the South Asia Forum for Human Rights; The Daily Star, 16 November 2001, 6 January 2002 and 26 May 2002, online; The Janakaantha, 26 May 2002, online.

police. Even if it is assumed that only a single person per day is tortured in the country per station, an alarming number of 2, 29,585 persons are being tortured in Bangladesh every year. This figure excludes those victims who are tortured outside the police stations or other detention centers.[18]

## 4. Provisions of some internationals documents against the torture under remand and violation of human rights

The protection to the life and personal liberty of individuals are inalienable and universal human rights recognized in a growing body of international human rights instruments of which Bangladesh is a party. Bangladesh is a ratifying party of the International Covenant on Civil and Political Rights 1966 (ICCPR)[19], International Convention on the Elimination of all forms of Racial Discrimination (CERD)[20], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[21],Convention on the Elimination of all forms of Discriminations against Women (CEDAW)[22], Convention on the Rights of the Child (CRC)[23] and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is also a signatory of the 1948 Universal Declaration of Human Rights. Under these international instruments states parties are required to submit periodic reports stating actions they have taken to comply with their obligations as bested upon them. These instruments also unequivocally outlaw all kinds of torture, cruel, inhuman or

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18 http.www.humanright.asia,an online report of Asian human right commission- (torture in Bangladesh).

19 This Convention (ICCPR) Ratified by Bangladesh on 7th September 2000.

20 This Convention (CERD) ratified by Bangladesh on 11th June 1979.

21 Bangladesh was ratified this convention (CAT) on 5th October, 1998.

22 This convention (CEDAW) was ratified by Bangladesh on 6th November 1984.

23 This (CRC) was ratified by Bangladesh on 3 August 1990.

degrading treatment or punishment without any derogation. The Universal Declaration (Article 5), ICCPR (Articles 4.2 and 7) and the Torture Convention may be relied upon to show that acts of torture under police remand in Bangladesh constitute a gross violation of human rights recognized in and protected by international law and the United Nations.

## 5. Provision against torture under remand in Bangladesh constitution

The *Constitution of Bangladesh* guarantees fundamental rights to life and personal liberty,[24] equality before law,[25] protection of law,[26] safeguards against arrest and detention,[27] and freedom of movement.[28] Its protection in respect of trial and punishment requires that "no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment".[29] There is also the provisions that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice[30] and there is also the provisions in the same article that "every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journeys from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate".[31] These constitutional

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[24] Article 32 of the Constitution of Bangladesh.
[25] *Ibid* Article 27.
[26] *Ibid* Article 31.
[27] *Ibid* Article 33.
[28] *Ibid* Article 36.
[29] *Ibid* Article 35.5.
[30] *Ibid* Article-33(1).
[31] *Ibid* Article 33(2).

guarantees are not barely ornamental and declaratory, but entail precise legal obligations. Articles 44 and 102 of the Constitution provide judicial remedy against any violation of fundamental rights. So the constitutional provisions are very clear against the torture and illegal detention.

## 6. Provisions for remand in existing law of Bangladesh

The existing laws of remand for extracting confessional statement from an accused person are very much favorable for the law enforcing agencies in Bangladesh. Section 54 of the code of criminal procedure 1898 authorizes the police to arrest without warrant and section 167 provides for the provisions for granting or refusing remand against the accused person for the magistrate and also section 344 of the same code provides for the adjournment or postponement of trial and grant remand and reasons for granting so. There is a similar provision in the *Dhaka Metropolitan Police Ordinance 1976* (s. 86), which is applicable only in Dhaka, the capital city. The magistrate grants remand on a request from the arresting police for extracting confessional statements or evidence from the arrestee. Section 54 entitles the police to arrest anybody without warrant on the basis of reasonable suspicion of committing, or being involved in the commission of an offence. This power of arrest is not unqualified. It is contingent upon the existence of any one or more of the (9) nine grounds expressly specified in the section, which clearly identify the persons coming within its ambit. Thus s. 54 does not permit the arrest of citizens merely on apprehension not substantiated by plausible grounds. Generally it allows the police to arrest convicts, accused persons of pending cases, possessors of stolen property or possessors of instruments useable for house breaking. The right against torture is a fundamental right under Article 35 (5) of the Constitution of Bangladesh, which reads *"No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"*. Ironically,

Article 46 of the Constitution empowers the State to provide impunity to the perpetrators. The legal limitations on the use of police power to arrest without warrant are explained by the Supreme Court of India in *Joginder Kumar v State of UP*:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as the person's complicity and even so as to the need to effect arrest. Denying a person of his [or her] liberty is serious matter".[32] In reality, torture is not a punishable crime in the domestic laws of Bangladesh. The Penal Code of 1860 (Sections 330, 331 and 348) penalizes offences relating to causing hurt or wrongful confinement to extract confession. However, these provisions do not meet the standards of the CAT as Bangladesh has ratified this convention (CAT) on 5th October, 1998 or define 'torture' as a crime. In contrast, the provisions of the Code of Criminal Procedure, 1898 (Sections 132 and 197) protects the public servants such as police officers from prosecution unless prior approval from the government is obtained. According to the current interpretation of these provisions, the courts refuse to take cognizance of crimes committed by state agents without the prior approval of the state. This reflects the moral as well as jurisprudential deficit of the judiciary of Bangladesh.

## 7. Power of magistrate and duration of remand

Section 167 of the code of criminal procedure 1898 empowers any first class magistrate to authorize the detention of any person arrested by the police under section- 54 of the same code. Magistrates, other than first class, need to be specially empowered to be able to authorize such detention. Under

[32] (1994) 4 SSC 260.

section- 167(5) of the Code of Criminal procedure 1898(CrPC), the competent magistrate may continue the detention up to 120 days. A magistrate who lacks jurisdiction to try the case in question is allowed to grant detention for 15 days (s. 167.2). If such a magistrate considers further detention necessary, he/she may order the accused to be forwarded to the magistrate competent to try the case. Section 344 of the same code empowered the magistrate to adjourn the proceeding and sent for remand the accused and also in the *'explanation'* of this section 344 the reasons for the so is mentioned. However, the period of remand under s. 167 is too long to be justified. This prolonged detention of arrestees, who in many cases are innocent, for the purpose of extracting confessions or evidence, raises a question about the efficiency of the police and the administration of criminal justice. Moreover, there is an acceptable way of investigation under the judicial inquiry as enshrined in s. 202 of the CrPC..

## 8. Necessity of police remand:

The necessity of police remand (only when reasonable and justifiable) to ensure the administration of criminal justice and fair trial is mentioned in the sections 61, 167 ,344 of the code of criminal procedure 1898 and in section 84 of the Dhaka metropolitan police ordinance 1976. As remand can be the most important step for the investigation stage if it use fairly and without any malafide intention. If we go through the sections 61,167,344 of the code of criminal procedure-1898 and section 324 of the police regulation of Bengal and also section 84 of the Dhaka metropolitan police ordinance 1976, can get a clear idea about the necessity of remand; these are as follows:-

a. When the investigation is not completed within 24 hours from the arrest of the accused as mentioned in the section 61of the code of criminal procedure.

b. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.[33]
c. If the name of the accused is not mentioned or vague in the FIR.
d. For the identification of the accused persons.
e. For the discovery of property.
f. For the identification of property.
g. For collection of the used materials or things at the time of occurrence.
h. For the verification of the accused person's statements.
i. For extracting additional clue or evidence etc.

But this power of remand is misused by the police most of the time intentionally to meet up the demand of their interested authority or by the command of the higher or superior authorities against the opponent party.

## 9. Police remand and violation of human rights

### *9.1. Different modes of torture under police remand*

According to a report of a national daily of Bangladesh police can torture an accused person in 14 ways.[34] Some are namely:

a. Water therapy,
b. Without cloths therapy,
c. Disco dance therapy,
d. Without serving any food therapy,
e. Bottle therapy,

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[33] Explanation of Section 344 of Cr, PC-1898.
[34] The daily nayadiganta-26th December 2012.

f. Egg therapy,
g. Sewing therapy,
h. Jalmori therapy,
i. Air therapy ,
j. Monkey therapy etc.

**Again**, some of the various techniques of brutalities inflicted on the detainees by the law enforcement agencies in Bangladesh as described by some recent victims are mentioned below:[35]

1) Electric shocks to different sensitive body parts (breast nipple, ear lobe, private parts);
2) Inserting needles and pokers into the victims' fingers and toenails;
3) The victims are supplied with urine to drink when they are thirsty;
4) The victims are not allowed to respond to nature's calls on time;
5) Hot water-filled bottles are pushed through rectum;
6) High-pressured water is poured on the victims, with their hands tied-up hands and their faces covered to make breathing impossible;
7) Beatings in such a manner that muscular parts are damaged but no spot becomes visible. This is done by putting the victims in a large bag and beating up with a roller on the soft parts of the body, or by hanging the victims from the ceiling upside down, and then beating on their feet with a baton; and
8) The victims are compelled to live without any sleep for days.

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[35] Ain O Salish Kendro (ASK), Human Rights in Bangladesh 1998, Dhaka: The University Press Limited, 1999, p. 58-59. Also See in Z Ahsan, "Arrested people being denied fundamental rights", The Daily Star, 6 April 2002, online; The Daily Star, 17 March 2002, online; The Independent, Dhaka, 18 March 2002, online.

**Again** person arrested under the special powers act-1974 are also torture by police both mentally and physically. Torture by the law enforcing agencies includes:[36]

a. Beating with sticks,
b. Kicking needles in hands,
c. Pouring hot water into nose,
d. Throwing chili mixed water in the eyes and mouths,
e. Pushing hot egg into the anus,
f. Beating knee-joints and the bottom of the feet,
g. Breaking finger nails and forcing the victims to drink urine

*9.2. Involuntary acknowledgement of guilt in remand under inhuman torture*

On 23 July 1998, police of city detective branch of Dhaka arrested Shamim Reza Rubel, a brilliant student of BBA of the IUB from near his house at about 4.30 P.M. he was tortured barbarously in the DB custody. As a result of torture Ruber falsely said that he would give them armes if he was allowed to go to his residence. After arrival near of his house he denied his previous statement. Then police beat him, kicked him mercilessly and threw him on electrical light post. Members of his family tried to save him from the claws of police, but failed. Rubel was taken to the custody of police again and he was succumbed to death for cruel and inhuman torture. The police claimed two lakh taka as bribe on condition of Rubel's release .but their demand was not satisfied. One day hartal was observed by the opposition political parties against the killing of Rubel.[37] The Supreme Court of Bangladesh in *State v Munir and Another* held that confessional statements can be

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[36] Annual Report 1998 of Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). P-8-9.

[37] *Ibid* P-8.

the sole basis for conviction if the confession is voluntary and true.[38] Same decision we can see in Jhumur Ali and others vs. state.[39] Article 35(4) of the Constitution forbids any compulsion on a detainee to make a confession or to be a witness against him/herself. The CrPC itself has provided safeguards against involuntary confessions made by a detainee under coercion (s. 163). Section 164 allows the detainees to refute the statements or confessions given to the police during remand, and to give fresh statement to the magistrate. A great disparity exists between the spirit of s. 163 and s. 164 and the practice under s. 167 by granting frequent remands with the knowledge that they will be treated inhumanly or tortured. Prior to recording any confession of the person sent on remand, s. 164 requires the magistrate to make such a person aware of the fact that he/she is not bound to make any confession and that his/her confession, if voluntarily given, may be used as evidence against him/her. To make sure this information is communicated, the magistrate is required to take a note to this effect at the foot of the record. It is all too common that a single person is remanded for more than once without assigning any reasons whatsoever. The accused in remand will often be threatened by police before being produced before the magistrates, and warned that further remand will be sought if he/she refutes the confession or informs the magistrate about torture or ill-treatment, and that more severe treatment will be waiting during the next round of remand. In such a dilemma, many remand victims prefer to condone their false confessions and even accept imprisonment for life, or any other term, as preferable to endless life-threatening torture and inhuman treatment in successive remands. It may also see them implicated ex post facto in criminal cases based on confessions extracted during remand by employing "Third-Degree" methods. Eventually many of them choose life

[38] (1996) 1 BLC 345.

