M.J.H.R. **Mediterranean Journal of Human Rights**

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EDITORIAL FOREWORD

The publication of this double issue of the Mediterranean Journal of Human Rights illustrates the versatility of Human Rights and the extent to which they have become the dominant global ideology of our times. In the twenty-first century, Human Rights law is more than a quirkily idealistic chapter in International Law textbooks, or a source of vague and emotive political slogans. It has become the framework within which various international relations are conducted, a *sine qua non* for economic aid and the primary justification for resort to military force. In the process, Human Rights have long broken out of the specific confines of international law to invade other domains. They have penetrated popular consciousness in countries around the world, as well as creating a common discursive terrain where legal and non-legal expertise unite in the challenging task of constructing, defining and protecting the human subject.

The articles contained in this issue manage to contribute to various debates while remaining firmly anchored to the central problematic of human rights protection in the Mediterranean. The most theoretically provocative article we publish is Peter Serracino Inglott's original attempt to rethink the basic subjects of human rights. Proposing that humanity as a whole also be recognised as a subject of human rights, he deftly constructs a philosophical justification that simultaneously caters for what could be termed basic human obligations as well as for third generation environmental rights. The link is supplied by the notion of the common heritage of mankind; a promising concept also invoked by Claudio Zanghi for its potential legal uses in constructing an acceptable international status for the city of Jerusalem. Zanghi's concern with Middle Eastern realities is in turn echoed by Tom Najem and Abdel Sidahmed; who provide insightful commentaries on current human rights policies in Morocco and the notion of apostasy in Islam respectively. These articles do more than simply comment on the current situation. Thus Najem explores the relationship between the occasionally bland truisms of human rights law and the turbulent political settings in which it is implemented, while Sidahmed queries the oft asserted religious basis for punishing apostates under Islam.

Shifting the focus away from formal rights declarations, other articles, such as that by Bassem Eid, concentrate on the social and

cultural settings in which rights are advocated. Noteworthy for its careful sociologically informed approach, is the article by Anna Mestitz and Patrizia Pederzoli. Outlining the impact of the Italian *Tangentopoli* scandal on the judicial system, they show how it encouraged the development of new alliances between Italian magistrates and the media. The media has come to be viewed as the central arena in which judicial reputations are made or destroyed, with profound implications for the kind of legal protection afforded to human rights.

While we might be tempted to bracket out such transformations in the bureaucratic machinery enforcing human rights, other articles prove that these are not superficial changes. The legal content and role of human rights is also evolving in response to globalisation; which as Janusz Symonides observes is a complex multifaceted process with mixed implications for human rights development. Thus, even as Jonathan Black-Branch discusses recent UN efforts to extend the legal framework of children's rights, Silvano Labriola suggests that human rights may be emerging as the unofficial constitution of a re-born European Union.

In the Mediterranean the evolution of human rights protection is occurring against the backdrop of large population shifts. We here publish a cluster of articles dealing with the legal ramifications of this movement of peoples. In a well informed and critical article, Stefano Lezczynski views recent Italian immigration laws as inspired by the Italian government's attempt to balance between its European role and its Mediterranean aspirations. In the process, economic interests tend to take precedence over humanitarian concerns. Similarly, Katrine Camilleri critically appraises the strengths and weaknesses of the recent Maltese law on refugees, while Marcia Young explores the interface between legal categories and the lifestyles of these refugees.

Global transformations have also created propitious conditions for the cross-cultural transmission of legal doctrines. Guido Alpa's article provides a historical perspective on this issue; exploring the varying roles played by foreign law in one European legal system over the last two hundred years. Our editorial objectives could be put in a nutshell as the creation of an inter-disciplinary venue for such borrowing and cross-fertilisation. We hope, through this issue, to have partially realised them.

Salvo Andò **Ian Refalo** **David E. Zammit**

ARTICLES

THE LEGAL PROTECTION OF REFUGEES IN MALTA

KATRINE CAMILLERI

The aim of this paper is to examine the scope of the protection provided by Malta's new Refugees Act, in order to determine the extent to which the Act will effectively improve the situation of refugees and asylum-seekers in Malta. It concludes that the Refugees Act is a milestone in the history of refugee protection in Malta, as it marks a qualitative shift, from a system based largely on humanitarianism and governmental discretion, to one that offers legal protection to refugees and asylum-seekers and affords some guarantees of respect for their rights. However, on a practical level, the Act will bring few real improvements to the situation of refugees and other protected persons in Malta, as they already enjoy most of the benefits granted by the Act. The major difference will be that once the Act comes into force they become legal entitlements not simply benefits. The rights contained in the Act are extremely basic, and fall far below the basic minimum recommended by the 1951 Convention. Moreover, the Act fails to tackle a number of issues of fundamental importance. The most important of these issues are without doubt those relating to internal freedom of movement of asylum-seekers and to the right to work or to be assisted in order to be able to live with dignity.

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The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them.

Hannah Arendt[1]

1. Introduction

Last year, the Maltese Parliament approved the Refugees Act, 2000[2]. This legislation, which is expected to enter into force by June 2001[3], establishes domestic procedures for the determination of applications for refugee status and lays down the rights of refugees and asylum-seekers in Malta.

At present three hundred and sixty one persons are enjoying some form of protection in Malta. Of these one hundred and seventy five are UNHCR Mandate Refugees or Persons of Concern to UNHCR. The rest are asylum-seekers or persons enjoying some form of temporary protection. These persons come from various countries, however the largest groups are from ex-Yugoslavia, Iraq, Palestine and Algeria.[4]

In contrast to the trends witnessed in some European countries, the refugee[5] population in Malta has decreased in size over the past few years. The highest number of refugees ever recorded was nine

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[1] The Origins of Totalitarianism, Andre Deutsch, 1986, pgs 295-296.

[2] The Refugees Act, 2000 (Act XX of 2000, Chapter 420 of the Laws of Malta) was approved by Parliament on July 25, 2000.

[3] Section 1(2) of the Refugees Act provides that: "This Act shall come into force on such date as the Minister responsible for immigration may by notice in the Gazette appoint, and different dates may be so appointed for different provisions or different purposes of this Act".

[4] These statistics were published by Emigrants' Commission, Valletta, and represent the situation as of July 31, 2000.

[5] In this context the term 'refugee' refers to all persons enjoying some form of protection in Malta and not simply to UNHCR mandate refugees.

hundred and eighty one, in December 1993. At the time Malta experienced an unusually large influx, at least by Maltese standards, of Iraqi refugees. Since then the number of refugees in Malta has dwindled considerably[6]. This is primarily due to the fact that many of them were accepted for resettlement in a third country.

To date the recognition and protection of refugees in Malta is not regulated by domestic law, in spite of the fact that Malta signed the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to the Convention in 1971[7]. Once it comes into force, the Refugees Act will therefore constitute a major milestone in the history of refugee protection in Malta. It will mark a qualitative shift, from a system based largely on humanitarianism and governmental discretion, to one that offers legal protection to refugees and asylum-seekers and affords some guarantees of respect for their rights.

As a result of the manner in which refugee protection has been regulated, up to the present day refugees and asylum-seekers in Malta are forced to survive in a grey area outside the protection of the law, excluded from effective participation in Maltese society. It is submitted that the ultimate test of any legislation enacted to regulate the recognition and protection of this class of migrants is whether it enables them to do more than just survive, whether it enables them to live with dignity. This end can only be achieved by providing effective guarantees of respect for the rights of these people.

The aim of this paper is to examine the scope of the protection provided by the Refugees Act, in order to determine the extent to which the Act will effectively improve the situation of refugees and asylum-seekers in Malta. The starting point is a brief outline of Malta's existing obligations towards refugees in the light of the various conventions to which Malta is a party and in the light of

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[6] According to statistics published by the Emigrants' Commission, Valletta, for the period from 1992 to 1999 the number of refugees, i.e. persons enjoying some form of protection in Malta, at the end of each year were as follows: 871 in 1992, 981 in 1993, 822 in 1994, 698 in 1995, 538 in 1996, 448 in 1997, 486 in 1998 and 378 in 1999.

[7] Malta acceded to the 1951 Convention on the Status of Refugees on June 17, 1971 and to the 1967 Protocol on September 15, 1971.

developments in customary international law. The purpose of this section is to highlight the sources of these obligations, rather than to provide a detailed analysis of their extent and scope.

2. Malta's international legal obligations towards refugees

The absence of specific domestic legislation regulating the recognition and protection of refugees and asylum-seekers in Malta does not mean that Malta has no legal obligations towards these persons. As a signatory to the 1948 Universal Declaration on Human Rights, Malta agrees that, in principle,

> *"Everyone has the right to seek and enjoy in other countries asylum from persecution".*[8]

In actual fact, however, the obligations assumed by the Maltese government towards persons seeking protection from persecution fall short of this generous standard.

2.1 The 1951 Convention on the Status of Refugees and the 1967 Protocol to the Convention

Malta is a party to both the 1951 Convention on the Status of Refugees and the 1967 Protocol, which to date constitute the most widely accepted standard for the recognition and protection of this class of migrants. These international legal instruments are therefore the most obvious starting-point in any examination of Malta's international legal obligations towards refugees.

As a party to these instruments, Malta has not only recognised that refugees are a distinct category of migrants worthy of special protection but has also assumed certain definite, albeit limited, obligations towards these persons.

When acceding to these instruments, the Maltese government retained the geographical limitation contained in the 1951 Convention. As a result, to date, the definition of the term 'refugee' for the purposes of Malta's obligations under the Convention is limited to any person who

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[8] Article 14(1) of the 1948 Universal Declaration of Human Rights.

> *"As a result of events occurring in Europe and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country..."*[9]

Moreover, besides effectively limiting its formal obligations under the Convention and Protocol to refugees from European countries, Malta also made reservations with regard to a number of articles of the Convention[10]. All of these reservations and the geographical limitation were retained when Malta acceded to the 1967 Protocol.

Thus, Malta is not obliged to provide public relief and assistance to refugees within its territory, nor is it obliged to issue refugees with identity papers or a travel document. A host of other obligations, including that of allowing refugees within its territory the right to work, whether as an employee or a self-employed person, and that of facilitating the assimilation and naturalisation of refugees, "apply to Malta compatibly with its own special problems, its peculiar position and characteristics"[11].

As may be seen, it was amply clear from the outset that, even with regard to the relatively small category of refugees for whom it had assumed formal responsibility, Malta did not consider itself a country of resettlement. Refugees would be allowed to remain in Malta until a permanent solution could be found for them elsewhere, but little more than that[12].