[39] 7 BLC 62, also in 51 DLR 244.

term imprisonment as a comparatively better alternative to successive repressive remands and hiding the coercion used for their confession.

*9.3. Remand and commerciality*

Remand is a judicial process which should be used for the administration of justice only. But the common phenomenon is that after or before issuance of remand by the magistrate the police demand money from the relatives of the accused to do less torture during remand. Then the relatives of the accused are helpless before the police demand to save his or her brother, husband, father etc from the torture of the police. So the police is using remand procedure for their commercial purpose. According to a statement of a officer-in-charge of Dhaka metropolitan police (under a pre-condition that his rank, name and posting shall not be disclosed) said that if we use light torture then the accused may not disclose the important statements for which he is remanded.[40] In *Rubel Custodial Murder Case* of 17 June 2002, state vs Haroon &others in 2007, which are mentioned above elaborately can be the vital examples to understand the commercial utilization of police remand in Bangladesh.

*9.4. Denial to give medical assistant to the sick accused during remand:*

To get medical assistant is one of the fundamental rights of the accused. The sick detainees are often denied medical treatment and life saving drugs during remand. Dr mohiuddin khan Alamgir, our present honorable Home Minister, was arrested on 15 March 2002. The CMM granted his remand only for two days and issued a specific directive that he must not be tortured who was a diabetic and a patient with high

[40] See Supra Note-9.

blood pressure, but was not allowed to take his prescribed medicine despite repeated requests, which he told the Court after the expiry of remand. The HCD of the Supreme Court on 10th March 2002 took into account the deteriorating medical condition of Bahauddin Nasim, was the private secretary of the present prime minister of Bangladesh, and was arrested on 28 February 2002. The Chief Metropolitan Magistrate (CMM) of Dhaka granted his remand for five days under police custody and ordered that he be presented before the CMM Court after the remand period and directed the remand authority to urgently organize his medical treatment by forming a medical board within three days, which went unheeded beyond the specified period.[41] Recognizing the detainees' right to medical treatment, the Supreme Court of India in the *Basu Case* held that detainees should have medical examinations by a trained doctor every 48 hours.[42] The deprivation of this right poses a threat to life, which violates the citizens' human rights enshrined in chapter 3 of the *Constitution of Bangladesh.*

## 10. Some important instances of misuse of power under police remand

The existing laws of Bangladesh has given power to police under section 167 and 344 of the code of criminal procedure to remand an accused person with the permission of the magistrate to investigate and extract information for the proceeding and only in the offences which are grave and dangerous in nature such as under section-302, 364, 395,396,397 etc but now this legal word 'remand' is an alarming sound to utter for the mass people from top to bottom as the police seeking remand even in a simple proceeding where remand is not reasonably

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41 "Amnesty seeks neutral probe into 'torture' of Nasim and Alamgir", (The Daily Star, 2nd April 2002, online.

42 As cited in '-D K Basu v State of West Bengal (hereafter the Basu Case) 1997) AIR, 611.

necessary i.e. police seeks remand of 20 suspected arrested women without any specific allegation against them.[43] On August 26, 2011, Momtaz Uddin Ahmed, an Advocate of the Supreme Court, died at the Intensive Care Unit (ICU) of Square Hospital, Dhaka while he was in police custody. Earlier, Advocate Momtaz Uddin Ahmed was admitted to the National Heart Institute in a critical condition after being allegedly tortured by Detective Branch (DB) police. On August 11, 2011, at 3.30 am, police arrested Advocate Momtaz Uddin Ahmed from his apartment and took him to the DB Police office. On the same morning, his family was informed that Momtaz Uddin Ahmed had been admitted to the National Heart Institute in a serious condition. Later he was moved to Square Hospital. His wife Shelina Ahmed alleged that her husband was tortured in custody. Shelina Ahmed sued the Home Minister Sahara Khatun; Attorney General Mahbubey Alam; the Home Secretary; Dhaka Metropolitan Police Commissioner; Detective Branch Deputy Commissioner; and Officer-in-Charge of Shahbagh Police Station on the charge of killing Momtaz Uddin Ahmed. A First Information Report was submitted to the Ramna Police Station on August 26, 2011 but the police did not record the complaint as a case.[44] In Shamim Reza Rubel case where Rubel was murderd by police by torture in their custody, created considerable public outrage which led to the formation of judicial inquiry commission headed by the justice Habibur Rahman Khan to investigate the death of Rubel on 23th august 1998.[45] The commission in its report pointed out that corruption, negligence, and lack of qualified personnel are responsible for the breakdown in the enforcement of law by the police force. It future criticized false arrests and use of torture to obtain

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[43] See Supra Note -9 & 40.

[44] The Daily New Age, 27th August, 2011, also see in 'Annual report -2011 of ODHIKAR, page-70.

[45] Supra note, P-8.

confessions during interrogation as violation of article -35(5) of the constitution, article 5 of the universal declaration of human rights, section 33(b) of the police act and section 55 of the police ordinance.[46] A public interest litigation was also filed jointly by the Bangladesh legal aid and services trust (BLAST), Ain O Shalish Kendra, Sammilita Samajik Andolon, in the High Court Division of the Supreme Court.[47] The high court division passed a ruling on 7th april,2003 directing the government to change in the existing provisions of section 54,167,176,202 of the code of criminal procedure 1898 as well as sections 330,331 and 348 of the penal code-1860.[48] On 12th July 2011, a high court division bench comprising by justice Nazrul Islam Chowdhury and justice Anwarul Haque in a hearing expressed its serious concern regarding the violation of human rights by both the ruling party (Awami League) and opposition BNP and also by the law enforcing agencies in Bangladesh. In another incident it is seen that Salauddin Qader Chowdhury ,M.P and a BNP leader ,was arrested on 15th December 2010 on charge of allegation involvement with crime against humanity . He was interrogated in remand in "safe home" rather than police station on 19th April 2011 to extract confession. On 11th may 2011 he was interrogated from 10 A.M to 5 P.M. it is alleged that his lawyer and relatives were not allowed to meet with him.[49] Another victim Nurul Absar, a night gurar of Fatikchari thana health complex of Chittagong district, died of police torture on 9th august, 1997 while he was in remand.[50] Another victim of brutality was Mr. Nuruzzaman, an air crewman of Bangladesh Biman, who died of police torture in tejgaon P.S jail custody on 17th June, 1997. The accident created sensation among the conscious

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[46] Human rights in Bangladesh 2002, p-157 Ain O Shalish Kendra (ASK).
[47] Writ petition no-3806/1998.
[48] 55 DLR (2003)363.
[49] The Daily Protom Alo, 11th May 2011.
[50] Human rights fact-finder, March-April, 1998.

people that how brutal police torture snatched away the life of a strong and stout man who was suspended from his job.[51] The editor of daily Amar Desh Mahmudur Rahmand was tortured by the police when he was arrested for a report in his daily regarding judiciary *i.e. chamber judge means automatic allowance of bail.* When he was produced before the court, he said to the court regarding torture that ***"your honor I was undressed in the custody by the police".***[52]

## 11. Statistical examples of death by torture under police remand in Bangladesh

The statistics of death and torture under police custody are as follows[53]: -

| Serial no- | years | Death under police custody | Torture by police and other legal agencies | Death in jail custody |
|---|---|---|---|---|
| 1 | 1994 | 12 | 3014 | 31 |
| 2 | 1995 | 12 | 2810 | 10 |
| 3 | 1996 | 19 | 3617 | 29 |
| 4 | 1997 | 38 | 3000 | 23 |
| 5 | 1998 | 56 | 555 | 52 |
| 6 | 1999 | 12 | --- | 30 |

In 2000(January to September), 49 persons were killed in jail, court hajat, police and army camp.[54] The following annual reports of **Odhikar** show the nature of violation of human

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51 *Ibid.*

52 The Daily Naya Diganta, 26th December, 2012.

53 Human Rights; Fact Finder; Annual report 1998 (BRCT); The Daily Sangram, 4th January 2000, and The Daily Star, October 5, 2000.

54 See Supra note-9, 40 & 43.

right by torture committed by the perpetrators during **2005-2010.**[55]

| Serial no- | years | Death caused in police custody | Death caused in jail custody |
|---|---|---|---|
| 1 | 2005 | 06 | 76 |
| 2 | 2006 | 84 | 62 |
| 3 | 2007 | -- | -- |
| 4 | 2008 | -- | 66 |
| 5 | 2009 | 123 | 50 |
| 6 | 2010 | 109 | 60 |
| 7 | 2011 | 35 | 105 |
| 8 | 2012 | 07 | 63 |

But in the same year, 2010, total 22 persons were reportedly tortured to death by the different law enforcing agencies in Bangladesh and which is proportionately **9%** by the rapid action battalion (RAB) and huge **91%** by the police.[56]

## 12. Remedies

### *12.1. The Necessity for Criminalizing of Torture*

In order to stop the practice of torture, the Government must consent to enacting a law or amending the Penal Code of 1860 in order to provide for the criminalizing torture in all its forms and manifestations, in line with international laws and standards and strengthen complaint and investigation mechanisms, including the National Human Rights

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[55] For the report of 2012 see The Daily Naya Diaganta, 13th January 2013 and for report 2011 see in Annual human rights report-2011 of ODHIKAR page-69.

[56] Annual human rights report of odhikar, 2010, page-24.

Commission, in order to thoroughly and fairly investigate all allegations of arbitrary arrests and detention, torture and extra-judicial killings and pave the way for the prosecution of those alleged to be responsible in fair trials. What is also necessary for the protection of victims and witnesses so that they can appear and speak freely in a court of law to see that the ends of justice are met.

### *12.2. Draft laws in-compliance with CAT to reduce Torture*

Bangladesh ratified the Convention against Torture (CAT) on 5 October 1998. Even after a decade the country still does not have any specific law criminalizing torture. Bangladesh has not ratified the Optional Protocol of the CAT. A draft Bill for criminalizing Torture and Custodial Death, which was prepared in compliance with the mandates of the CAT, was submitted to the Parliament as a Private Member's Bill by Mr. Saber Hossain Chowdhury (MP) on 5 March 2009. The Bill has primarily been reviewed by the Private Member's Bill Review Committee led by the former Law Minister Mr. Abdul Matin Khasru (MP), a lawyer of the Supreme Court of Bangladesh and urgently needed to give the practical view of the bill into the law to reduce the torture in the name of remand and enhance human rights.[57]

### *12.3. Provisions for Compensation to the victim*

Since torture is not criminalized, a victim of torture cannot get any compensation in Bangladesh at all. No specific law allowing compensation for the victims of torture exists in the country despite the fact that the right against torture is a fundamental right. So in the existing laws (penal code-1860 or in the code of criminal procedure-1898) of Bangladesh must have to bring an amendment to compensate the victim of the

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[57] www.bangladesh.ahrchk.net/docs/tortureandcustadialbill2009.

torture against the perpetrators to reduce the violation of rights in the banner of police remand.