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[9] Article 1A(2) of the 1951 Convention on the Status of Refugees, the emphasis on the words "as a result of events occurring in Europe" is mine.

[10] On deposit of its instrument of accession to the 1951 Convention, the Maltese government, in terms of article 42, declared that article 7 paragraph 2, and articles 14, 23, 27 and 28 would not apply to Malta, and article 7 paragraphs 3, 4 and 5, and articles 8,9,11,17,18,31,32 and 34 would apply to Malta "compatibly with its own special problems, its peculiar position and characteristics". (Source: Refworld, UNHCR, Geneva)

[11] Refworld, UNHCR, Geneva.

[12] For a more detailed discussion of the rationale behind Malta's reservations to the 1951 Convention and the 1967 Protocol see Buttigieg, Charles, (1997), "Refugee Rights: A Small Nation's Perspective," Mediterranean Social Sciences Review, Vol. 2. No.1., pp. 67-78.

In spite of these reservations, which severely limit the civil and socio-economic entitlements of refugees present in Malta, it must however be said that the 1951 Convention and the 1967 Protocol do afford these persons some measure of protection, the most fundamental of which is the prohibition of *refoulement*.

The extent of the protection provided by these instruments is set to increase upon the coming into force of the Refugees Act. There has been a firm commitment on the part of the government of Malta to formally lift the geographical limitation to its obligations under the Convention once the Act enters into force. Thus the obligations Malta assumed under the Convention will extend to European and non-European refugees alike. It should also be stated at this juncture that the definition of the term 'refugee' contained in the Refugees Act makes no reference to 'events occurring in Europe', thus effectively removing the geographical limitation. Moreover, section 3 of the Act makes specific reference to the obligations assumed by Malta under the Convention, stating that:

> *"This Act incorporates the obligations assumed by Malta under the Convention, and in its interpretation regard may be had to the provisions of the Convention."*

2.2 Malta's treaty obligations under the various human rights instruments to which it is a party

Malta has also signed a number of international human rights instruments which, though not directly concerned with the treatment and protection of refugees, have a direct bearing on the manner in which governments may or may not treat refugees and asylum-seekers within their territory.

These instruments, which provide fundamental guarantees for the protection of the human rights and fundamental freedoms of all persons within the Maltese government's effective jurisdiction, including refugees and asylum-seekers, are particularly significant. This is primarily due to the fact that Malta's obligations under these instruments extend to all refugees and asylum-seekers present within Maltese territory, as opposed to those assumed under the 1951 Convention which, to date, are limited to European refugees. Moreover, as Malta is party to most of the major international

human rights conventions[13], the rights protected by these instruments are extremely wide-ranging. As a result, the effect of the many reservations that Malta made to its obligations under the 1951 Conventions is to some extent mitigated.

The guarantees contained in these conventions, which address the particular vulnerability of refugees and asylum-seekers most effectively, are undoubtedly those prohibiting the forcible return of persons to a country where they would face persecution.

Article 3 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly states that

> *"No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"*

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires the Contracting Parties to ensure that no one within their jurisdiction be subjected to torture, or inhuman or degrading treatment or punishment. This article has on occasion been used to provide protection from *refoulement* to persons who would face a real risk of being subjected to treatment contrary to article 3 if removed to another state.

The European Convention is a particularly effective tool for the protection of refugees and asylum-seekers in Malta as, unlike other human rights conventions, it is part of Maltese law and can therefore be invoked before and enforced by local courts[14].

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[13] The following are some of the international human rights conventions to which Malta is a party: Malta signed the International Covenant on Economic Social and Cultural Rights in 1990, the International Covenant in Civil and Political Rights in 1990 and the two Optional Protocols to the said Covenant in 1990 and 1994 respectively, the International Convention on the Elimination of All Forms of Racial Discrimination in 1971, the Convention on the Elimination of All Forms of Discrimination against Women in 1991, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1990 and the Convention on the Rights of the Child in 1990.

[14] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was in fact invoked on two occasions by individuals faced

2.3 Customary International Law

There is considerable support for the view that the principle of protection from *refoulement*, for persons who would qualify as refugees in terms of the 1951 Convention, has crystallised into a norm of customary international law. This norm thus binds all members of the international community whether or not they are parties to the 1951 Convention on the Status of Refugees.

During the last twenty years there has been much debate regarding the extant scope of this principle in customary international law. Goodwin-Gill maintained that customary international law has extended the principle of *non-refoulement* beyond the narrow confines of Article 1 of the 1951 Convention. He suggests that the "essentially moral obligation to assist refugees and provide them with refuge or safe haven" has developed into a legal obligation "albeit at a relatively low level of commitment" (Goodwin-Gill, 1986: 103). In his view, the principle of *non-refoulement* requires states to offer at least temporary refuge from imminent danger to persons fleeing events which could cause them serious harm and which are completely beyond their control, such as civil disorder or violent conflicts. Other scholars[15] have rejected this thesis as overly optimistic, while at the same time conceding that "an intermediate category of refugee protection does now exist" at a lower level of commitment than that suggested by Goodwin-Gill (Hathaway, 1991: 26).

It is therefore clear that Malta's international legal obligations towards that category of refugees, European or otherwise, who come within the scope of the 1951 Convention definition, are more far-reaching than is immediately apparent. Moreover, Malta is obliged

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with removal to another state. Neither of these cases reached judgment stage as in one case the petitioner absconded from Malta and in the other an amicable solution was reached and the petitioner was allowed to remain in Malta on humanitarian grounds.

[15] For an overview of the debate on the existing scope of the principle of *non-refoulement* refer to Goodwin-Gill, Guy S., "Non-refoulement and the New Asylum Seekers" and Hailbronner, Kay, "Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?", both published in The New Asylum Seekers: Refugee Law in the 1980s, (1986) The Netherlands, Martinus Nijhoff Publishers, pp.103-158, and Hathaway, James C., (1991), The Law of Refugee Status, Canada, Butterworths, pp.24-27.

to provide protection against *refoulement* to a wider category of persons at risk of treatment that would violate their rights as protected by the various international instruments to which Malta is a party.

However, with few exceptions, notably the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, until very recently these international obligations were never incorporated into domestic legislation. As a result to date there are no formal structures in place to examine and determine applications for refugee status, in order to identify those persons who are in need of protection and to guarantee protection of and respect for the rights of refugees and asylum-seekers.

This is not to say that Malta has completely disregarded its international obligations towards these persons. However, as will be seen, to date the protection of refugees in Malta has been characterised by piecemeal solutions, by policies and practices created to deal with situations as they arose. In practice, the absence of clearly defined legal standards has led to the informal creation of various categories of protected persons enjoying different levels of protection. The next section examines the procedures and practices which were created to deal with applications for refugee status, and the various forms of protection provided under the present arrangements. It also looks at the protection that the Refugees Act will provide to those persons enjoying some form of protection in Malta at present as well as to persons who will apply for protection under the new regime.

It must be emphasised that the treatment of asylum-seekers and refugees in Malta is regulated on a purely discretionary basis by the authorities concerned. As a result there is a dearth of clearly enunciated rules or other official information on the subject. Any assessment of governmental policy must therefore ultimately be based on an appraisal of the facts, as they are determined from publicly available information.

3. Procedures for the determination of applications for refugee status and other forms of protection

Refugees in Malta may, for the purposes of this examination, be broadly divided into two categories: those of European origin, for the most part persons coming from the countries which made up

the former Yugoslavia, and those coming from non-European countries. Due to the fact that Malta has assumed some, limited, obligations under the Convention to refugees of European origin, the procedures and practices which were developed for the recognition and protection of these persons differ from those developed to deal with refugees of non-European origin.

3.1 Applications from refugees of non-European origin

As, to date, Malta has not assumed formal responsibility for refugees of non-European origin; there are no national eligibility procedures or mechanisms in place for the determination of applications for refugee status from these persons. The Emigrants' Commission, a local NGO that has an 'operational-partner' agreement with the UNHCR, therefore receives applications from refugees of non-European origin. Personal interviews are conducted with all applicants after they have completed a standard application form. The information thus collected is then passed on to the UNHCR Branch Office in Rome for consideration and final determination of the application.

While they are waiting for the outcome of their application, asylum-seekers are allowed to remain in Malta. Those who are recognised as mandate refugees by UNHCR or are declared to be 'persons of concern to UNHCR' are allowed to remain in Malta until they are permanently resettled in a third country or until they can safely and voluntarily return to their country of origin, whichever happens first.

Over the years another category of 'semi-protected' persons has emerged. This group is made up of persons of non-European origin who remained in Malta for one reason or another, in spite of the fact that their application for refugee status was rejected by the UNHCR. Most of these persons claimed, then as now, that they could not be sent back to their country and they were therefore allowed to stay on humanitarian grounds. They remained included in the 'Refugee List'[16] and as such still receive some nominal

[16] The list of persons enjoying some form of protection in Malta, which is kept by the Emigrants' Commission, Valletta.

protection from forced return to their country of origin. Some of these persons have been in Malta for up to ten years, and, at this stage, it is hardly likely that they could be expected to return to their country of origin. It must be stated that not all asylum-seekers whose applications have been rejected remain included in the 'Refugee List', but only those who are deemed to require some sort of protection.

3.2 Applications from refugees of European origin

Although Malta has assumed responsibility for the protection of refugees of European origin, to date there are no formal procedures in place for the determination of applications for refugee status from these persons. Over the last decade, in view of the turmoil experienced by a number of European countries particularly those forming part of the former Yugoslavia; a significant number of persons of European origin sought refuge in Malta. In the circumstances, arrangements were made with the Emigrants' Commission to receive applications from these persons with a view to providing protection in deserving cases. Once they have applied, these persons are registered on the 'Refugee List' of the Emigrants' Commission, and are recommended for "temporary protection" (Calleja, 1995). The persons allowed to stay in Malta under these arrangements are never officially recognised as refugees and the protection they are granted in practice amounts to little more than permission to remain in Malta until they can safely and voluntarily return to their country.

3.3 Refugee status and other forms of protection under the Refugees Act, 2000

The Refugees Act, which provides for the setting up of a central, competent authority to hear and determine applications for refugee status, will no doubt introduce a measure of consistency and uniformity to the procedures employed for the purpose. All applications will be examined and determined by the same authorities and if accepted the applicant will be granted one of two forms of protection envisaged by the Act.