*12.4. Regularize the Departmental Action system*

We now that there are specific provisions for taking departmental action against the liable person whatever his rank or positions for negligence or corruption. According to section-29 of the police Act-1861 and section 53 of the Dhaka metropolitan police ordinance 1976 –any types of violation of fundamental rights through torture or custodial violence are punishable offence with imprisonment but in very rare case we hardly see the practical practice of this section which are still enforce in out country. Till now two police personals are held liable and punished for custodial death.[58] In addition to departmental action, the law enforcement personnel responsible for torture during remand must be brought to justice on every occasion pursuant to the *Penal Code 1860.* Commanding officers are authorized to take actions against their subordinates responsible for torture under s. 33(b) of the *Police Regulations.*

*12.5. Provisions to Protect the Witness in a case of Torture*

Bangladesh does not have any specific law concerning witness protection. None of the existing domestic law like the Code of Criminal Procedure contains a provision to protect the witness. The court, when it grants bail to an accused, may impose conditions for bail, which are often violated with impunity owing to the lack of monitoring and implementing facilities. The courts have also demonstrated their lack of commitment in this regard through their decades long neglect in addressing this issue. In such a context, the witnesses in a

[58] "Sensational Rubel murder case verdict", The New Nation, 18 June 2002, online.

case of torture not only remain far beyond any legal protection but also face further threat, intimidation and the possibility of having fabricated charges filed against them.

## 13. Recommendations and suggestions against torture under remand to enhance human rights

Some important recommendations were come up through a meeting organized by BLAST (Bangladesh legal Aid and Services Trust), such as:[59]

a. Sufficient Human rights training should be given to the police personnel.
b. A good number of people suggested to establish a monitoring cell in different thanas to figure out whether there is any abuse of power by the police under section 54 and 167 of Cr PC or not.
c. There should be equality and fairness at the time of recruitment and training of the police.
d. The Government receives donations for many unproductive sectors which remain idle and this money can be used to increase the number of police and police reform.
e. Police must behave humane with the person arrested and if there is good discussion between police and the person arrested then the trend of violence will be reduced.
f. The government must establish police ombudsmen.
g. Police commissioners should be made responsible to find out the causes of abuse of police power.
h. Some people recommended that, BLAST should take

[59] BLAST organized a roundtable on "Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence" held on 7th April, 2005 in CIRDAP Auditorium; Also see- Shadeka Jahan, sections 54 and 167 of the Cr.pc and some recommendations, The Daily Star, 30th July2005.

steps to provide necessary awareness training to the police. Further some participants suggest that BLAST should send their representative to every thana to monitor the situation.

i. Police should be kept free from any Political influence.
j. The benefits like salary, Ration, bonus of the Police should be increased, otherwise they can't work fairly.
k. If a person is arrested without any sufficient ground and harassed by the police, then the police must be forced to give compensation to the arrestee, so that the abusing tendency of the police power reduces.

**Again** in order to check the abuse and misuse of power by the police, the government may take the following steps on an urgent basis.[60]

1. The police should be made responsible to the civil administration at each and every administrative unit of the country changing the present warrant of precedent and administrative set-up.
2. The disputed section 54 of the code of criminal procedure 1898 should be immediately modified by curtailing the arbitrary and whimsical power of arrest.
3. Sections 167 and 344 of the same code are also to be reformed and codified coping with constitutional provision so that torture in the name of remand shall be up-rooted.
4. The activities of the criminal investigation department (CID), Special branch (SB), and detective branch (DB) must be supervised and coordinated by the ministry of Home regularly through an effective administrative unit to which the above mentioned agencies shall be accountable for their every omission or commission.

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[60] See Supra note -9, 43 & 54, also see in- KABIR.A.H. MONJURUL, "Policing the police?", The Daily Star, 2nd August, 1998, Dhaka.

5. A separate department must be created within the existing police exclusively for investigation of case or compliant against police.
6. The black law like the special powers Act-1974 must be repealed immediately in order to reduce the abuse of power both by the police officer and ADM/District Magistrate.
7. With a view to stop further gross miscarriage of justice all alleged homicide, rape and torture committed by police should be investigated and the responsible police shall be tried by giving exemplary punishment especially in the case of child rape and the victims of their heirs shall be given adequate compensations.
8. Honest persons and persons of high moral character are to be appointed in the police force.
9. After appointment, they are to be given training on human and fundamental rights along with moral and religious training.
10. Police are not to be used to serve the purpose of any political party which has been clearly stated in the police regulation. Section-1 of police code of conduct 1860, states that the police shall discharge their duties neutrally. So the politicization of the police force must be stopped without any future delay.
11. Every police must make a declaration of his wealth either in his name or in the name of his dependents and relations at the time of his recruitment. Every after five years and at the time of his retirement all wealth not in proportion to his income, to be determined by a committee appointed by the government for such ırpose, will be confiscated to the government treasury.

**:luding remark**

ıdless practice of torture practiced with impunity, ed a fear psychosis in the society of Bangladesh.

The people, has been losing their faith and confidence on the criminal justice mechanism. Victims refrain from complaining owing to the fear of further persecution. In addition the wide-spread corruption and huge litigation expenses makes the complaint process unaffordable for the ordinary people. This scenario of the present police torture oriented influenced criminal justice system should be stopped and should give the effective practical view of the above mentioned recommendations and suggestions to prevent torture in police remand to enhance both human and fundamental rights for the future generations of Bangladesh. By this way a situation may be created where police and mass people will be friends and not rivals. Police must think that they are to serve the people and not become their master as they are being paid from the public revenue per month. The police must have to ensure the proper law and order situations of the country by checking the activities of various types of offenders to ensure a peaceful Bangladesh for the average people which they can do as they have been caring a glorious past and a proud bearing history till the independence of Bangladesh.

# THE CONDITIONS OF THE CHILD IN TUNISIA

HELLA TURKI BEN CHEIKH

This paper explores the conditions of the child in Tunisia and investigates whether the child in this state enjoys his full human rights. In the first part, I will describe the place of the child in this country and examine his/her situation. Then, I will study the rules and codes established by the government that promote the status of the child in general and the girl in particular. The next part is an assessment of the extent of improvement of the position of the Tunisian boys and girls. Indeed, this part will deal with the critical issues that hamper the Tunisian children from enjoying their full rights. In fact, according to the United Nations Committee on the Rights of the Child, despite the progress that this country has achieved in the field of children's rights, there are still inequalities from which these children suffer.

## 1. Introduction

If we focus on the conditions of children in Tunisia, we notice that this country is a very interesting source of study. Nowadays, the State of Tunisia appears to be a country in transition, and is no longer counted among the poorest nations of the world, but among the emerging economies. This country is known unanimously to be a state which has built an efficient model concerning children's rights. It reserves to childhood a privileged place and considers the child as a full person who represents the future.

Indeed, the promotion of the rights of the child in Tunisia is given great attention at the highest level. The Tunisian Government believes that the respect of man's rights begins

with the way that society treats its children. Each community should love its children and grant them freedom and dignity. Every society should provide their young generation with the conditions and means that enable them to develop their abilities and sharpen their natural gifts so that they might have a free and decent life.

Tunisia maintains the position of its child at the very heart of national development plans. In order to promote children's rights, the government has taken several important measures and translated them into a practical reality, such as the commitment to education, of both girls and boys, in the Constitution. Institutions have been created and legal mechanisms, such as a Code for the Protection of the Child, introduced in 1995 so that every child, as a member of society, can enjoy all his/her rights whether they are political, civic, economic, social or cultural.

As long as the government continues on a large scale to respect its commitment to promote the rights of its children, child survival remains an urgent priority. Tunisian childhood policy has undergone a thorough change, based on a progressive move to a strategy based on the acknowledgement that the child is a right-bearing individual. In fact, the Tunisian Government is taking more seriously the issue of children's rights and the child has become a priority.

## 2. The place of the Child in Tunisia

Various indicators show a substantial improvement of the living standards of all Tunisians. For instance, life expectancy increased to 78.4% and the mortality rate decreased to 5% in 2003. The population growth increase rate fell from 3% in 1996 to 1.08% in 2002.[1] Furthermore, the poverty rate dropped to about 4%. It was limited to 4.2% of the population in 2004

[1] Tunisia 2005. *Key Economic and Social Indicators.* Tunisia: Tunisian External Communication Agency, 2005, p 6.

versus almost a third of Tunisians living below the poverty line in 1960. In addition, more than nine households out of ten nationwide had access to drinking water and electricity. 84% of households in rural areas had access to drinking water, and 94% to electricity in 2003, against one out of five households in 1984.[2]

The rate of vaccination among children increased to more than 95% in 2001 against 70% in 1984. In fact, one of the most important priorities of the Tunisian authorities is to reduce maternal and neonatal mortality. As a consequence, we notice a reduction of 50% of the number of children dying from malnutrition in 2003 compared to 1990.[3]

Prior to independence in 1956, in this nation, many children had no schooling and could not read at all. Education in Tunisia was only available to a privileged minority, which represented 14% of the total population. Most were not educated except the elite; now, the situation is different and education is given an extremely high priority. After independence, there was a shift to seeing children as a strategic target of social investment, based on the provision of universal social benefits. The state encouraged not only education in general but also promoted girls' education and equality with boys in this domain.

Tunisia is placing great value on education and training. Progress in schooling has been striking. Today, Tunisia spends nearly 7% of its GDP on education. The child's right to education is guaranteed by Act number 91-65 established on July 29, 1991. Administrative measures concerning the educational system were established to ensure the exercise of this right. They set up various levels of legal penalties which can be used against any parent who attempts to prevent a son or daughter from attending school. In addition, it obliges the state to guarantee an education to all persons of school age.

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[2] *Ibid.* p 7.

[3] *Ibid.* p 8.

Education in Tunisia is free and accessible to everyone. Schooling is compulsory between the ages of six and sixteen. This principle was introduced in 1989 by an Educational Reform. As a result, one Tunisian out of four is currently enrolled in school or in a vocational training centre. In accordance with national statistics, estimated by the Ministry of Education, the percentage of six-year old children in full-time education rose from 85% in 1975 to 99% in 2004. The school enrolment rate is 95% for children aged six to fourteen.

Moreover, recent reforms in the educational system have attracted an even larger number of children and especially of girls. Basic education for both boys and girls has been compulsory since 1991. Indeed, Tunisia has invested not only in its children but also in equality in education. In fact, the other area of interest in Tunisian policy is the strengthening of the place of the girl. Indeed, there is an emphasis on the universal schooling of girls and the development of mothers and child healthcare programmes. The result is the increase in the rate of six-year old girls schooling, which is 99%, that is equal to that of boys.

We remark a rise in the rate of female students in secondary and higher education that rose from 19.4% of the total in 1966 to 53% of the total in 2005. In addition, in 2005, the ratio of female students reached 53% in secondary education and 57% in higher education.

The number of higher education students grew significantly and reached 334,000 in 2004 including 3,000 students in private education, against 11,000 in 1970. This reveals the significant improvement in the percentage of young people in full-time university education, which stood at 33.3% in 2004 against 2.1% in 1966.[4]

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[4] All the statistics mentioned in this page and in the previous one are withdrawn from Tunisia News. "Children's Rights in Tunisia". Vol. 644. (Jan 2006), pp 13-14.

In addition, the Tunisian Government has reinforced the social and integral protection of adopted children and those without family support. It has extended the national network of public libraries for children and facilitated the life of disadvantaged children. For instance, in 2005, Tunisia created 110 sports associations for 3,000 handicapped children.[5]

Tunisia has taken other important steps to reinforce the rights of children by promulgating a series of legal texts and instituting a number of procedures. The intention was to put into practice the commitments made by ratifying international instruments and treaties.

In July 1993, the government amended its Personal Statute Code by introducing joint parental authority and adopting the divorce procedure to serve the best interest of the child in conjunction with the divorce procedure. The other improvement was the promotion of children's legal protection by enacting a Code for the protection of the child.

On the occasion of the National Children's Day, on January 11, 1994, the Tunisian legislature strengthened the position of the child by preparing a draft Code for the Protection of the Child (CPE) aiming at ensuring the socialization of children. The Code was adopted by the Parliament in November 1995, and aims in particular at confirming the child's place in the family, and thereby ensuring his/her equilibrium, survival and development. It is part of an overall, harmonious vision of the rights of the child.