The following is a brief outline of the procedures prescribed by the Act for the determination of applications for protection. A detailed examination of these procedures is beyond the scope of this

paper, which is more concerned with an analysis of the rights and benefits conferred by the Act upon persons who qualify for some form of protection. This short description is intended simply to give a general idea of the manner in which such applications will be determined once the Refugees Act comes into force.

Section 4 of the Act provides for the appointment of a Refugee Commissioner who will receive and examine all applications for refugee status. On the basis of such examination, the Commissioner must then recommend to the Minister the acceptance or otherwise of the application (section 8(5)). Section 8(6) provides that, where the Commissioner recommends the acceptance of the application, the Minister may appeal from such recommendation or make a declaration that the applicant is a refugee.

Although the law does not expressly provide that in the case of a negative decision the applicant is entitled to appeal, section 7 of the Act which makes provision for appeals to the Refugee Appeals Board[17], indicates that an appeal may in fact be lodged by the said applicant. Section 7(2) states that "...where an appeal is entered by the applicant a copy of the appeal shall be served on the Minister and the Commissioner". Moreover, section 7(5) provides that "An appellant shall have the right to free legal aid under the same conditions applicable to Maltese nationals." This is a further indication that in fact the applicant may lodge an appeal, as it is highly unlikely that the legislator would have seen fit or necessary to make such a provision for the benefit of the Minister.

The decisions of the Refugee Appeals Board will be final and binding, and may not be challenged before any court of law. The only exception in terms of section 7(9) is the possibility of filing an

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[17] In terms of Section 5 of the Refugees Act, 2000, the Refugee Appeals Board shall consist of a chairperson and two other members appointed by the Prime Minister, of which at least one must have practised as an advocate in Malta for a period of not less than seven years. Section 7(1) states that: "The Board shall have the power to hear and determine appeals against a recommendation of the Commissioner". The decision of the Refugee Appeals Board is final and binding (section 7(9)), and if the Board finds in favour of the applicant the Minister must issue a declaration accordingly (section 7(10)).

application before the Courts alleging a violation of the applicant's human rights as protected by the Constitution of Malta and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Should the Board decide in favour of the appellant, the Minister must issue a declaration accordingly (section 7(10)).

The Act provides also for another, subsidiary, form of protection in cases where, the Commissioner is of the opinion that the asylum-seeker is in need of protection, in spite of the fact that he or she does not qualify as a refugee in terms of section 2 of the Act. This 'humanitarian protection' is defined as:

> *"special leave to remain in Malta until such time when the person concerned can return safely to his country of origin or otherwise resettle safely in a third country"*

It would seem from section 8(8) that the minister has no right to appeal from such a recommendation, and must grant the applicant 'humanitarian protection' once the Commissioner has recommended it. This section states that:

> *"When such recommendation is made the Minister shall grant such humanitarian protection".*

No mention is made of any right of the applicant, who is granted 'humanitarian protection' rather than full refugee status, to appeal from a recommendation not to recognise him as a 'fully-fledged' refugee.

It is, no doubt, positive to include the possibility of an alternative form of protection granted to a wider category of persons than those defined in section 2 of the Act as this will help to ensure that every person who needs protection is in fact granted it. However as will be seen this status confers on the holder less rights and benefits than refugee status. The difference between the two forms of protection is far from cosmetic, as it is only refugee status, which confers upon the holder any legally recognised rights in terms of the Refugees Act. In reality it could be many years before a person granted 'humanitarian protection' is able to return safely to his country of origin. The form of protection that is granted to an asylum-seeker is a matter of fundamental importance for the person concerned as it is what will ultimately determine the quality of life he will enjoy in Malta.

3.3 Status of persons enjoying some form of protection at present in terms of the Refugees Act

Section 20 of the Act, which will regulate the transition from the present to the future system of protection, provides that:

> (b) Without prejudice to the provisions of any other law, a person in Malta who before the commencement of this Act had already been recognised as a refugee by the High Commissioner[18] shall upon his request continue to be regarded as such, and the provisions of this Act, where relevant, shall apply also to him.
>
> (c) A person in Malta who before the commencement of this Act, although not recognised by the High Commissioner as a refugee, enjoys humanitarian protection granted to him by the said High Commissioner, or whose case is one classified by the Commissioner as one of concern, shall upon his request continue to be regarded as such and shall enjoy humanitarian protection in Malta as defined under this Act.

By virtue of this section therefore, persons recognised as UNHCR mandate refugees or as 'persons of concern to UNHCR' under the present arrangements will make a more or less smooth transition from one regime to the next.

Two categories of persons who are at present enjoying some form of protection seem to fall through the cracks. The first are persons of European origin, who are supposed to be enjoying the protection of the Government of Malta. These persons cannot be said to be enjoying "humanitarian protection granted .... by the High Commissioner". The second category comprises those 'semi-protected' persons referred to in Section 3.1 above. As they were not recognised as refugees or as 'persons of concern to UNHCR' at the time of application, they too cannot be said to be enjoying "humanitarian protection granted....by the High Commissioner".

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[18] The term "High Commissioner" here refers to the UNHCR not to the Refugee Commissioner. The latter is in fact referred to as the Commissioner not the High Commissioner.

As these persons have remained included on the 'Refugee List' of the Emigrants' Commission, it is clear that this agency deems all of these persons to be in need of some form of protection, and that it has continued to regard them as refugees for the purposes of its activities. These persons cannot be presumed not to need protection simply because they are not in possession of a UNHCR certificate declaring them to be refugees or 'persons of concern'. Some of these persons never had the opportunity to apply for such protection from the UNHCR as they were meant to be receiving it from the Maltese government. Moreover, all or some of these persons, especially those who have been in Malta for a considerable period of time, could well be unable to return home safely at this stage.

In order to ensure that the rights of these people are safeguarded it is indispensable that each case is viewed on its merits, in order to guarantee that each person in need of protection is identified and granted the protection required.

Having identified the categories of persons who will be granted protection in terms of the Refugees Act, we will now describe the rights that the said Act confers upon them.

4. The rights of asylum-seekers, refugees and persons granted humanitarian protection in terms of the Refugees Act

Each of these categories of persons is granted a different standard of protection by the Act. The protection provided to each particular category will be briefly outlined hereunder.

The one right that applies across the board to all three categories is that of protection from *refoulement* which is contained in section 9 of the Act. This section substantially reproduces the prohibition contained in article 33 of the Convention. It is clear that, in interpreting the scope of the protection provided by this section, Malta's obligations in terms of the international conventions to which it is a party and under customary international law must be taken into account.

There is general agreement that the principle of *non-refoulement* must be scrupulously respected at all times, not only with respect to those refugees and asylum-seekers who are already present

within state territory, but also at the frontier[19]. To exclude persons presenting themselves at the frontier from the scope of this principle would make the protection it affords asylum-seekers and refugees more dependant on luck than on merit.

4.1 The rights of asylum-seekers

Section 8(1) of the Act states in passing that persons seeking asylum in Malta have a right to apply for a declaration of refugee status. It also states that they are entitled to consult a representative of the UNHCR and to have legal assistance during all the phases of the asylum procedure.

In addition to the protection provided to asylum-seekers by section 9, which prohibits *refoulement*, section 10(1) provides that

> *"Notwithstanding the provisions of any other law to the contrary, an asylum-seeker shall not be removed from Malta before his application is finally determined in accordance with this Act, and such applicant shall be allowed to enter or remain in Malta pending a final decision of his application..."*

A margin of executive discretion will still be retained by the immigration authorities, who shall, in terms of section 8(1) of the Act, interview each asylum-seeker who arrives at the border seeking protection. The Act does not state the purpose of the prescribed interview, which places the immigration official concerned in the position of being able to effectively block the asylum-seekers' access to the status determination procedures. This is, to some extent, counter-balanced by the fact that the Act imposes on the interviewing officer an obligation to inform the asylum-seeker of his right to apply for asylum and to consult a representative of the UNHCR or a legal adviser. However it will be very difficult to

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[19] The need to protect asylum-seekers from *refoulement* 'both at the border and within the territory of a state' was affirmed by the UNHCR Programme Executive Committee (EXCOM) Conclusion number 6 (XXVIII) 1977 on *Non-refoulement* and the UNHCR EXCOM Conclusion No 22 (XXXII) 1981 on the Protection of Asylum Seekers in Situations of Large Scale Influx.

monitor whether or not all the persons seeking protection are in fact allowed access to the determination procedure.

In spite of this apparent chink in the armour, the Refugees Act constitutes a substantial improvement upon the present system. This is not so much because at present asylum-seekers are not allowed to enter or remain in Malta, on the contrary, as was previously stated, by and large asylum-seekers are allowed to remain in Malta until their application is determined even at present. However, the fact that the rights of persons seeking asylum are clearly laid down and guaranteed by law, is, in itself, a major development.

Apart from the rights outlined above, asylum-seekers are also granted the right of free access to state educational and medical services while they are waiting for the outcome of their application.

4.2 The rights of refugees

Section 11 of the Act lays down the rights to be accorded to those persons who are determined to be refugees in terms of its provisions. It states that refugees will be entitled to remain in Malta. They will also be granted personal documents, including a residence permit. Moreover refugees will be granted not only freedom of internal movement, which is enjoyed by all persons granted some form of protection under the present system, but also a Convention Travel Document, which will allow them to leave and return to Malta without the need of a visa. In addition, refugees, like asylum-seekers, will be entitled to free access to state educational and medical services.

The Refugees Act falls short of granting even recognised refugees the right to family re-unification. Section 11(2) of the Refugees Act entitles "dependent members of the family of a person declared to be a refugee, if they are in Malta at the time of the declaration or if they join him in Malta" to the same rights as the refugee. However it does not grant them the right to join him in Malta.

In effect, most of the benefits outlined above are already granted to refugees in Malta, albeit on a purely discretionary basis. The fact that now refugees are entitled to them by right is in itself a step forward. By virtue of these provisions, refugees are no longer simply the objects of Malta's charity but the subjects of legally guaranteed rights. The only real innovations are the granting of

a residence permit and a Convention Travel Document to recognised refugees. The latter is doubtlessly the measure that will be most warmly welcomed by the refugees who are in Malta at present. To date these persons have been virtually prisoners on the island, unable to leave Malta legally, except to travel to a country of resettlement.