This document is one of Tunisia's greatest achievements regarding children. It is the first complete Tunisian legal frame, and the main legislation supporting and protecting Tunisian children in general and those in need of special protection in particular. It intends to provide the child in danger with different aspects of social and legal protection. It was also established to lay down a certain number of rules to

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[5] Tunisia News. "Children's Rights in Tunisia". Vol. 644. (Jan 2006), pp 13-14.

protect children, particularly disabled ones[6], from any physical or moral danger threatening them. It aims at ensuring them a life of freedom which contributes to their development as responsible adults. The Code's purpose is to confirm the supremacy of the concern for children by guaranteeing their rights. With its special character, it began contributing enormously in improving the living conditions of Tunisian children and women as soon as it was established in 1995.

The Code contains articles which are in conformity with the provisions of the United Nations Convention on the Rights of the Child. Some of them guarantee children's rights to an identity at birth and to the respect of their privacy. Others give the child the right to health and a healthy environment and favorable living conditions. Furthermore, the Code promotes the right to education and educational, social and cultural activities that favor the development of children's mental, physical and emotional faculties. The other rights set forth in the Code are free expression of opinions and protection from all forms of exploitation, violence, physical and sexual attack, and from abandonment and negligence (Articles 7, 19 and 34).

Article 1 of this Code aims at firmly anchoring the child's national identity and his feeling of belonging to a civilization. According to Article 2

> "This Code guarantees the right to enjoy the various social, educational and health preventive measures and other arrangements and procedures aimed at protecting him/her from any kind of violence, harm, physical, mental or sexual attack or abandonment or negligence that give rise to mistreatment or exploitation".[7]

Article 3 defines the child. In coherence with the UNCRC, eighteen is the maximum age for majority in conformity with

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[6] The Child Protection Code: Article 7.

[7] The Child Protection Code: Article 2.

the fundamental idea that children who are under that age have not yet reached a sufficient psychological maturity which brings them to the adult's status. It says:

> "A child is, for the effect of the present Code, every human being under eighteen years old and who has not attained his/her majority by special provisions".[8]

The second principle in this article is the establishment of the minimum age for entry into the labor force in all sectors of activity regulated by the Labor Code, whether they are industrial, commercial or agricultural. It prohibits economic exploitation of children.

It was on this basis that the state progressively integrated social norms through the promulgation of the Code of Work of 1966. Since then, Tunisia had accelerated its ratification of a series of International Labor Organization Conventions. So far fifty six Labor Conventions have been ratified by the Government of Tunisia, including the seven Conventions related to fundamental human rights.

Tunisia's ratification of the ILO Convention on the Minimum Age for Admission to Employment, in July 1995, enforced its choice of sixteen years old as a minimum age for both full-time and part-time work. This age corresponds to the end of compulsory schooling. According to Article fifty eight of the New Labor Code, employment by its nature or by the conditions in which it is carried out "is dangerous for the life, health or the morality of the persons engaged therein".[9] This emphasizes the idea of protecting children from labor exploitation. The minimum age for employment is sixteen years old, whereas the minimum age for hazardous or manual labor is eighteen years old. Furthermore, the minimum age for light work in the non-industrial and agricultural sectors is thirteen years.

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[8] *Ibid.* Article 3.

[9] The New Labor Code: Article 58.

Under the Labor Code, children may work as apprentices or through vocational training programmes at age fourteen. In addition, children less than sixteen years of age may work in family-run businesses as long as the work does not interfere with school, pose a threat to the child's health, exceed two hours per day, or exceed seven hours per day when combined with time spent in school. Workers between the ages of fourteen and eighteen must have twelve hours of rest per day. Children between the ages of fourteen and sixteen in non-agricultural sectors may work no more than two hours per day.

Article 5 stipulates that every child has the right, from birth, to have an identity, which includes the first name, the family name, the birth date and nationality. Article 6 prevents children's separation from their parents and gives the delinquent child the right to special treatment.

In addition to all these rights, the Code prohibits the involvement of children in armed conflicts and their exploitation in organized criminality. Indeed, the document forbids the participation of children less than eighteen years old in wars and armed conflict.

Special groups of Tunisian children, such as the abandoned, parentless, those born outside wedlock, the disabled and delinquency-menaced, profit from specific programmes which aim at helping them to enjoy an effective social reinsertion. Although protection is every child's fundamental right, these groups of children are more in need than others for the intervention of legal and social procedures to protect them against whatever may endanger their health or their physical or psychological safety.

The Code, in Article 7, confirms the right of mentally or physically handicapped children to special protection and medical care and to a degree of education and training. These prerogatives are supposed to strengthen their self-sufficiency and facilitate their active participation in social life. For example, on May 11, 1994, the Ministries of Education and Scientific Research established an Agreement that aimed at

creating specialized centers for education and qualification of the handicapped, and established tools to organize and manage these centers. In addition, disabled children were provided with the right to pursue their schooling under normal conditions in specialized institutions, in accordance with the terms of the Agreement.

As already mentioned, the other area of interest of the Tunisian policy was to strengthen the status of the girl. This is clearly declared in the Code. The concept of children's rights is applicable to all children without distinction and girls have the right to enjoy equal opportunities. The National Programme of Action for the Family reinforces non-discrimination in education and in social life, and guarantees gender equality in the right to education, health and employment.

The Tunisian law also protects the girl child against all forms of abuses. For instance, Article 5 of the Code sets the minimum age for marriage for girls, which was formerly fifteen years old, at seventeen, and gives them the right to consent to marriage. According to the Tunisian Constitution,

> "Men less than twenty years of age and women less than twenty years of age cannot enter into a marriage contract. Below this age, marriage cannot be contracted unless there is a special authorization granted by a judge".[10]

In October 2006, the President of the Tunisian Republic enacted an amendment and established age eighteen as the minimum age for marriage for both girls and boys.

A Personal Status Code was adopted shortly after independence in 1956 which, among other things, gave women

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[10] Act No. 93-74 of July 1993 amended certain Articles of the Tunisian Constitution and the Personal Status Code, where the main concept enshrines the reinforcement of the family in general and the child in particular.

full legal status and outlawed polygamy. Tunisia fostered partnerships between women and men in the management of family affairs and of children, as well as in the areas of employment, social security and other fields related to civil and economic relations.

Furthermore, the government required parents to send girls to school, and today more than 50% of university students are women. The Tunisian Constitution guarantees partnership and equality between spouses not only through banning polygamy, but also through creating institutions of judicial divorce and consolidating the rights of women in charge of children's custody. Some of these features of the Tunisian policy distinguish it from other Muslim countries; in fact, this state is known for its progressive struggle to emancipate women.

One notices that Tunisia looks like a modern country that follows in one way or another the European model. Indeed, since gaining its independence from France, Tunisian officials have been working to develop a system that is responsive to the needs of a rapidly developing and modern country, while also emphasizing the need to develop a distinct national and regional identity. In fact, the Tunisian Constitution's originality lies in modernizing its religion and at the same time orienting the public education system towards teaching younger generations, including boys and girls, the values of tolerance, peace and moderation inherent in Islam.

The Code also protects children who are accused of legal offences and guarantees them special treatment which respects their dignity. Tunisian law grants young people in conflict with the law the right to special treatment regarding both the administration of justice and penalties imposed. Youngsters who have problems with the law are given the right to be treated in a way that protects their dignity and their person. This is possible thanks to the reorganization of specialized children's jurisdictions and the creation of a children's court in 1995.

The reorganization of juvenile courts was achieved by appointing specifically qualified magistrates, also called minors' judges, responsible for cases relating to children. These specialized judges are particularly trained to serve children's needs and rights.

The promulgation in 1995 of the Children's Welfare Code was followed by the creation of the duties of the juvenile court judge and commissioner for children's welfare. The role of family judges is to decide whether the child should, for instance, be kept in his family environment, assisted within the family as necessary, placed in an outside home or institution, or be subjected to medical or psychological examinations. When holding proceedings concerning a child, the family judge is supposed to conduct hearings both with the child and his parents and make a decision that corresponds to the child's best interest.

The Code provides that juvenile delinquents have to be heard in a juvenile court in the presence of a juvenile judge and two assistants who are fully familiar with the available evidence. The judge has to substantiate his/her decision if it runs counter to the advice given by those assistants. Juvenile courts are specialized courts that recognize and focus on offences; minor offences and crimes committed by children aged thirteen to eighteen. The Youth Court consists of a president, two advisory judges and experts on children. One or more examining magistrates and one or more prosecuting attorneys specializing in child affairs are assigned to each of the existing higher-level courts. The creation of children's courts enables each child to show his/her capacities to take decisions and to have the right to participate in society.

The minimum age for being prosecuted is thirteen years old. The child who is under that age is not liable to prosecution. Article sixty eight of the Child Protection Code states that a child under thirteen years of age is considered irrefutably to be unable to have infringed the Criminal Code; this presumption becomes refutable for children aged from thirteen to fifteen

years old. Children between thirteen and fifteen who have committed an infraction or a minor offence or a crime are not submitted to the penal jurisdictions of common law. All crimes except homicide can be minimized to the level of minor offences so as to attenuate the punishment.

The appointment of a Child Protection Officer, also called the Deputy for Childhood Protection, is one specific mechanism that was instituted to monitor and address the difficulties that children may face. The Deputy, or the Delegate, is ranked as a "Judicial Police Officer" similar to a social supervisor. S/he is the special person who determines the measures which are adequate to the child's situation. Although the Delegates are appointed by the Ministry, they are not civil servants. They have special investigative powers and have the prerogative to summon the child's parents. They work in cooperation with municipal and regional authorities, judges, law enforcement personnel and civil society.

The mission of the Child Rights Observatory is to take preventive action when a child's health or physical and moral integrity are in danger. Officers may take measures to eliminate the source of the threat or temporarily place the child with a foster family or social institution. They collaborate with all other facilities, institutions, and cultural, legal, educational, health and social bodies that deal with children. Any person, doctors, relatives, teachers or social assistants, who notice the existence of a dangerous situation, should inform the Delegate who has the responsibility, under Article 35 of the Code, to take the appropriate protective measures.

Other legislative measures fortify the Tunisian approach in the area of promotion and protection of the rights of the child. Children with specific needs, such as those who are disabled and orphans, also have the benefit of major care, and several laws and measures have been made in this field. This was particularly revealed through the Act of October 28, 1998 relating to the granting of a patronymic family name to children of unknown parentage or those abandoned. Moreover,

in January 2002, a law was adopted under which a child born of a marriage between a Tunisian woman and a foreign man could be granted Tunisian nationality even though the parents separate.

Furthermore, Tunisia established a 1997-2001 programme of cooperation, the National Action Plan for the Survival, Protection and Development of children. This Plan permitted the annual assessment that constituted an important measuring device allowing regular follow-up of the goals targeted in the area of children. The pillars of this work were the promotion of child rights, innovation, a demand for quality in health and educational services, and a struggle against all forms of exclusion. The programme aimed to ensure genuine equality in access to education and health, and to offer to all Tunisian children and women their rights.

The other noticeable event established for the benefit of the Tunisian child was the creation of a parliament for children and a judge for family affairs in 2002. The child Parliament is a forum for dialogue. Children can organize themselves within a space for dialogue in order to express their opinions on rights issues and to practise the exercise of responsibility. They there cultivate their sense of civics and promote their child rights culture. Children's Parliament demonstrates how youngsters, when given the opportunity and an informed choice, can make a valuable contribution to society. The age of members is limited to children aged from twelve to sixteen years. The total number of members is equal to the number of adult members of the parliament.

The creation of the children's parliament as a place for dialogue enables children to be responsible and allows them to express their views over their rights. The purpose is to spread the culture of participation and to educate and train youngsters to make them citizens capable of fully assuming their responsibilities in all duties and at all levels. The parliament organizes periodic meetings that discuss policies, plans and programmes concerned with childhood.