4.3 The rights of persons granted humanitarian protection

Section 2 of the Act defines 'humanitarian protection' as

> *"special leave to remain in Malta until such time when the person concerned can safely return to his country of origin or otherwise resettle safely in a third country"*

Apart from this definition the Act makes absolutely no mention of the rights or benefits which this status will confer on its holders. It therefore seems that such persons will receive little more than the permission to remain in Malta temporarily, as the Act does not confer upon them even the basic rights granted to the other categories of protected persons. They are not even granted the right to freedom of internal movement, i.e. release from custody if they are being detained only for a breach of immigration regulations, once they are granted humanitarian protection.

Moreover, section 8(8) of the Act provides that humanitarian protection "shall cease if the Minister is satisfied, after consulting the Commissioner, that such protection is no longer necessary". The person concerned has no right to appeal from such a decision. A refugee, by comparison, is entitled, in terms of sections 15, 16 and 17 of the Act, to appeal from a decision to revoke or cancel his status, or to expel him from Malta.

It seems likely that persons enjoying humanitarian protection in terms of the Refugees Act will be in exactly the same position as all refugees and other protected persons in Malta are today – allowed to remain but effectively denied any legal protection of their rights.

It must be stated that, although the persons granted humanitarian status are by far the least protected, the rights the Act confers upon all the categories of protected persons are extremely basic. More worryingly, the Act fails to address a number of issues, which are of fundamental importance for refugees,

asylum-seekers and other persons granted protection in Malta. The next section discusses three of these issues.

5. Protection issues left unresolved by the Refugees Act

The matters discussed in this section were selected not because they are the only issues the Act fails to resolve, but because they are three of the most serious problems faced by refugees and asylum-seekers in Malta today. All of them, to a greater or lesser extent, constitute a denial of the core rights of refugees as contained in the 1951 Convention. The issues discussed are the following: the detention of asylum-seekers, the right to work and the provision of some sort of financial assistance for all categories of protected persons.

5.1 Detention of asylum-seekers

In terms of the 1951 Convention, Malta is bound not to restrict the internal freedom of movement of refugees within its territory more than is strictly necessary. Article 26 of the Convention clearly states that:

> *"Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."*

With regard to refugees 'unlawfully' present in state territory, which also includes those asylum-seekers whose status has not yet been regularised (Hathaway and Dent, 1995: 18-19), article 31 provides in paragraph 2 that:

> *"Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or until they obtain admission into another country".*

In terms of article 31(1) the term 'unlawfully' refers to a person present in state territory without the necessary authorisation. Although article 31(2) does not specify which restrictions would

qualify as necessary, when read in conjunction with article 31(1) it emerges clearly that illegal entry into state territory cannot in itself justify the detention of an asylum-seeker (Hathaway and Dent, 1995: 19). In fact article 31(1) states that:

> *"Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from territory where their life or freedom was threatened in terms of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

The Executive Committee of the UNHCR, in Conclusion No. 44 (XXXVII) – 1986, which deals with detention of refugees and asylum-seekers in some depth, states unequivocally that, in view of the hardship it involves, detention should normally avoided. It stresses that the fact that an asylum-seeker is in possession of false or insufficient documentation should not in itself lead to automatic detention, unless there is a clear intention to mislead the authorities.

5.1.1 Present government policy on the detention of asylum-seekers

Maltese law says nothing about the reasons for which asylum-seekers may be detained. As a rule, asylum-seekers who enter Malta legally are not detained. It is only those who are refused admission into Malta or who enter or are otherwise present in Malta illegally who are, at times, detained.

By virtue of the Immigration Act, which deals with matters relating to immigration into Malta, persons who are considered 'inadmissible' and refused leave to land in Malta, may be detained until they can be removed from Malta (section 10). While in custody such persons will be deemed not to have landed in Malta (section 10(3)). Persons, who are found guilty by the competent Court of entering or staying in Malta illegally, shall be issued with a removal order in terms of section 14 of the Immigration Act. Until the said removal order can be executed the person concerned shall be kept in custody. As the Immigration Act makes no special provision for differential treatment to be provided to asylum-seekers who are in this situation, it would therefore seem that their position in terms of Maltese Law is identical to that of any other immigrant in the

same situation. Moreover, it would appear that asylum-seekers are not protected from the consequences of illegal entry or stay in Malta.

In practice, however, asylum-seekers, who are refused admission into Malta or who enter or are present in Malta illegally, do not receive the same treatment as other irregular migrants. As a rule, asylum-seekers are allowed to remain in Malta until their claim is determined, as is required in order to ensure that they are protected from *refoulement*. Moreover, while asylum-seekers refused entry into Malta are as a rule detained, the provisions of the Immigration Act regarding the consequences of irregular entry or stay, are not applied to all asylum-seekers in these circumstances, i.e. asylum-seekers who enter or are present in Malta illegally are not always detained.

In the ultimate analysis, it would seem that it is not the illegality of entry or stay in Malta *per se* which determines whether or not an asylum-seeker will be detained, but rather the timeliness of that person's application for protection. If an application is lodged before the illegality of the person's entry or stay in Malta is discovered by the authorities concerned then, as a general rule, the asylum-seeker is not detained. An asylum-seeker who files an application after he has been apprehended by the authorities will usually[20] be detained, in special facilities earmarked for the detention of irregular migrants pending the final determination of his application.

Where the detained asylum-seeker's application for protection is rejected he is removed from Malta. Persons who are recognised as refugees or 'persons of concern to UNHCR' are released from detention. In cases where a removal order has been issued by the competent authorities, the person concerned must be granted a presidential pardon cancelling or revoking the said removal order, before he can be released from detention.

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[20] There have been a number of exceptions, most notably in cases involving minor children. This is not to say that minor children and their primary care-givers or other accompanying adults are never detained, but rather that there have been occasions when they were not.

5.1.2 Detention of asylum-seekers under the Refugees Act

The Refugees Act does little or nothing to clarify the Maltese government's somewhat inconsistent approach to the detention of asylum-seekers who enter or are present in Malta illegally. The Act does not include a provision echoing the prohibition contained in article 31 of the Convention. Moreover, upon ratification Malta made a reservation to its obligations under article 31, stating that it would apply to Malta "compatibly with its own special problems, its peculiar position and characteristics". As a result the actual extent of Malta's obligations under the Convention in this regard is somewhat unclear.

That an asylum-seeker may in fact be detained in certain circumstances is indicated by section 10(2)(b) of the Refugees Act, which mentions, in passing, that an asylum-seeker "shall, unless he is in custody, reside and remain in the places which may be indicated by the Minister". The particular circumstances, which would justify such detention, are however not clearly stated. It is however clear, from references to persons "in custody in virtue only of a deportation or removal order" (sections 7(3) and 11(1)), that an asylum-seeker may be detained for breaching the provisions of the Immigration Act. Under Maltese law such orders are issued by the competent authorities, in terms of the Immigration Act (sections 14, 15 and 21), against aliens who are in Malta without leave from the Principal Immigration Officer or who are declared to be prohibited immigrants in terms of section 5 of the said Act.

It would therefore seem, although it is still too early to state this with any certainty, that the Refugees Act will not make any major changes to the Maltese government's present position on the detention of asylum-seekers. The Act will give certain practices the force of law, thus strengthening the protection provided. An asylum-seeker will have the right to "enter or remain in Malta pending a final decision of his application" (section 10(1)) and "shall not be removed from Malta before his application is finally determined". The operation of the provisions of the Immigration Act will be suspended until the applicant's claim is determined in terms of the Refugees Act. However, it must be said that, if anything, the Act will impose increased restrictions upon the movements of asylum-seekers in general, even those who are not detained, requiring them in section 10(1)(b) to:

"(b)....reside and remain in the places which may be indicated by the Minister."

They will also be required to report to the immigration authorities at specified intervals. A breach of these provisions is considered an offence punishable by up to six months imprisonment.

It is clear that every sovereign state has the right to control irregular migration through its borders. Detention, it is often argued, is a means of control as it facilitates the removal of asylum-seekers whose application has been rejected and who have no claim to remain in the territory of the host-state. Moreover, detention is perceived as a powerful deterrent, and therefore an important tool in the fight against irregular migration.

While it must be admitted that there is an element of truth in the former assertion, it must be emphatically stated that detention is by no means the only way that a state can control the movements of asylum-seekers within its territory. There are other, far cheaper and equally effective, ways of doing so[21]. Moreover, the contention that detention is an effective deterrent completely ignores the fact that refugees and asylum-seekers are involuntary migrants, forced to flee not out of choice but out of necessity in search of protection.

Article 31 of the 1951 Convention acknowledges this reality. It is a fact that the luxury of a passport issued promptly upon request is little more than a dream for many persons living under oppressive and undemocratic regimes, or in situations where the structures of government have crumbled to the extent that they are no longer able to discharge their normal administrative functions. To make the protection of a person fleeing persecution conditional on his being able to obtain a valid passport or a visa to enter another a country would reduce the value of the 1951 Convention for such persons to less than that of the paper it is printed on. It is also submitted that to punish persons for a breach of immigration regulations which may have been committed out of necessity, in an extreme manner usually reserved for persons who have committed serious criminal offences, is, at best, completely disproportionate.

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[21] For a discussion of alternative measures see ECRE paper on "Alternatives to Detention. Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum Seekers (September 1997).

More so when the period of detention in some cases can stretch on for months.

The detention of asylum-seekers should be considered an extreme measure, resorted to only where it is absolutely necessary. Moreover, the conditions under which detention is considered justifiable or necessary should be clearly stipulated. Whether an asylum-seeker is made to spend months in what is little more than a prison should not be left to administrative discretion or to luck, as is the case at present.

5.2 The right to work

Article 17 (1) of the Convention requires the Contracting States to:-

> *"...accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment."*

Moreover paragraph 2 of the said article states that restrictive measures imposed on aliens for the purpose of the protection of the national labour market shall not be applied to a refugee who has completed three years residence in the country, or who has a spouse or children possessing the nationality of the country. The said article requires also that Contracting States give sympathetic consideration to assimilating the rights of all refugees with regard to wage earning employment to those of nationals.

Article 18 deals with self-employment, and provides that with regard to the right of refugees lawfully within their territory to engage in commercial business, the exercise of a trade or profession, etc, states should grant treatment as favourable as possible, and in any event, not less favourable than that granted to aliens generally in the same circumstances.

5.2.1 Present government policy on the employment of refugees

Malta's obligations under articles 17 and 18 of the1951 Convention and 1967 Protocol are limited by a reservation which states that these articles "shall apply to Malta compatibly with its own special problems, its peculiar position and characteristics".

Although the extent of this reservation is not clear from the

manner in which it is phrased, in practice until very recently it had been translated into a policy which made it virtually impossible for refugees and asylum-seekers to work legally for any length of time and discriminated between refugees and other foreign nationals.

The provisions of the Immigration Act regulate the employment of foreigners present in Malta. Sections 11 of the said Act requires foreigners to be in possession of a work permit issued by the Office of the Prime Minister in order to be able to engage in any form of wage earning employment. Such work permits are issued on a discretionary basis at the request of a prospective employer, on condition that a Maltese citizen cannot fill the post, which is to be allocated to the foreign national. These work permits are issued for one year and are renewable.

As opposed to other categories of migrants, until relatively recently refugees and asylum-seekers were only granted a three-month work permit, which was not renewable. On the 19th January 1999 the Minister for Home Affairs Dr Tonio Borg announced a change in government policy regarding the granting of work permits to refugees, bringing refugees on a par with other non-nationals.

From that date government policy on this matter has undergone a further transformation, and today recognised refugees, i.e. those who are in possession of a UNHCR certificate, are granted a work permit if an application is filed on their behalf. This is the case even if the post could technically speaking be filled by a Maltese citizen. Initially work permits granted refugees, like those granted to other aliens, authorised the holder to take up a specific post or job. More recently[22] refugees are being authorised to undertake employment in Malta. They are simply bound to inform the relevant government department if they change job before the expiration of the permit, one year after it is issued.

Asylum-seekers do not benefit from this policy. Also excluded are persons enjoying temporary protection who are not in possession of a certificate issued by UNHCR, i.e. refugees of European origin. Paradoxically, it would seem that the very persons for whom Malta assumed responsibility are the ones who have the worst deal in the circumstances.

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[22] This latest development was introduced in March 2001.

In spite of these restrictions many asylum seekers and persons enjoying some form of temporary protection do in fact hold some sort of job. With the exception of recognised refugees who receive a small allowance from the UNHCR for a period of two years, refugees, asylum-seekers and persons enjoying temporary protection are not entitled to any form of assistance, financial or otherwise, from the authorities. In the circumstances these persons are left with little alternative but to resort to working illegally. The only other option available to them was to have to depend on charity in order to be able to survive. In view of the fact that many of these persons cannot work legally in Malta, they can claim none of the protection provided by law which every worker takes for granted, and they are therefore extremely vulnerable to exploitation. The jobs they manage to obtain are usually characterised by difficult working conditions, with salaries far below the average and at times below the legal limit. Even today, although recognised refugees are granted a work permit, they hardly ever progress from the bottom rung of the employment ladder to more skilled jobs, and are usually forced to accept jobs that are far below their qualifications.

The change in government policy regulating the employment of refugees is a very welcome development. Refugees are a special category of migrants and they should therefore be treated more favourably than other migrants where access to gainful employment is concerned.

5.2.2 The Refugees Act and the employment of refugees

It was hoped that the Refugees Act would grant refugees and other protected persons the right to work, whether as an employed or a self-employed person. However, not only does the Act not grant a right to work, it fails to even give the present government policy the force of law. Section 19(1)(f) of the Act simply authorises the Minister responsible for immigration to make regulations "regulating, with the concurrence of the Minister responsible for labour, the granting of work permits to recognised refugees", thus leaving matter firmly within the realm of policy and governmental discretion.

While there is no doubt that the present government policy is a vast improvement on the previous arrangements, it falls short of granting refugees a right to work. Governmental policies may be changed at any time at the discretion of the authorities concerned.

On the other hand, amending legislation, as opposed to policy, implies far greater levels of public scrutiny and parliamentary control.

This change in policy has not improved the lot of asylum-seekers and persons enjoying temporary protection, who are still forced to work illegally in order to be able to feed themselves and their families, in the absence of other means of subsistence. The wording of section 19(1)(f) with its emphasis on "recognised refugees" does not hold out much hope that the present policy will be extended to a wider category of persons in the near future. If anything, the Act has actually made the situation of asylum-seekers even more difficult. Although it was always a breach of the provisions of the Immigration Act for an asylum-seeker to work without obtaining the necessary permit, in practice asylum-seekers are not usually prosecuted for working illegally. The Refugees Act, however, states specifically in section 10(2) that asylum-seekers who "seek to enter employment or carry on business without the consent of the Minister", "shall be guilty of an offence and shall be liable on conviction to imprisonment for a term of not more than six months".

It is interesting to note that many state parties to the 1951 Convention, particularly industrialised countries, grant the employment rights laid down in the Convention to recognised refugees, with many states actually granting them employment rights on a par with nationals. With regard to asylum-seekers, the practice is less uniform. Some states, such as Denmark and France, completely deny them the right to work, while others such as Canada, Belgium, New Zealand and the Netherlands grant them the right to work, subject to certain limitations in some cases (Hathaway and Dent, 1995: 26-27). In most cases the decision to allow asylum-seekers to work is based more on financial considerations than the desire to fulfil legal obligations on the part of the states concerned. It has been found to be far more profitable to allow asylum-seekers to work, than to have them depend on the state to provide them the means for subsistence, which would be the only alternative if they were not allowed to work to maintain themselves other than to leave them to starve (Hathaway and Dent: 25-26).

5.3 Public Relief and Assistance

Article 23 of the Convention obliges contracting states to grant refugees lawfully staying in their territory the same treatment that

they accord to their nationals with respect to public relief and assistance.

5.3.1 Present government policy regarding the granting of public assistance to recognised refugees

At present the only assistance which refugees, asylum-seekers and persons enjoying temporary protection receive from the government is access to free state medical and educational services. They do not receive any form of financial assistance from the state and, in terms of the law as it stands, they are not entitled to any. UNHCR does provide some financial assistance to the persons for whom it is responsible, however this assistance is granted for a period of two years, and it decreases progressively. The office of the UNHCR also provides parents with an allowance for each minor child. Most other assistance refugees and protected persons receive is provided by the Emigrants' Commission. This assistance includes housing and financial and material assistance, funded by church and private donations.

Most refugees require assistance, especially initially, as it is usually some time before they are able to secure employment. Adapting to a new society often implies having to learn a new language or acquire new skills, all of which take time. Moreover, as many of the jobs available to refugees and asylum-seekers are temporary or seasonal, they are often unemployed for long periods. It is therefore very difficult for these people to maintain themselves, and few of them ever achieve any sort of financial independence.

5.3.2 The Refugees Act and the provision of public assistance

The Refugees Act makes no provision for any sort of financial assistance to refugees, asylum-seekers and persons enjoying humanitarian protection. It simply authorises the Minister responsible for immigration to make regulations "extending... the provisions of the Social Security Act to persons falling under this Act" (section 19(d)). In view of the fact that most of the persons "falling under this Act" are prohibited from working it is hard to imagine how these persons are expected to survive.

When signing the Convention Malta entered a reservation to article 23, declaring that it would not apply to Malta. It is however indeed difficult to justify the stance taken by the Maltese government in the circumstances. A grant of refugee status or

humanitarian protection is an acknowledgement that the person concerned is in need of protection and should be allowed to remain in Malta. It stands to reason that if a person is to be allowed to remain in Malta, then he should also be given the means not only to survive, but also to live with dignity for the duration of his stay. It is unacceptable that people are forced to depend on charity in order to be able eat.

6. Conclusion

The major achievement of the Refugees Act, is without doubt the fact that the recognition and protection of refugees will no longer be regulated solely on the basis of governmental discretion. Once the Act comes into force, these persons become subjects of the law, vested with legally protected rights.

On a practical level, the Act will not bring any substantial improvement to the situation of refugees and other protected persons in Malta, as they already enjoy most of the benefits granted by the Act. The only difference will be that once the Act comes into force they become legal entitlements not simply benefits. On this level, the introduction of the Convention Travel Document for recognised refugees, is without doubt the most important improvement. It must be stated however that the rights contained in the Act are extremely basic, and fall below the basic minimum recommended by the 1951 Convention.

The Act should significantly increase the protection granted to asylum-seekers. Although by and large most of the rights contained in the Act were already provided on a discretionary basis, the fact that they have now been given the force of law strengthens the protection provided to this vulnerable category of persons by limiting the discretion of the authorities concerned.

The greatest shortcoming of the law is perhaps that it fails to tackle a number of issues which, for refugees and other protected persons are of fundamental importance and which have a huge impact on the quality of life they enjoy. The most important of these issues are without doubt those relating to internal freedom of movement of asylum-seekers and to the right to work or to be assisted in order to be able to live with dignity. The present government policy on these matters causes the persons concerned much unnecessary hardship and is an affront to the dignity of these

persons. It was therefore hoped that these matters would be resolved by the Refugees Act, in the manner recommended by the 1951 Convention.

In spite of its shortcomings, however, it must be said that the Act is in itself an important development, as it constitutes a basic standard of protection that the government must provide, and for which it can be held accountable. However it must be seen as the *alpha* rather than the *omega*, the first step towards the creation of a system of adequate legal protection for this special class of migrants.

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LE ROLE DE LA COUR DE JUSTICE DANS LA DÉFINITION DE LA CONSTITUTION EUROPÉENNE.[1]

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[2] Table of Contents:

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1 Prémisse. Brèves considérations sur les caractères généraux de l'Union européenne

L'évolution de l'Union européenne montre des caractéristiques particulières, difficilement comparables aux autres expériences connues chez les systèmes juridiques modernes et contemporaines, dans l'indistinct espace juridique qui sépare l'organisation du droit international et les typologies nationales, fédéral ou demi-fédéral.

On ne peut pas approfondir ici, du point de vue théorique formel, cette réalité atypique. Sur sa définition et son évolution dans le temps influent différents ordres des facteurs, qui se succèdent et pèsent d'une façon discontinue: et cela apparaît l'une des causes les plus importantes des formes de l'Union, et de leurs attitudes plus spéciales.

Les origines remontent au moment où, à la fin de la seconde guerre mondiale, se fixent les nouveaux équilibres internationaux, et une partie de l'Europe, consistante mais pas capable d'en épuiser représentation et intérêts, reflète l'opposition entre aire atlantique et aire communiste, à travers les structures parallèles des premières Communautés occidentales et celles rassemblées autour du Pacte de Varsovie.