They provide the necessary facilities and resources to carry out comprehensive national surveys concerning children's conditions. It is essential that children participate in the formulation of the questions of the survey and that their vision is clearly represented. The parliament creates situations that allow children to achieve this objective; it also develops mechanisms, such as conducting surveys and answering questionnaires that enable them to complain against abuse. There are no specific mechanisms for protecting children who have been abused except prosecuting the person responsible for the abuse. The abused child has the right to be heard and defended and judges reserve to abusive people the hardest punishment.

The Tunisian society protects its children by enacting rules and plans. One recent noticeable event is the Tenth Plan of Development 2002-2006 which was devoted especially to women, the elderly and handicapped people and children. The purpose was also to increase literacy, decrease unemployment and promote the status of children and young people within both the family and the society. The Government's policy aimed to protect children through enforcement of relevant laws and to create jobs for adults so that more children could attend school.

The promises, commitments and so achievements made by the government are stipulated in laws which provide mechanisms to protect children. However, the ratification of human rights instruments is also a major procedure and initiative since the State Party becomes committed to all the rights set forth in the ratified instrument. Moreover, the promotion of the rights of the child represents a long-term undertaking. Looking at the legal aspect, the republic of Tunisia is party to a large number of international conventions promoting human rights. International treaties bind ratifying countries to principles that they are obligated to honor.

At the international level, Tunisia ratified the Charter on the Rights and Welfare of the African Child, which is

the first regional Charter of its kind. The purpose of such a regional Convention was to strengthen the position of African children and their rights. As indicated in the UN website, this instrument was prepared by the Organization of the African Unity (OAU) in 1988. Then, a strong input came from the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), which is an African NGO. In July 1990, it was approved by the OAU Assembly and also by the Committee of Ministers. Later, a draft Charter on the Rights and Welfare of the African Child was circulated among all OAU member States. It contains a Preamble, articles on rights and responsibilities and others establishing a Committee on the Rights of the Child and dealing with administrative dispositions.

Most of the provisions are similar to the UN Convention. For instance, Article 4 of the Charter, as Article 3 of the CRC, provides that "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".[11]

Nevertheless, several additional articles relate specifically to Africa. Indeed, this document is based on the exceptional economic and social conditions in Africa today. Promoting children's rights is considered as a positive development in Africa. It focuses on the notion of access to health care, which is a priority in Africa. There is also a specific article condemning traditional practices such as female mutilation. This issue is specific to the African world. However, it has never been the custom in Tunisia to use such a practice.

The other important international instrument specific to children's rights that Tunisia ratified, on January 29, 1991, is the UNCRC. This was the starting point for a moderate and progressive course based on giving a fundamental impulse for Tunisia to all the programmes established in favor of childhood. It was also the initiation for organized strategies

[11] The Charter on the Rights and Welfare of the African Child: Article 4.

and plans. In harmony with the principles and rules of the Convention, Tunisian policy ensures a better commitment of national laws to the principles set forth in this international document.

Tunisia also ratified the two Protocols added to the CRC by Law 2002-42 in 2002. This Law authorized the enactment of the Protocols on child trafficking, child prostitution and child pornography, and on children in armed conflict. By ratifying the Convention and its protocols, governments state their intention to put this commitment into practice. States Parties are obliged to amend and create laws and policies and to fully implement the instrument. They should consider all actions taken to verify if they respect their commitments to children's rights.

The Committee on the Rights of the Child urges governments to use the Convention as a guide in policy-making and implementation. It further obliges States Parties to take particular measures and develop special policies and programmes for children in order to contribute to the creation of a higher political priority for children. It can also make suggestions and recommendations about the steps to take to ensure the protection of the rights stipulated in the CRC. It then reviews and comments on the Reports submitted by States Parties.

Article 4 of the CRC asserts that by ratifying the treaty, states commit to undertake all appropriate legislative, administrative and other measures for the implementation of the rights that are recognized in the Convention. All States Parties have an obligation, regardless of resource constraints, such as in the code of countries with limited natural resources, to ensure at least some minimal essential level of each right, to plan strategies and programmes for the eventual achievement of all their obligations under the CRC, and to monitor both the fulfillment and the non-fulfillment of these obligations over time.

Furthermore, there was particular attention given to

health and nutrition of girls and to pregnant or breast-feeding women. The other focus was on the access of all couples to information and services related to avoiding early, frequent or late pregnancies.

Additionally, the absolute poverty rate was reduced from 13% in 1980 to 6% in 1995. In this way, Tunisia is ranked among the group of countries having most reduced their monetary poverty. As far as the adult illiteracy rate is concerned, it fell at least by half, taking into account the rate in 1990 with a focus on female literacy. Thanks to all these combined efforts, Tunisia has achieved great performances in terms of fighting to promote children's rights.

## 3. The Critical Issues

To evaluate the status of the child, each state has to submit Reports to the United Nations Committee on the Rights of the Child. These Reports are provided in accordance with Article 44 of the Convention. They give an account of the progress recorded, of difficulties encountered and the challenges that states have sought to overcome in order to ensure the well-being of children and the effective enjoyment of their rights. Each government has to submit Reports to the Committee within two years of ratification, and every five years thereafter, specifying the steps taken to change national laws and formulate policies and actions.

The Committee is a group of eighteen adults from different countries who are experts on children's rights. Its function is to provide an international mechanism for monitoring progress on the implementation of the Convention. Reports include meaningful and feasible recommendations for legal reform. They are presented to the Committee, which uses them to analyze how well a country is fulfilling its international commitments with regard to children. Indeed, it examines the government's record on implementing children's human rights.

The Committee demonstrates a willingness to criticize governments and takes a robust approach to breaches of the principles of the CRC. It usually appoints one or two of its members to act as Country "Rapporteurs". These responsible persons make a particular study of the government's Report and any NGO submissions, and draws up a list of questions and suggestions to put to the concerned government. The aim of submitting such a Report, is to analyze national laws in terms of the international commitments that a government has made.

As far as Tunisia is concerned, the Committee welcomed the submission of the Reports on time, in 1996, 1999 and 2002. According to its members, it contains comprehensive information concerning the legal framework within which the Convention is implemented and the other measures adopted since the ratification of the CRC by Tunisia.

It noted the series of new laws adopted regarding children born out of wedlock and the joint responsibility on the part of spouses. It also encouraged other measures that ensure maintenance following divorce, and protect children deprived of a family environment.

However, the Committee noted that the Tunisian system of collecting data relevant for the monitoring of the implementation of the Convention needs to be improved and extended. The written Report should be well-documented with statistical data and adequate explanations. The gap was that insufficient data regarding certain critical issues were noticed by the board. For instance, there was no indication from the Ministry of Public Health of statistical data concerning the mber of consultations and hospital days relating to those ed between zero and fifteen years old. In addition, it was not sible to assess the amount of the budget allocated to health d medical services offered to children and its distribution the various local, regional and central levels. According the last Tunisian Report on the implementation of the C in 2002, the State of Tunisia was required to provide

data, statistics and additional information, by age and sex, concerning health care, children with disabilities, children victims of physical or mental abuse and state allocations paid as subsidies.

The board urged the State Party to take all legislative measures to prohibit in the most effective possible way all forms of physical and mental violence, including corporal punishment and sexual abuse, against children in the family, in schools and in institutions. It also recommended the state to take all necessary measures to effectively prevent and combat child labour.

As already mentioned, Tunisia ratified in 1995 the ILO Convention 138, concerning the Minimum Age for Admission to Employment, and in 2000 the ILO Convention 182, concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Moreover, it abolished compulsory labour in 1989, and its law prohibited forced bonded child labour. However, a serious number of exploited children were noticed. The percentage of child workers of the total number of children aged between ten and fourteen for Tunisia between 1980-1991 was 2.7% for boys and 4% for girls.[12]

Inspectors of the Ministry of Social Affairs and Solidarity examined the records of employees to verify that employers comply with the minimum age law. There were no reports of sanctions against employers. Nonetheless, observers expressed concern that child labor continues to exist, disguised as apprenticeship, particularly in the handicraft industry. Moreover, young children often performed agricultural work in rural areas and worked as vendors in urban areas, primarily during the summer vacation from school. For instance UNICEF estimated that 2.1 percent of children aged five to fifteen years in Tunisia were working in 2000.

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[12] UNICEF Website at www.unicef.org.

Many children are forced to beg or work in conditions contrary to the law. For example, 50,000 teenage girls, who come from the poorest regions, are placed by their families as household domestics[13] in order to collect their wages. Even though in July 1965 a law related to domestic servitude was created to regulate working conditions for domestic servants and limit their minimum age to fourteen years old, these girls are overexploited by families and by their fathers who make them work even at nine years old. There are no recent reliable statistics on the extent of this phenomenon; however, an independent lawyer who conducted a study of the practice in 2000 concluded that hiring of underage girls as household domestics has declined with increased government enforcement of school attendance and minimum work age laws.

Even though Article 19 of the Code states "that it is forbidden to exploit a child through the various forms of organized crime, including instilling fanaticism and hate, and inciting the child to committing acts of violence and terror",[14] acts of violence are still a common practice in traditional Tunisian education. According to the 2002 Report, it is considered normal in traditional Tunisian culture to inflict corporal punishment on children when they disobey. 64% of parents consider that beating their children is good for their education.

The Committee urged the State Party to take all legislative measures to prohibit in the most effective possible way all forms of physical and mental violence against children in the family. It asked the government to conduct a study to assess the nature and extent of ill-treatment and abuse of children, and design policies and programmes to address this issue.

It is also at school that children mostly suffer corporal punishment, which is considered as a method of education. This traditional tolerance of violence inflicted on children

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13 *Ibid.*

14 The Child Protection Code: Article 19.

violates Article 19 of the CRC, which requires children to be protected from "all forms of physical or mental violence".[15] It also clearly infringes Article 28 (2) of the Convention which declares that "school discipline shall be administered in a manner consistent with the child's human dignity".[16] Many participants mentioned corporal and moral punishment, such as insults inflicted by teachers, as means of enforcing order in the classroom. The Committee was concerned with the infliction of such punishment, not only in the home but also in schools and penal institutions. It urged plans to promote awareness of the problem and foster a culture of non-violence.

Furthermore, the Committee recommended that a system should be put in place to have teachers punished for violent acts against children, and to find solutions to prevent violent acts among students. It suggested the creation of a participatory Committee in charge of controlling school violence within each school.

While the Ministry of Education has banned the use of all forms of corporal punishment in schools, chapter 313 of the Criminal Code permits certain tolerable forms of corporal punishment if inflicted by persons authorized to do so. However, the Committee noted that 'tolerable' forms of corporal punishment are allowed in Tunisia and that it is very difficult to set limits on what is acceptable.

As a consequence, after the establishment of the Code for the Protection of the Child, the Tunisian Government authorized a criminal procedure if a medical certificate indicates that the child is subjected to physical harm. Furthermore, anyone inflicting harmful corporal punishment is liable to receive a prison sentence of up to twenty years.

The Tunisian Constitution declares that Islam is the official state religion, 99% of Tunisians are Muslims; in fact, in this country, Islam is a way of life which regulates the personal

[15] The CRC: Article 19.

[16] The CRC: Article 28 (2).

and spiritual as well as the physical and social aspects of everyday life. The idea of human dignity is very strong in this religion, founded on the idea that humans are the "emissaries" of God who have a mission and a responsibility on Earth. The Koran also affirms the idea of equality; it improved the condition of women compared with what it was before the Koran was written. For instance, it forbids parents to kill their children, especially unwanted females, who previously had been buried by their fathers. It also advocates their well-being by prohibiting adoptive parents from naming their adopted children and urging them to retain their father's name. In a number of places in this holy Book it is mentioned that children and wealth are the ornaments of life.

Despite the non-sexist policy in this country, which promotes equal opportunities and participation in society for women, the girl child issue is still a problem in Tunisia. Girls are victims of domestic violence, sexual abuse and exploitation. In parallel with the efforts made by the government, legal discrimination against girl children and women continues to exist in certain areas, such as property and inheritance law, which are governed by the Shariàa, the Islamic Law, and by cultural beliefs. For example, the Personal Statute Code provides that according to the rules of inheritance, the boy receives a share that is twice that of the girl's. However, the government has made serious efforts to advance the rights of women by allowing people greater choice in matters of inheritance. For instance, it encourages the possibility of joint ownership of property in marriage contracts and persuades couples to make this choice. In addition, some families avoid the effects of Shariàa on inheritance by executing sales contracts between parents and children to ensure that sons and daughters receive equal shares of property.

Moreover, the Committee criticized the legislative discrepancy between the age for completion of mandatory education, which is sixteen, and the minimum age, which is also sixteen, for admission to employment, as it is considered

as a way of encouraging adolescents to drop out of the school system.

Finally, the Committee suggested that the state enhances efforts to close gaps in the enjoyment of rights between different regions, and between urban and rural communities. It urged Tunisia to reinforce its efforts to allocate appropriate resources and adopt better policies and programmes to improve and protect the health situation, particularly in the rural regions that contain the highest mortality indicators. The Tunisian population is around 9.6 million people, of whom 63% are urban dwellers and 37% rural. Children aged fifteen or less make up just less than 30% of the total population and the poverty rate is just under 6%.[17]

In 1992, a Plan was formulated to address the issue of persisting regional and urban/rural disparities in the availability and quality of maternal and child health care services. However, these disadvantaged zones do not benefit from equal opportunities. For instance, the supply of electricity, water and other amenities are not equal to those provided in the urban zones, despite the government's policy to reduce inequalities and improve the living conditions of their inhabitants. The situation of children in these areas needs improvement and the enormous gap must be narrowed.

However, if we compare the situation of the child with another Mediterranean country such as Libya, we notice that Tunisian children are more privileged in terms of rights. Actually, Libya is really very unstable. Indeed, after the revolution against the Libyan regime the bombings destroyed more than 15 schools and many others were closed. Consequently, many children are deprived of their right to education. Moreover, the revolution had serious repercussions on children's health. The country lacks medicine for pregnant women and their babies. In addition, many children are subjected to psychological

[17] The Committee on the Rights of the Child. Implementation of the CRC: List of issues, 2002, p 10.

trauma after witnessing terrible events such as the loss of a family member, their separation from their parents especially for refugees at the country's borders. What is more shocking is that rape victims are discouraged from reporting the crimes because they themselves could end up being prosecuted and held in a social re-education center. Libyan children no longer live in security since the revolution, their life is threatened and their rights are infringed. The situation is still unsteady and the country is vulnerable because of the bad effects of the revolution.

## 4. Conclusion

This paper has explored the conditions of the child in Tunisia and evaluated the extent of respect of the codes of children's rights in this society. It is sure that this country has promoted the human rights of girls and boys but there are some inequalities that hamper some Tunisian children from enjoying their full rights.

There are of course several critical issues that Tunisia and other countries witness but what is of crucial importance is that this government takes children's rights seriously. The main goal is not to achieve perfection but to put forth maximum efforts to promote the culture of children's rights. This is the first step towards progress. Even if the role of each government is fundamental, not all of them respect the basic rules of the protection of children's human rights. Moreover, the situation of the country affects really the respect of people's rights. We can, for sure, mention the instability that Tunisia has lived since its revolution. Children no longer live in a cultural homogeneity as the country itself is unstable. After nearly one year, the new government is still unable to solve the problem of unemployment and poverty. New religious extremist beliefs are spreading and poisoning the life of youngsters. This new Islamic culture represents a danger for future generations.

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## BOOK REVIEW

## Achieving Certainty, Clarity and Stability through the Law of Procedure

Chief Justice Emeritus Professor Giuseppe Mifsud Bonnici, *Constitutional Procedure relative to Fundamental Rights and Freedoms*, Sta Venera, Midsea Books Ltd., Essex, UK, Pearson Education Limited, second revised edition 2012, xiv +198.

**Reviewed by Professor Kevin Aquilina**

Chief Justice Emeritus Professor Giuseppe Mifsud Bonnici had published the first edition of his book on *Constitutional Procedure relative to Fundamental Rights and Freedoms* in 2004. It covered the salient judgments delivered by the Civil Court, First Hall, and the Constitutional Court during the period 1964-2000. The second revised edition published in early 2012 now covers an additional ten years of fundamental rights and freedoms' judgments, from 1964 to 2010.

The book starts off by emphasising the centrality of the laws of procedure within the realm of the law, in particular, in the field of fundamental rights and freedoms. The right to a fair trial, both under the Constitution of Malta and the European Convention of Human Rights and Fundamental Freedoms, are amongst the most rights resorted to. Certainty of the law is a must in any legal system and this book analyses human rights case law with a view to contributing to the consolidation of that certainty much needed in the law. Clarity and stability are two further values which the law of procedure strives to achieve. Knowledge of the law of procedure is identified as the first ingredient to look for successful candidates for judgeship for once a judge has mastered procedural law s/he can decide the matter immediately or within a short period of time. This, in turn, ensures a speedy decision.

The book adopts a con-

structive critical approach to a discussion of constitutional human rights judgments delivered by our courts during the period under review. The author does so to identify conflicting judgments in order to bring order within a chaotic jurisprudential world. The end result is that the efforts Professor Mifsud Bonnici's has invested writing the first edition of this book have not been in vain: the second revised edition has demonstrated that the courts have made good use of the Chief Justice Emeritus' first edition such that it can be observed that the conflicts in case law has been drastically reduced.

In so far as the book format is concerned, it is divided into seven chapters. The author discusses the history of fundamental rights and freedoms, how they evolved in the 1961 Constitution with no concomitant right of action to enforce such rights. The right of action was introduced in article 46 of the 1964 Constitution and extended in 1987 by the European Convention Act. This chapter then discusses the sources of the right of action and that previous judgments do not have binding force as in the United Kingdom. This is because the Maltese legal system, in this respect, belongs to the Civil Law tradition. The composition of the Constitutional Court as it changed over the years is discussed during with the automatic constitution of this court when the government fails to appoint it as well as the doctrine of necessity enunciated in the 1985 Archbishop Mercieca v Prime Minister case. The court made the point that if further challenges were to be accepted to the composition of the court, it would not be in a position to hear the case. Hence it was necessary that the court remained constituted to dispose of court proceedings pending before it. The final point raised is whether the Civil Court, First Hall, may review a judgment of the Constitutional Court. Professor Mifsud Bonnici does not agree with this line of procedure because it is always possible to request the same court to retry that judgment or else take the case before

the European Court of Human Rights. By allowing the Civil Court, First Hall, to sit to judge a Constitutional Court judgment would be to topple on its head the hierarchy of the court where in our juridical system it is the Constitutional Court which hears appeals from the Civil Court, First Hall, and not vice-versa.

The right of action is then discussed. It is referred to as a 'new' right of action which goes beyond the ordinary rights of action provided in the Code of Organization and Civil Procedure. This is because the new right of action contemplates not only an actual violation of a human right but also a potential threat of such a violation. Further, whilst in the Code it is possible to appoint a curator to represent the intents of a defendant, under the 'new' right of action the court can appoint a third person as an applicant in a human rights case. Moreover, the court can also decline to exercise jurisdiction if ordinary remedies exist whilst under the Code once a court is seized of a case it has to bring it to its natural conclusion and not avoid deciding the dispute. This chapter discusses what constitutes 'merely frivolous and vexation' and the conflicting court judgments as to whether to allow a retrial of a human rights judgment. It was only in 2007 that the legislator intervened to clarify that there can be such a retrial.

A human rights case is instituted by one or more parties against another or more parties representing the state. Chapter three thus addresses who are the parties to a human right cause. One might think that this should be a straight forward exercise but as Professor Mifsud Bonnici demonstrates, this is far from being the case. The applicant can be both a physical person as well as a moral person. The latter has included the Catholic Church, various kinds of civil and commercial partnerships, political parties, trade unions, etc. on the other hand the defendant is normally the state in its various manifestations, the defendant par excellence being the Prime Minister. Where

there is no identified head of a government department, the Attorney General is the default defendant.

The Constitution allows any court to refer a human rights case to the Civil Court, First Hall. However, the author opines that where a human rights question is raised before the Civil Court, First Hall, and the Constitutional Court, they need not request the applicant to refer that application to the Civil Court, First Hall, but should decide it themselves. Moreover, case law has not always be consistent as to which authority can make a reference. Difficulties have arisen in the case of whether tribunals such as the Small Claims Tribunal and the Land Arbitration Board may refer a human rights case to the Civil Court, First Hall. Professor Mifsud Bonnici is of the view that the guiding principle to be followed is whether the registry of that tribunal is the same registry as that of the courts of civil jurisdiction. judgments relating to reference by a first court Civil Court, First Hall, are classified into five categories and discussed at length. These are when an application is filed simultaneously with the raising of the same question in the first court; when an application is filed after the first court has decreed the question raised to be merely frivolous or vexatious; where an application is filed but no question is raised in the first court; where an application is filed in the Civil Court, First Hall, before proceedings commence in the first court and other cases where both a reference and the application somehow come into play. The correct procedure to be followed, in Prof Mifsud Bonnici's view, is that the first court may either refer the question to the Civil Court, First Hall, and suspend the proceedings before it or declare the raising of the question to be merely frivolous or vexatious. Essentially the first court has to ask: will the finding of an alleged violation of fundamental rights and freedoms in any way effect the proceedings before it? This implies that the first court cannot abdicate from

deciding this question. Nor may it have recourse to other proceedings not mentioned in article 46 of the Constitution.

Article 46(2) contains a proviso which essentially states that before filing a fundamental rights and freedoms case one has first to exhaust ordinary remedies. Prof Mifsud Bonnici examines this provision and sets out four requirements: the remedy has to be effective; the procedure is not futile when attempted; the proviso is not automatic; and a judiciously prudent approach is applied so as not to bring about an injustice to the applicant if the proviso is applied.

The final chapter deals with the time-limit within fundamental rights and freedoms cases are dealt with. In so far as appointing these cases within the established period, the times established by rules of court have been observed and respected. However, the same cannot be said for deciding such cases within an expeditious time. On the contrary there have been quite a number of cases which have taken more than six months to be decided at first and appellate instance: some have taken up to eighteen months; others to two years and others more than two years. One case took eight years to be decided. This trend has continued till the present day.

Although the first edition consisted in 184 pages and the second revised edition in 198 pages, it would constitute an injustice to the author of this monograph if one were to conclude that the only work involved in drawing up the second revised edition was the writing of 14 extra pages. This is far from the truth! This is so because Prof. Mifsud Bonnici had to patiently go through all the Civil Court, First Hall, and Constitutional Court fundamental rights and freedoms' judgments delivered in the last ten years. This is no mean feat. In the second revised edition the author comments on not less than 122 judgments and at most times these judgments have to be trebled as they comprise those of the first court,

the Civil Court, First Hall, and the Constitutional Court and this – apart from cases of retrial. Professor Mifsud Bonnici's work makes valid points which ought to be legislatively addressed whilst others should sound the bells for the judiciary especially where the mistakes he highlights in his book continue to be committed over and over again. It is thus recommended reading to Members of Parliament, the judiciary, the advocacy and persons interested in fundamental rights and freedoms as well as their adequate and proper enforcement.

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## دساتير الدول الأنكلوفونية لغرب إفريقيا ومعاهدات حقوق الملكية الخاصة.