Ensuite, les sorts de la Communauté européenne, dans laquelle se fondent les organisations originaires de l'Euratom, de la Ceca, et autres, suivent le cours du bipolarisme Est-Ouest, jusqu'à sa dissolution, qui a donné une nouvelle impulsion à l'évolution de l'Union et en a favorisé l'agrandissement d'influence et participation, en produisant en même temps problèmes et difficultés nouveaux. A cet égard, ont la même importance les croissants phénomènes de globalisation de l'économie et de la finance.

Ce que nous avons rappelé de l'évolution de l'Union et des ses primitifs rudiments sert à souligner une première donnée, essentielle pour la question qui nous occupe. L'Union a été, et est encore, après cinquante ans d'histoire complexe, une réalité fortement dépendante des équilibres internationaux, et ça touche aussi la nature de ses sources. Le système de l'Union se présente formellement fondé sur des pactes, mais en même temps tend à se modeler sur ce type d'entente permanente entre Etats qui, comme il est déjà arrivé en autres temps et autres situations, exige la cession de parties de souveraineté de la part des Etats membres en sa faveur, pour conférer à l'action commune, qui est action de l'Union, la capacité de poursuivre les buts convenus.

Le deuxième des deux caractères entre en conflit avec le premier: il s'ensuit une antinomie destinée, comme on verra, à influer sur le rôle de la Cour de justice, que nous traitons ici en particulier, sur le système même de l'Union, et sur son se poser et s'imposer.

2. La question de la Constitution européenne

Le fait qu'on parle de plus en plus de Constitution européenne, et non seulement au niveau de la littérature commune, mais aussi chez celle des spécialistes, révèle la contradiction, que nous venons de souligner, entre l'origine et le fondement, formellement internationalistes, et la base institutionnelle de l'Union, produite par une renonciation progressive à des parties de souveraineté de la part des Etats membres, qui confluent à bâtir une ensemble de pouvoirs souverains de l'Union même.

Si l'Union serait une normale institution entre états, douée de personnalité juridique de droit international, crée et régie par des traités entre les états qui la constituent ou qui y adhèrent après, il n'y aurait même pas une trace de « Constitution » de l'Union. Il s'agit d'une réalité de nature différente, qui participe des éléments des institutions entre états, et des autres éléments qui ne peuvent pas y être compris, parce que ils découlent de la possession de parties de souveraineté (une expression imprécise, comme il est superflu de souligner, à laquelle nous faisons recours pour facilité de compréhension, et pour créer une référence, même si embryonnaire, à la prétention au caractère originaire avancée à propos du système de l'Union).

Un cas très récent, symptôme de la nature atypique de l'Union, dans le sens que nous avons souligné, est représenté par la question de la soi-disant charte des droits, énoncée à la Conférence de Nice le huit décembre.

A propos de l'interprétation du document de Nice, s'ouvre un débat entre ceux qui soutiennent qu'il n'a aucune signifiance du point de vue juridique, parce que il n'est pas régit d'un pacte conclu entre les états membres, ni par des manifestations de volonté capables quand même de les obliger, et une opinion contraire, qui tend à en affirmer l'importance.

On ne peut pas douter que l'acte de Nice soit privé du caractère de pacte («il n'entre pas dans les Traités»). Mais si on pense à la question de la sauvegarde des droits fondamentaux par la juridiction

de la Cour de justice, et au thème de la fixation des *standards*, que nous allons traiter, sur lesquels on discute avec animation dans la littérature scientifique et dans la jurisprudence même de la Cour, il est facile prévoir que l'importance de l'Acte se détachera très tôt, et dans l'Acte serons identifiés la volonté des états membres de l'Union à s'y obliger et l'indicateur des *standards* utilisables du point de vue formel par la jurisprudence européenne en matière de droits fondamentaux de l'individu.

3. Le rapport entre système de l'Union et systèmes des Etats membres: en particulier, le cas italien

Au sujet des considérations esquissées à propos de la nature atypique de l'Union, c'est très important le thème, amplement débattu, du rapport entre système de l'Union et systèmes des états membres: les réflexions qui suivent se réfèrent en particulier au cas italien.

Tout d'abord, s'impose la mise en train de la séparation, sur laquelle s'atteste la Cour constitutionnelle. A partir de cette qualification, les deux systèmes procèdent séparément, et l'incidence des règles européennes sur le système italien est analysée et définie selon les principes qui gèrent les rapports entre systèmes différents, ce qui détermine les pouvoirs de vérification de la Cour constitutionnelle dans la juridiction de légitimité.

On rappèle le principe, contenu dans l'article 11 de la Constitution, qui permet, en présence de conditions précises, une renonciation partielle de souveraineté. Ce rappel, d'autre part, suscite des sérieux doutes, parce que l'Union ne présente pas le caractère que la norme constitutionnelle prescrit pour la cession légitime de la souveraineté.

D'après la soutenue séparation entre système de l'Union et système intérieur, et la conséquente qualification des sources normatives de l'Union, la Cour constitutionnelle fixe les critères pour déterminer la position des sources de l'Union dans le système constitutionnel des sources, s'accordant au principe du *pacta sunt servanda* (qu'on peut croire constitutionalisé en force de l'article 10 de la Constitution, étant un principe général compris dans le premier alinéa de l'article, selon lequel le système italien se conforme aux dispositions du droit international généralement reconnues, entre lesquelles se trouve certainement le *pacta sunt servanda*).

Sur cette base, les sources de l'Union prévalent sur toutes les sources ordinaires du droit intérieur, parce que le système doit se conformer à l'obligation de l'Etat de s'acquitter des traités et de ce qu'en découle. Ces constat s'étend aussi aux dispositions constitutionnelles, sauf, selon la Cour constitutionnelle, une distinction qu'en exclurait certaines.

Une connue jurisprudence de la Cour constitutionnelle nie qu'on puisse déroger aux normes de la Constitution qui contiennent les « principes de régime », qui forment le code génétique du régime constitutionnel en vigueur. Le jugement de comparaison doit, selon ces thèses, préserver l'intangibilité des principes de régime, même par rapport aux sources de l'Union.

4. Les principes de régime et les sources de l'Union

La notion de principe de régime, autrement dit norme « sur-constitutionnelle », utilisée par la Cour constitutionnelle dans la jurisprudence sur les sources de l'Union, se trouve au cœur d'un débat très complexe, et n'arrive pas à gagner des résultats indiscutablement partagés: à tel point que quelqu'un montre de croire à la nature de l'inviolabilité absolue de l'espèce, tandis qu'il est de toute évidence qu'il s'agit de facteurs intégrateurs de la continuité du régime constitutionnel, du moment qu'il n'y a aucune norme juridique (en tant que juridique) non modifiable.

La question, qui ne se pose pas seulement pour les rapports entre système de l'Union et système intérieur, mais aussi du moins pour un autre problème, relatif aux normes du Concordat entre l'Etat et le Saint-Siège, touche dans ses implications immédiates le contenu et les limites de la puissance de révision constitutionnelle.

Une fois qu'on admet la notion de principe de régime, en découle nécessairement une limite générale à la révision, qui ne peut être surmontée si non en coupant la continuité du régime constitutionnel: si le principe est, en ces termes, intangible, il l'est intrinsèquement, et cela touche le *pacta sunt servanda* et la fonction de révision.

Deux éclaircissement s'imposent.

D'un côté, le principe de régime ne peut être repéré avec certitude en vertu de dispositions écrites dans la Constitution, qui le déclare comme tel. L'autodétermination du principe de régime est douée, tout au plus, d'une valeur symptomatique très limitée: sans quoi, et contre toute la théorisation soutenue par les partisans de la

subsistance de l'espèce, la Constitution italienne aurait un seul principe de régime, celui de la forme républicaine de l'Etat, ce qui serait une conclusion tout à fait inacceptable.

De l'autre côté, la détermination substantiel du principe de régime ne peut être confiée à l'organe titulaire de la fonction de révision, parce que le principe constitue la limite de la révision. De ce constat dérive que la puissance de vérifier le principe de régime doit appartenir à la Cour constitutionnelle et à personne d'autre, opinion qu'en effet la déjà citée jurisprudence de la Cour constitutionnelle sur ce point laisse clairement transparaître.

Les conséquences sont assez remarquables. L'attribution de cette puissance à la Cour constitutionnelle touche en profondeur les caractères généraux du système, spécialement du point de vue de la position du principe de représentation, sur lequel se fonde essentiellement le caractère démocratique du régime constitutionnel républicain.

La détermination des principes de régime procède à partir de l'interprétation de reconstruction des fondements du système constitutionnel. Il s'agit d'une opération techniquement difficile, comme démontre le fait que la doctrine parvient, dans leur vérification, à des résultats du tout univoques, et en large mesure diversifiés.

Il ne faut pas négliger une donnée qui est préliminaire: la définition du principe de régime, telle que est formulée, oscille entre deux dérives, et dans chacune d'eux se cache le danger de la dissolution de son contenu positif. D'un côté, les principes ont des racines communes avec celles propres de visions idéalistes, jusnaturalistes, qui n'ont rien à partager avec le système du 1948; de l'autre côté, dans leur approfondissement on effleure la pétition de principe, parce qu'ils sont considérés en même temps éléments du code génétique du régime et produit de l'abstraction des ses caractéristiques, qui par contre changent dans la course du temps.

5. Les principes de régime entre formulation définitoire et évolution du système juridique

Justement à propos des rapports entre système de l'Union et système intérieur, le droit vivant pourvoit à démentir la théorie de la séparation, et la conséquente théorisation des limites que les principes de régime opposeraient d'une manière insurmontable aux

sources de l'Union. Sur ce point, la position et les orientations de la Cour européenne gagnent une importance considérable.

La thèse de la séparation est mise en crise dans ses mêmes arguments, qui baissent du point de vue théorique et dans la projection pratique, contredite par l'évolution du droit vivant: la doctrine ressent de cette réalité, et s'oriente vers la direction contraire. La logique initiale se renverse: les principes de régime, au lieu de représenter une limite opposée à la puissance dérogatoire des sources de l'Union, finissent pour dériver (aussi) de celles mêmes sources qui auraient du « arrêter ».

Dans le développement le plus récent de l'évolution du système de l'Union se détachent des données non équivoques en ce sens. Il sera suffisant de prendre en considération l'innovation représentée par le principe de subsidiarité (Maastricht et après Amsterdam), considéré du point de vue des niveaux d'attribution des compétences et de celui concernant le discriminant entre public et privé dans la dévolution des activités d'intérêt général.