أولوسيسان أولييدي

يقيّم المقال معاهدات تتعلق بحقوق الملكية الخاصة، كما يبحث دساتير كافة الدول الأنكلوفونية لغرب إفريقيا للتأكد من مدى اتساق هذه الدساتير مع أحكام المعاهدات. ويأخذ المقال بعين الاعتبار قيمة ومبرّر المعاهدات والدساتير ووثاقة الصلة التي تربط بينها، خاصة من وجهة نظر جديتها في ترسيخ حقوق الملكية الخاصة. هذا ويعالج المقال قضية التسلسل الهرمي بين معاهدات تخصّ الملكية الخاصة ودساتير الدول الأنكلوفونية لغرب إفريقيا، كما يختص بتاريخ وطبيعة وسَعَة حقوق الملكية الخاصة وأساسها الفلسفي. ويختتم المقال بتوصيات ضرورية تهدف إلى المزيد من الترسيخ لحقوق الملكية الخاصة عبر المعاهدات ودساتير الدول الأنكلوفونية لغرب إفريقيا.

OLUSESAN OLIYIDE

# انتهاك حقوق الإنسان أثناء الحبس الاحتياطي في بنغلادش: دراسة قانونية

**محمد رضوان گوني**
**محمد حسن مراد**
**محمد اكثر العلم تشوذوري**

يهدف هذا المقال إلى بحث أساليب وممارسة التعذيب أثناء الحبس الاحتياطي ومبرّرها من وجهة النظر البنغلادشية. ويزعم المقال أن الوكالات الحكومية لإنفاذ القانون تتجاوز حقوق الإنسان بإفلات من العقاب منذ لحظة الاعتقال المشبوه حتى نهاية فترة الحبس الاحتياطي الرامي إلى الحصول على اعتراف المشتبه فيه. وأساءت الشرطة بانتظام استخدامها لسلطة اعتقال الناس دون مذكّرة توقيف، وفي معظم الحالات لأهداف غير قانونية، بحجّة الاحتفاظ على حالة القانون والنظام في البلد. ويتعرض المعتقلون مراراً للتعذيب الوحشي بغية الحصول على المعلومات أو الاعترافات. هذا وفقدت الشرطة بسبب ذلك ثقة المواطنين، الأمر الذي يتطلب اتخاذ تدابير فورية للإصلاح تهدف إلى استعادة ثقة الشعب. واستجابة للضغط المتصاعد والانتقادات المستمرّة من شتى الجهات يُلاحظ حالياً توجّه بطيء نحو إصلاح القانون، بما في ذلك إجراءات الحبس الاحتياطي. ويهدف المقال إلى تأكيد ضرورة إجراء هذا الإصلاح بطريقة عاجلة، كما يتقدم المقال ببعض التدابير الإصلاحية والتوصيات من أجل حلّ، أو تقليل، مشكلة التعذيب وانتهاك حقوق الانسان أثناء الحبس الاحتياطي الهادف إلى الحصول على تصريحات الاعتراف من المشتبه فيه.

Mohammad Ridwan Goni
Mohammad Hasan Murad
Mohammad Aktarul Alam Chowdhury

## تعايش تقاليد قانونية مختلفة في أرض واحدة: قضية حرية التعبير في فلسطين.

**ممتاز م. قافيشه**

يبحث هذا المقال تعايش ثلاثة تقاليد قانونية في فلسطين، أي القانون القارّي والقانون العام والقانون الإسلامي، ويأخذ المقال بعين الاعتبار عدة بنود تشريعية تخصّ حرية التعبير ومقارنتها بالعهد الدولي الخاص بالحقوق المدنية والسياسية. ويقترح المقال بعض التدابير لإصلاح الأنظمة الحالية على أساس الافتراض أن يكون فلسطين مهتماً بالانضمام الى العهد الدولي، كما سبق له أن أعلن في دستوره عام ٢٠٠٢، وخاصة في ضوء محاولات فلسطين الأخيرة للحصول على العضوية الكاملة ضمن منظمة الأمم المتحدة. ويتبنى المقال، من خلال الأسلوب المقارن والأسلوب الاستقرائي، تعريفاً أوسع لحرية التعبير يتكوّن من خمسة عناصر وهي الخصوصية وحرية الدين وحرية الرأي وحرية التجمع السلمي وحرية تكوين الجمعيات.

MUTAZ M QAFISHEH

## ولاية المؤسسات الوطنية من أجل حماية حقوق الإنسان: ما هي فعالية اللجنة الوطنية لحقوق الإنسان في حماية الحقوق في نيجيريا؟

تشارلز أولوفيمي أديكويا

يبحث هذا المقال ولاية المؤسسات الوطنية من أجل حماية حقوق الإنسان ويقيّم فعالية اللجنة الوطنية النيجيرية لحقوق الإنسان في هذه المهمة، وذلك نظراً لأهمية معنى حقوق الإنسان على المستوى الوطني. ويزعم المقال أن الإصلاح القانوني الرئيسي لعام ٢٠١٠ الذي يعزّز ويضمن استقلالية اللجنة هو كاف لتمكين اللجنة من حماية الحقوق بطريقة فعّالة واستجابة طلبات ضحايا انتهاكات الحقوق في نيجيريا. ويستنتج المقال أنه يمكن تصنيف اللجنة كمؤسسة فعّالة وأنه حان وقت حماية حقوق الإنسان في نيجيريا على نحو فعال. ومع ذلك فيعرب المقال عن قلقه بخصوص التحدّيات المتعلقة بالتمويل غير الملائم وبعدد المحقّقين غير الكافي وشتى التحديات التي قد تقلّل من مصداقية اللجنة، الأمر الذي يحدّ من قدرتها على تحقيق ولايتها. هذا ويناشد المقال الحكومة أن تموّل اللجنة بطريقة ملائمة حتى تبرهن على أنها لا تستهزئ بالإصلاحات القانونية. كما يتساءل المقال حول المبرر وراء إنشاء مثل هذه المؤسسة الحيوية دون تخصيص التمويل الملائم. هذا ويشير المقال إلى ضرورة تعزيز اللجنة بمزيد من المكاتب لأن المكاتب السبعة الحالية لا يمكنها أن تخدم الشعب النيجيري الذي تجاوز عدده ١٥١ مليون نسمة. كما يناشد المقال اللجنة أن تصعّد ولايتها في الرصد حتى تضمن التنفيذ الفعّال للاتفاقات الدولية لحقوق الإنسان التي تشارك فيها نيجيريا، وذلك بسبب عدم تطابق بعض القوانين النيجيرية للمعايير الدولية.

CHARLES OLUFEMI ADEKOYA

# أوضاع الطفل في تونس

هيلا تركي بن شيخ

يعالج المقال أوضاع الطفل في تونس ويبحث ما إذا يتمتّع الطفل في هذا البلد كامل حقوقه الإنسانية. وفي الجزء الأول من المقال أصف مكانة الطفل في هذا البلد وأبحث وضعه. ثم أدرس القواعد والمدوّنات التي تقدّمت بها الدولة لتعزيز وضع الطفل بصفة عامة والبنت بصفة خاصة. ويشمل الجزء التالي تقييماً لمدى التحسين في أوضاع الصبيان والبنات التونسيين. ويعالج هذا الجزء القضايا الحرجة التي تعرقل تمتّع الأطفال التونسيين بحقوقهم الكاملة. وبالفعل، فحسب لجنة الأمم المتحدة لحقوق الطفل، فرغم التقدّم الذي شهده هذا البلد في مجال حقوق الأطفال، غير أنه لا تزال هناك تفاوتات يعاني منها هؤلاء الأطفال.

Hella Turki Ben Sheikh

## تأثير حقوق الإنسان في ترجمة مطالبات النساء والبنات اللاجئات من المنظور الجنساني

**مـاري ب. أياد**

يجب على دول الاتحاد الاوروبي، وخاصة الدول المتوسطية منها، أن تعالج مطالبات تخصّ اللاجئين واللجوء والتي تؤثر في اللاجئات وطلاب اللجوء. ويرى الكاتب أنه إنصافاً لحماية حقوق الإنسان فإنه يجب النظر في مطالبات النساء والبنات اللاجئات من المنظور الجنساني. ورغم أن هذه قضية متنازع فيها، فإن الحجج في صالح الاعتبارات الجنسانية هي أقوى، بل تساير مبدأ حماية حقوق الإنسان. فالوضع الحالي في البحر الأبيض المتوسط يتطلب النظر في مطالبات اللجوء بناء على «ثقافة» و»ديانة» و»المعتقد السياسي» و»الانتماء لفئة ما» للاجئات. ذلك لأن هذه الاعتبارات تؤثر سلباً، في أغلب الأحيان، في النساء وتُستخدم كأساس لاضطهاد النساء والأطفال. أما تجاهل القضايا الخاصة بالاضطهاد الجنساني فيشكّل تحريماً لحقوق الإنسان كلياً. هذا وعلى كل دولة جادة في أجندتها الخاصة بحقوق الإنسان أن تواجه هذه القضية، وخصوصاً إذا كانت ترغب في أن تكون مثالاً لتلك الدول التي تستخدم الثقافة والديانة والسياسة والانتماء لمجموعات لاضطهاد النساء في مجتمعاتها. وهذا أمر متصل خصوصاً بالبحر الابيض المتوسط.

MARY B. AYAD

## جهات فاعلة من غير الدول وانتهاكات حقوق الإنسان في نيجيريا: تقييم لنشاطات الهيئات النفطية عبر الوطنية في منطقة دلتا النيجر

**مايكل س. أوغويزّي**

لقد تم تصنيف الجهات الفاعلة من غير الدول كهيئات تشارك أو تعمل في مجال العلاقات الدولية. إنها لا تملك سمات السيادة القانونية غير أنها تملك قدراً من المراقبة على شعب و أراضي بلد ما. فالهيئات عبر الوطنية تمثل الجهات الفاعلة من غير الدول، لها دوافع ربح تعمل في مختلف الدول ذات سيادة وفي قارّات في العالم. وتستمدّ قواها في أغلب الأحيان من قوانين تلك الدول. واتفق الاقتصاديون والمحامون والعلماء الاجتماعيون لسنوات عدّة أن الاستثمارات الأجنبية كالهيئات عبر الوطنية بإمكانها أن تعمل كمحفز للتمتع بالحقوق الإنسانية أوانتهاكها وخاصة في الدول النامية. هذا ومما يؤكد ذلك أن مستثمري الشركات في كثير من الحالات غير ملزمين طبقاً لاتفاقات الاستثمار أن يراعوا حقوق الإنسان، مع أنهم يمارسون القوة على الأفراد والجماعات والشعوب الأصلية. أما مثل هذه التوكيدات فقد وطّدت الصلة التشريعية بين انتهاكات قانون الحقوق الإنسانية والنشاطات للهيئات عبر الوطنية كالشركات النفطية. وبناء على هذا الافتراض، يناقش المقال الأسلوب الذي على أساسه أدّت النشاطات للهيئات النفطية عبر الوطنية في منطقة دلتا النيجر إلى انتهاكات لحقوق الإنسان. كما يشير المقال إلى ما قامت به الحكومة الفيديرالية النيجيرية من تمكين لهذه الشركات النفطية عبر وطنية للخوض في نشاطات تؤدّي مباشرة إلى مثل هذه الانتهاكات الفاضحة لحقوق الإنسان.