Il n'y a aucun doute que le principe de subsidiarité, au-delà des incertitudes interprétatives encore présents, touche le principe posé par l'article 5 de la Constitution, qui prescrit autonomie et décentralisation dans l'organisation des pouvoirs publiques, et ceux qui règlent le rapport public-privé, relatifs aux articles 35-47 pour les rapports économiques et aux articles 29-34 pour les rapports éthique-sociaux. Ils ne sont pas donc, l'un et les autres, des principes de régimes?

On doit croire qu'il s'agit seulement d'interrogations rhétoriques.

6. Le système des sources entre les deux Cours

Nous parvenons ainsi au thème du système des sources. Les sources de l'Union occupent une place d'importance croissante dans le système constitutionnel, soit parce que le matières pour lesquelles ils interviennent augmentent de plus en plus, et d'autres y renvoient implicitement pour l'inévitable interférence dans la régulation des rapports entre sujets et des fonctions publiques, soit en raison du différent traitement que la jurisprudence constitutionnelle même se trouve à réserver à ces source, par rapport aux orientations initialement manifestées.

L'auto-application des Règlements de l'Union est hors de discussion, et implique l'immédiate décision des situations

subjectives qui en découlent. La jurisprudence de la Cour constitutionnelle se montre aussi de plus en plus sensible à renforcer l'immédiate efficacité des directives, bien que partielle, encore avant la disposition d'exécution, jusqu'au point qu'elles sont utilisées pour réduire le pouvoir discrétionnaire du législateur *medio tempore*.

La Cour européenne intervient sur ce point, parfois en désaccord avec les orientations de principe de la Cour constitutionnelle. La Cour européenne revendique la puissance d'appréciation définitive du contenu des normes des traités, et par conséquent affirme la prééminence de son interprétation aussi par rapport à la concordance, sur ce point, des sources de l'Union, qui, selon une récente interprétation, sont sources du système intérieur.

Les normes des traités ne peuvent pas être considérées séparées des principes du système constitutionnel, ni, pourtant, insignifiant par rapport aux buts de la détermination des principes de régime: on parvient à cette conclusion, à la fin du raisonnement développé. Mais y prend aussi part le rôle que la Cour européenne revendique et exerce, avec un succès que les désaccords toujours ouverts (non également radicaux, comme il est bien démontré par les orientations du *Bundesverfassungsgricht*) n'entament pas.

7. La Cour européenne et la sauvegarde des droits fondamentaux

Un ultérieur aspect de l'influence de la Cour de justice sur la formation du système de l'Union européenne, pas moins significatif de celui qui compète à la revendication de l'exclusive dans l'interprétation des normes des Traités, est représenté par les pouvoirs obtenus par rapport à la sauvegarde des droits fondamentaux de l'individu.

La jurisprudence de la Cour dans cette matière est l'expression tendancielle mais nette de la prétention à la juridiction complète, fondée sur les sources de l'Union, que la Cour identifie avec une interprétation extensive, si non créatrice. Comme nous avons souligné, il est raisonnable prévoir que le caractère juridique de la Charte de Nice soit destiné à résulter moins incertain et évanescent grâce à l'action jurisprudentielle que la Cour entreprendra sur elle.

Il est remarquable noter comme dans l'exercice de cette compétence par la Cour de justice se produit un raccord direct entre

citoyen et autorité de l'Union, une espèce assez rare dans le système normatif européen. Au cœur de tel raccord, se glissent des formes de limitation de la souveraineté des Etats membres de notable portée. Par rapport au cas italien, se pose en évidence la réalité désormais consolidée des différends sur la violation du juste procès: les parties privées obtiennent des condamnations toujours plus fréquentes de l'Italie, Etat membre de l'Union reconnu coupable de ces violations et frappé par les sanctions conséquentes.

Comme bien sent l'opinion publique italienne, et non seulement les savants et les spécialistes, un champs s'est ouvert dans lequel la compression de la souveraineté des Etats membres est manifeste, et il s'agit d'un champs où se trouve une traditionnelle et jalouse exclusivité de l'exercice des pouvoirs souverains des Etats. L'effet est expansif, parce que révèle, à travers la statistique des jugements de condamnation prononcés par la Cour, que l'inclination à transgresser les principes du juste procès est très prononcée en Italie, avec un conséquent discrédit qui en dérive dans les relations intérieures à l'Europe.

Pour revenir au thème de la sauvegarde des droits fondamentaux, l'importance institutionnelle de la jurisprudence de la Cour européenne augmente par rapport à la fixation des *standards* dans la vérification et définition du contenu de ces droits.

Il s'agit d'un aspect central du thème, avec des implications générales sur le droit de l'Union, et sur les éléments constitutionnels des Etats membres. Abstraitement, on peut poser le problème dans des différentes façons, qui vont de la revendication de *standards* rapportés aux formulations les plus avancées entre celles adoptées par le droit positif des Etats membres, jusqu'à la prétention de chaque Etat à la reconnaissance des propres *standards*.

La Cour adopte un critère intermédiaire, qu'apparemment s'inspire au choix de la modération: le *standard* est reconstruit selon une évaluation qui considère les différents régimes constitutionnels, en déduisant la version la plus convergente et équilibrée.

De cette façon, la Cour exerce avec une ampleur remarquable ses pouvoirs de réglementation de sa propre jurisprudence pour la sauvegarde des droits fondamentaux, parce qu'elle se réserve la détermination des *standards*, ce qui constitue une activité créatrice de normes. En force de cette réserve, la Cour participe à la formation d'un véritable espace juridique européen dans le délicat domaine des droits fondamentaux de l'individu.

8. La Constitution européenne: l'apparent et le substantiel d'une notion

Sur la base des prémisses sommaires que nous avons tracées, on peut maintenant aborder d'une façon plus précise l'objet de cette réflexion, le rôle de la Cour de justice dans la définition de la Constitution européenne.

Le thème suppose l'existence d'une Constitution européenne, bien que *in fieri*. Mais tout le monde sait que cette affirmation n'est pas pacifiquement admise: les doutes sont consistants et autorisés, et leurs racines sont plus solides que certains enthousiasmes. Et cependant, si les arguments qui soutiennent l'existence d'une Constitution ne sont pas définitifs, toutefois on ne peut pas accepter le parti contraire, fondé sur la conviction qu'il s'agit encore et seulement d'un ensemble de traités internationaux qui établissent des règles communes entre les Etats, toujours libres de rescinder les pactes et changer système de relations.

Comme souvent se passe, la raison ne se fait pas séduire facilement, ni par l'illusion de l'optimisme, ni par la myopie des apparences.

Le fait est que la situation n'est pas d'une façon, ni de l'autre. L'Union, comme nous avons souligné au commencement, est un *quid* atypique, qui se détache également de la configuration de entité entre états douée de personnalité de droit international et de celle de forme accomplie de confédération d'Etats.

La définition peut apparaître vague, si non défaitiste: mais le juriste est bien conscient que quand on force les termes de la réalité, surtout d'une réalité entièrement neuve, on ne parvient pas à la meilleure définition possible, mais à formules lointaines de la réalité qu'on voudrait définir, et donc à une non-définition.

D'ailleurs, l'histoire politique et l'histoire des institutions démontrent que les typologies des spécialistes s'occupent de systématiser ce que les données du devenir historique créent, et que la production d'institutions et régimes ne se réalise pas d'un coup, mais les formes se définissent pendant des temps parfois très étendus. Si nous voulons des exemples qui aient un rapport de similitude avec l'Union, non substantielle mais du point de vue du procès, nous pouvons penser au phénomène allemand, à partir de la stipulation du *Bundesakt* en 1815, jusqu'à la proclamation de l'Empire fédéral en 1871.

La réalité de l'Union avance dans l'acquisition de parties de souveraineté des Etats membres, et dans l'exercice des pouvoirs qu'en dérivent à travers ses organes et en tant que ses propres pouvoirs. Cela est incontestable par rapport à différents domaines, tous de prioritaire intérêt constitutionnel: de la production de normes primaires, de rang supérieur dans le système des sources des Etats membres, à la sauvegarde des droits fondamentaux des citoyens des Etats membres, à l'exercice des pouvoirs d'intervention dans la régulation de l'économie, de la production et de l'échange de biens et services, à l'unification des monnaies (dont le règlement est conféré à une autorité de l'Union), à la fixation des fondements des bilans intérieurs des Etats de l'Union. Et l'énumération pourrait continuer.

L'évocation de parties croissantes de souveraineté ne peut être niée, même quand, comme dans la Conférence de Nice, l'issue du sommet de l'Union et des ses Etats est très médiocre et décevante. Pour en douter, il faudrait accéder à des conceptions arriérées de la souveraineté des Etats, que personne aujourd'hui considère, même si la crise du concept de souveraineté est ouverte mais pas accomplie.

Il y a donc une partie de souveraineté de l'Union à laquelle ne peut que correspondre un régime certain et convenu dans le système des fonctions qu'y se fondent directement. A partir de cet élémentaire constat, peut-il dériver une réponse croyable à la question: existe une Constitution européenne?

9. Suite. Les caractères des éléments constitutionnels de l'Union

La réponse à la question concernent l'existence d'une Constitution de l'Union est négative, si on entend pour Constitution un document fondamental que réduit organiquement à système les principes normatifs du régime d'un Etat. Il n'y a pas un Etat de l'Union, il n'y a pas une Constitution, et il ne peut pas y être.

Toutefois, si on procède à partir de la définition de l'Union en tant qu'entité intermédiaire entre sujet entre états et Confédération d'Etats, qui participe de la nature de l'une et de l'autre dans ses facteurs constitutifs, et qui dispose d'un certain nombre de pouvoirs souverains, exercés à travers ses organes, alors non seulement on peut, mais on doit donner une réponse affirmative. Le document

n'existe pas, mais les éléments pour une effective Constitution sont posés, adressés à régler l'exercice de ces pouvoirs souverains.

Il est nécessaire en déterminer les caractères généraux, pour gagner quelques conclusions au sujet du rôle de la Cour de justice dans la formation des éléments pour une Constitution européenne.

Le premier caractère général réside dans l'inconsistance de la position du principe démocratique. On parle communément de «déficit» démocratique dans l'Union européenne, et c'est une affirmation à partager. Le seul organe de l'Union qui a fondement et principe constitutif est le Parlement européen, dont toutefois les pouvoirs ne sont pas décisifs: le Parlement est maintenant réduit à Chambre de réflexion, plutôt que de délibération politique et normative.