MICHAEL C OGWEZZY

## مشروع نظام داخلي لقانون أوروبي مشترك للمبيعات: انتقادات ناظم ملزم اختياري.

**باسكوالي لاغي**

وافقت المفوّضية الأوروبية في ١١\٠١\٢٠١١ على مشروع نظام داخلي تقدّم به البرلمان والمجلس الأوروبي بغية تحديد «القانون الأوروبي المشترك للمبيعات» الذي يشمل عدداً وافراً من التدابير الخاصة بالمباحثات عبر الحدود بين الشركات والمستهلكين. وعندما يصبح هذا القانون ساري المفعول سيشكّل «نظاماً قانونياً ثانياً» وبديلاً للنظام القانوني في كلّ من الدول الأعضاء. وسيكون هذا النظام اختيارياً نظراً لأنه يتم اللجوء إليه بناءً على اتفاق بين الأطراف المعنية. أما من حيث المحتوى، فوُجّهت إليه الانتقادات من حيث المبادئ والمفاهيم وبسبب تدخّلها في مجال قوانين أخرى للاتحاد الأوروبي، وخاصة المتعلقة بالحقّ في الاستهلاك، الأمر الذي قد يحدّ من التنفيذ الفعّال وتوطيد حالة الشكّ القانوني الحالية في النظام الأوروبي.

PASQUALE LAGHI

## ليتشولاثيبي ضد الدولة: نحو إلغاء الإعفاء الزوجي في بوتسوانا؟

أوبونيي جوناس

رغم أنه ليس للعديد من الدول قوانين ضد الاغتصاب الزوجي، هناك حركة دولية تقودها مجموعات ضغط نسائية تنال باستمرار وبشكل دؤوب مصداقية في ترويج فكرة الإعفاء الزوجي كفكرة غير عادلة ولا مكانَ لها في مجتمع حديث. واستجابةً لهذه الحركة المتصاعدة فاتّخذت العديد من الدول مبادرات قانونية وقضائية تهدف إلى إلغاء الحصانة الزوجية. ويقدّم المقال تحليلاً نقدياً للقضية البوتسوانية المتعلقة بليتشولاثيبي ضد الدولة، وفيها صرّح القاضي كيربي أن عقيدة الإعفاء الزوجي مهينة للفكر الحديث لأنها لم تعد تمثل وضع الزوجة في المجتمع المعاصر، وعليه يجب إلغاؤها. ويشارك المقال مشاعر القاضي كيربي التي تعتبر عقيدة الإعفاء الزوجي عقيدة غير مناسبة للعصر، مع أن المقال يزعم أن التشريع يجب أن يقود المحاكم إلى إلغاء هذه العقيدة لتفادي مشكلة التطبيق ذي المفعول الرجعي للقانون الجنائي. فالادّعاء المركزي لهذا المقال هو إن عقيدة الإعفاء الزوجي يشكّل عقيدة قانونية قديمة تعارض كافة مفاهيم الكرامة الإنسانية والحريات النسائية. وفي الختام يتقدم المقال باقتراحات تخصّ التدابير التي يجب على توتسوانا أن تتخذها لتحقيق هذا الهدف المنشود.

OBONYE JONAS

## حقوق الإنسان والإسلام

دافيدي يوسيا

إن قراءة مليّة للقرآن تمكّننا من الاستنتاج أن الحياة والكرامة والعدالة والإرادة الحرّة والملكية والخصوصية تُعتبر مقدّسة ولا تُنتهك وغير قابلة للتصرّف. كما أن الحياة والدين والعقل والعائلة والملكية تُعتبر الضرورات الخمس الأساسية أو الأصول الخمسة للحكم الرشيد. غير أنه من البديهي أنه في مجتمع يقوم أساساً على فكرة الإله، ومؤسّس على فلسفة المطلق والسمو، فإن حرّية الأفراد تنعكس في عبوديتهم للإله. وتحدّد هذه الصلة بين القانون الإلهي وقوانين الدولة إقرار سلسلة من المشاكل تخصّ المساواة بين الرجال والنساء وحرية الديانة والتمييز على أساس ديني والعقاب البدني في العديد من الدول الإسلامية. فالتطورات الأخيرة في الحركات الشعبية التي أشعلت حوض البحر المتوسط منذ سنتين تدفع الملاحظ لهذه الأمور إلى التأمّل العميق في الثقافة الإسلامية فيما يخصّ حقوق الإنسان والتوافق بين المستويات الغربية حول حماية تلك الحقوق والشريعة.

DAVIDE IOSIA

## حقوق السجناء للإنسان واستخدام شبكة الاتصالات والاندماج الاجتماعي

**تيتسيانا راماتشي**

يسلّط المقال الضوء على عدم أمكانية الشروع في أي نوع من السياسات الداعمة لحقوق السجناء، بناء على إعادة دمْجهم الاجتماعي والمهني، دون الإشارة إلى أساس سياقي من شأنه أن ينظّم المبادرات البديلة وأهداف المشروع. ولهذا السبب فبإمكاننا أن نتفهم ضرورة تحسين مستويات القراءة ومهارات فهم اللغة للموظفين تغطيةً لحاجات السجناء. كما يجب أن يكون هناك نموذج تنظيمي للإدماج يكون بإمكانه أن يصل إلى اتفاق ضمني، وليس بالضرورة علني، بين السجناء والمجتمع، بغض النظر عن الشعور بالالتزامات لكلّ فرد. وبالفعل، فإن كل المبادرات تحمل ضمناً «طيفاً من المعاني» تسهّل الأهداف كالفهْم والتعبير عن، وشرْح وإحداث التغيير والوظائفية في النتائج الملاحظة. ويمثّل هذا الأمر بداية جيدة لتأكيد الكفاءة الضرورية للاقتراحات التي يتمّ تبنّيها.

TIZIANA RAMACI

## مدحاً في السيادة

توماسو إيدواردو فروسيني

يحلّل هذا المقال مبدأ السيادة وهو مبدأ يتغير باستمرار. فإنه كان في البدء مطلقاً وكان يُمارس من طرف جهة واحدة فقط. وتم ربْط السيادة عبر التاريخ ببعد إقليمي يشمل حكومة الدولة، ثم أُنيطت بالشعب طبقاً للمبادئ الدستورية الليبرالية. ولذلك فيجب أن تُعتبر السيادة الشعبية كمبدأ أساسي للديمقراطيات الليبرالية المعاصرة وذلك لأن كافة أنواع المشاركة للمواطنين، بما في ذلك الحقّ في التصويت والحقوق الأساسية والحريات الدستورية تتأسس عليها.

TOMMASO EDOARDO FROSINI

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## A Mediterranean Voice (MedVoice) for a Cross-Cultural Dialogue

**Some time ago, four graduates from the Mediterranean Master's Programme in Human Rights and Democratisation, University of Malta, decided to initiate a dynamic tool for inter-cultural dialogue, the Mediterranean Voice Website (www.medvoice.org), as the first step towards the fulfilment of their long-term project, which is the establishment of a Mediterranean Documentation Center for Human Rights.**


The main concern of the Mediterranean Master's Programme graduates, was to ensure the continuation of the unique chance for a Mediterranean dialogue that they were offered during the course and furthermore attempt to contribute in the promotion of the human rights awareness within the Mediterranean basin, in accordance with the Programme's aims.

### MedVoice – the new website

As an initial step they decided to concentrate their efforts on the creation of a website, which includes all relevant information regarding human rights in the Mediterranean (NGOs, IGOs, journals, law, media etc), until the suitable circumstances for the assignment's total application are shaped. The site, both in English and Arabic, includes a collection of selected articles, country information, as well as an exhaustive list of opportunity links (jobs, internships, programmes, etc.). In view of the promotion of human rights and the launch of a fruitful dialogue in the area, as first raised issue in their 'Opinion' forum, the floor is set for a 'Reform Debate concerning the Arab world', calling for ideas and comments.

### MedVoice - the Documentation Center

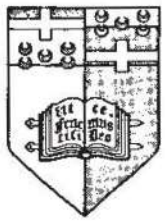
Their ultimate ambition, however, still remains their long-term project, the creation of a Mediterranean Documentation Center for Human Rights. The aim is to establish a body empowered to mediate among relevant human rights institutions (e.g. EU, universities, NGOs, etc.) and young human rights experts from southern Mediterranean countries working at the local level through flexible mini-projects.

Despite the obvious necessity for settlement of justice and order in the concerned areas, young people especially, and in particular those who have both a personal and professional interest in human rights, face difficulties in having their voice heard in a "Mediterranean dialogue," due to lack of facilities and formal linkages. MedVoice seeks to give such people a voice. Commissioned by the University of Malta, the MedVoice team completed a large database of human rights experts from southern and eastern Mediterranean countries.

### MedVoice - need for support

MedVoice is currently going through a strategic planning process in which the MedVoice team is trying to find organizations and academic institutions interested in hosting the website and project or through a concrete support.

**For more information:** www.medvoice.org • **Contact:** medvoice@medvoice.org



The Faculty of Laws at the University of Malta was established over 250 years ago. The University of Malta tracesits origins to the founding of the Collegium Melitense which was set up through direct papal intervention in 1592. The Faculty of Laws currently offers four taught masters programmes and one by research:

- Master of Laws (LL.M.) in European & Comparative Law
- Master of Laws (LL.M.) in International Law (Research)
- Master of Arts in Laws (Research)
- Master of Arts in Human Rights & Democratisation
- Master of Arts in Financial Services

Each of these programmes can be followed on a full-time (1 year), or a part-time (2 year) basis. We also welcome enquiries from students wishing to pursue research degrees for either a Ph.D. or M.Phil. Language of teaching is English. For further information on these programmes, and the research interests of the members of staff of the School, please visit our website at: http://www.um.edu.mt/laws/

You can also email our International Office on intoff@um.edu.mt or the secretary who co-ordinates the postgraduate courses on elisa.attard@um.edu.mt or you can call on 356 2340 2786.

# *Med* *ean Journal of Human Rights* Style Sheet

Articles submi[t] -Journal should be original and must not be under consideration for any other publ[ication] the same time. The journal retains the ownership of any articles it publishes. Ma[nuscripts] should be submitted for review in duplicate, using A4 paper, 1.5 spaced and should no[t exceed] 000 words in length (including notes). The word-count should be shown at the top of t[he manu]script. A version on diskette should be included, in Microsoft Word for Windows (PC [format] using font Times New Roman 12. Articles should be written in English, Italian or Fr[ench].

Typescripts s[hould] nform to the *Journal Style* outlined below:

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**2. Page Fo[rmat].** All pages should be numbered consecutively. There should be an empty line before each [para]graph, the first line of which should be indented by 0.5cm from the margin on the left. [Words] or phrases that the author means to emphasize should be in italics. Article headings s[hould] be in bold, sub-headings in italics and numbered consecutively

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ii) ARTICLE IN JOURNAL OR PERIODICAL: Should give the author's surname, the forename or initials, the date of publication in brackets, the title of the article in inverted commas, the title of the journal in italics, the number of the volume and issue, and the page numbers.
*Example*: O'Barr, William (1991) "Discourse and Power in an American Legal Office," *Law and Society Review*, Vol.5. No. 3., pp.342-357
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Articles submitted to the Journal should be original and must not be under consideration for any other publication at the same time. The journal retains the ownership of any articles it publishes. Manuscripts should be submitted for review in duplicate, using A4 paper, 1.5 spaced and should not exceed 8,000 words in length (including notes). The word-count should be shown at the top of the manuscript. A version on diskette should be included, in Microsoft Word for Windows (PC format using font Times New Roman 12. Articles should be written in English, Italian or French.

Typescripts should conform to the *Journal Style* outlined below:

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**2. Page Format.** All pages should be numbered consecutively. There should be an empty line before each new paragraph, the first line of which should be indented by 0.5cm from the margin on the left. Words or phrases that the author means to emphasize should be in italics. Article headings should be in bold, sub-headings in italics and numbered consecutively

**3. Quotations.** Long quotations should be separated from the text of the article by leaving an empty line before and after. The text of the quotation should be in font Times New Roman 10, single-spaced and indented by 0.5cm from the margin on each side. Short quotations should be incorporated in the text within inverted commas.

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