Le comité des ministres non plus peut combler ce déficit, parce que les représentants des Gouvernements des Etats membres agissent en qualité de composantes de l'organe collégial, qui est organe de l'Union, non en tant que représentation fiduciaire des Parlements nationaux (même en considérant que les Etats membres ne prévoient pas l'élection populaire des exécutifs).

Tous les autres organes dérivent de la nomination des Gouvernements des Etats membres, qui néanmoins ne disposent pas du pouvoir de révocation. Il en résulte qu'on ne peut pas parler, pour eux (de la Commission à la Banque Européenne), de responsabilité politique pour l'exercice des respectives fonctions.

Le *liberum vetum* qui règle toujours le processus d'adoption des délibérations les plus importantes de l'Union ne résout pas le nœud du déficit démocratique: plutôt, le serre encore plus, parce que exclut la représentation des intérêts de la base populaire de l'Union pour laisser place seulement aux intérêts des Gouvernements des Etats, c'est à dire aux intérêts nationaux proprement dits, et en plus ouvre un remarquable passage aux groups de pression.

Le deuxième caractère général est l'inexistence de la moindre codification des éléments pour la Constitution européenne. Cette donnée se rapporte d'une façon structurale aux principes constructifs de ces éléments, et à la (lointaine) origine de l'Union dans des pactes, qu'on utilise encore, même à ce but (celui d'empêcher la codification). On peut prévoir que ce caractère sera durable, du moins jusqu'à l'événement d'une conclusion de type fédéral (s'elle sera telle) du processus évolutif de l'Union.

Il en résulte, en vertu d'une bizarre astuce de l'histoire, que le procédé envers une Constitution européenne prend les formes de

la tradition de la *common law* (tout à fait minoritaire dans le continent), et non l'autre de la codification, qui par contre appartient à tous les Etats membres, sauf le Royaume Uni.

Pour être exhaustifs, il faut souligner un autre caractère, qui ne concerne pas directement le thème de notre réflexion. Le déficit du point de vue démocratique dans les éléments constitutionnels de l'Union est tel qu'il produit un déficit du moins pareil dans le régime constitutionnel des différents Etats.

Nous avons déjà remarqué la fragilité du barrage opposé par la jurisprudence de la Cour constitutionnelle italienne par rapport au soin de sauvegarde de l'immuabilité des principes de régime, en les mettant à l'abri de l'interférence des sources de l'Union: dans le domaine des rapports économiques et sociaux, cette fragilité est très prononcée. La figure de l'Etat interventionniste, par laquelle se produisent des importantes principes de régime, en premier lieu celui concernent l'égalité en sens matériel prévu par l'article 3, clef de voûte du système républicain, est mise à une dure épreuve par l'évolution du droit de l'Union.

Quel peuple, italien ou européen, a été appelé à se prononcer sur ça?

10. Réflexions conclusives. Les éléments pour la Constitution européenne et le rôle de la Cour de justice

Nous sommes maintenant dans la condition de fournir quelques contributions, tout à fait provisoires, à la spécification du rôle de la Cour de justice dans la formation des éléments pour une Constitution européenne, dont constituent une anticipation les réflexions formulées par rapport au pouvoir exclusif revendiqué pour l'interprétation authentique des normes des Traités, et celle relatives à la jurisprudence créatrice au sujet des *standards* dans la sauvegarde des droits fondamentaux de l'individu.

Une prémisse est due. Il y a une orientation qui ne reconnaît pas à la jurisprudence, en principe, la légitimation à créer droit dans des systèmes politiquement organisés: à cette opinion, on accède. Même quand il se réalise le gouvernement des juges, ou bien des formes moins extrêmes, la thèse n'est pas démentie.

En considérant avec soin les différentes espèces, on ne peut que reconnaître que soit il s'agit d'organes politiques qui attribuent ou permettent tacitement que soient attribués des pouvoirs politiques

et juridiques, soit on est en présence d'un agrandissement de l'*establishment* politique, dont une partie, légalement investie de la fonction juridictionnelle, détient la tâche d'exercer ses pouvoirs en vue des but communs de direction politique.

Cela dit, les caractères des éléments constitutionnels de l'Union, que nous avons rappelés, sont tel qu'ils autorisent des amples marges aux activités de la Cour européenne, organe de justice de l'Union, pour la formation des éléments constitutionnels de l'Union même.

La Cour peut contribuer concrètement à cette œuvre, parce qu'il n'y a pas un système organique, certain et écrit, définissable comme Charte constitutionnelle de l'Union, dans laquelle, en particulier, soit fixé le principe de la division des pouvoirs.

Le principes normatifs généraux, les éléments pour la Constitution européenne, dérivent de l'ensemble des sources que l'Union met à l'exécution à travers ses organes. Les principes se forment, et évoluent, avec l'accumulation de ces sources, alors que les Traités règlent essentiellement la discipline du déroulement pour la production des sources, la formation des organes de l'Union, et seulement dans un sens tout à fait général fixent le contenu des principes normatifs (même pas tous) que l'Union s'occupe de déterminer et définir concrètement.

Le déficit de démocratie de l'Union n'empêche pas le concours de la Cour européenne à la formation du droit. Comme démontre l'expérience, et elle ne craint pas les démentis des théoriciens, le pouvoir normatif de la juridiction rencontre sa principale limite, et son frein, dans les organes qui sont l'expression directe de la représentation politique, quand ils sont chargés d'une façon exclusive ou du moins principale du pouvoir normatif. A défaut de cela, limites et freins manquent et ne sont pas remplaçables.

Une apostille peut conclure ces sommaires considérations sur le rôle de la Cour dans la formation des éléments pour la Constitution européenne. Il peut apparaître une affirmation paradoxale, et contradictoire par rapport à ce qu'on a soutenu, mais c'est hors de doute: la Cour, dans la création de droit, déroule une fonction supplétoire et de corrective en sens proprement démocratique, vu que toute l'activité de direction de l'Union est confiée à des organes qui sont émanation d'exécutifs, gouvernements et majorités des Etats membres, et en même temps très perméables par rapport à la volonté des intérêts organisés.

POLITICAL CORRUPTION: THE INTERPLAY BETWEEN JUSTICE AND MEDIA IN ITALY

ANNA MESTITZ AND PATRIZIA PEDERZOLI[1]

The judicialization of politics has played a major role in altering the Italian political landscape since 1992. Undoubtedly, the increasing independence of both judges and public prosecutors must be counted among the factors that have opened the way to the investigations internationally known as "Clean hands" and "Kickback city". Nonetheless, the political impact of those affairs cannot be understood without taking into account the close interaction between the magistracy (i.e. judges and prosecutors) and the news media. After considering the deep changes in the organisational setting of the Italian magistracy, the article presents some preliminary findings of a research on the media coverage of the political corruption scandals in the period 1992-94. It appears that press reports have fostered a very supportive climate to the magistrates' initiatives often infringing upon the due process guarantees. On many occasions the countervailing right of access to, and divulgation of information has prevailed at the expense of the protection of the defendants' reputation and privacy. However, the existing literature indicates that in the subsequent years the media have adopted more critical positions than previously. This might have contributed to the steady decline of public confidence in the justice system which emerged in the period 1995-98.

1. Introduction

The interaction between justice and the media has become an area of concern in many countries. A tension inevitably exists between two sets of values which democratic polities recognise as fundamental rights to citizenship: due process protections

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[1] Patrizia Pederzoli is the author of paragraphs 1-4 and 7; Anna Mestitz is the author of paragraphs 5 and 6.

surrounding those who are involved in judicial proceedings, and freedom of opinion and expression on which rests the strength of the "fourth power". In principle, the press is expected to fulfil crucial functions in open societies. According to Robertson, for example, media reports can provide the public with the information it needs to understand the working of courts, and can also detect the defects in the justice system, thus "raising critical consciousness of the need for reform" (2000: 2). On the opposite side, it is often argued that trial and pre-trial media publicity may seriously undermine the litigants' and the victims' basic rights, such as the preservation of their privacy, and especially the defendant's constitutional rights, such as the presumption of innocence.

This article seeks to explore some of the issues raised by the increasingly complex interplay between justice and the media with particular reference to the intervention of Italian judges and prosecutors in the campaign against political corruption, a campaign which, since 1992, has played such a significant role in altering the Italian political landscape. The massive press coverage of the investigations internationally known as Clean hands (*Mani pulite*) and Kickback city (*Tangentopoli*) provides a relevant case for those who are interested in the study of the justice-media relationship and its consequences on the delicate balance between due process guarantees and public access to information.

We shall focus on both sides of the justice-media relationship. First, we shall consider the essential features of the judicial organisation in Italy, where judges and prosecutors not only belong to the same corps (as is the case in France) but also share in fact the same high levels of institutional independence[2]. It is submitted that these peculiar traits have supported the opening of the Italian justice system to the media, a fact which represents a not

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[2] We shall use the terms "magistrate" and "magistracy" to indicate both judges and prosecutors. Due to the influence of the Napoleonic model on the Italian justice system, the organisational arrangement of the judiciary in the two countries still exhibits some notable similarities. In both cases judges and prosecutors form a single corps and are allowed to change their roles even recurrently during their career. In France, however, the public prosecutors fulfil their functions under the direction and control of Chief prosecutors and ultimately the Minister of Justice (Di Federico, 1998; Guarnieri and Pederzoli 1996: 101).

insignificant aspect in the development of the scandals. Second, the press treatment of the Clean hands case will be considered by presenting some preliminary results of a research project aimed at analysing the press coverage of the scandals in the period 1992-94. Relying mainly on the available literature, attention is paid to the impact of televised trials as well. Some data on the citizens' confidence in the judicial system are also provided. Our point is that in the first half of the 1990s a close interaction was established between members of the magistracy and a prominent part of the news media. For a long while, this triggered a sort of co-operative endeavour in the struggle against political corruption with significant implications for the rights that the Constitution and the law afford to accused persons. The underlying assumption is that both the rapid escalation and the magnitude of this so-called Italian "judicial revolution" would be difficult to comprehend without taking into account the synergy between these elements.

2. The relevance of the relationship between justice and the media

In recent years political scientists have outlined the growing relevance that courts are acquiring in democratic polities (Tate and Vallinder, 1995). At a different level, however, the social and political significance of justice is confirmed by the capacity of judges' rulings and prosecutors' initiatives to gain news media coverage. Traditionally, newspapers have focused mainly on criminal justice. But the "global expansion" of the third branch, the crowded dockets of courts, the salience of the issues they deal with, and recurrent cases of judicial activism have resulted in major changes in the media's coverage both in quantitative and qualitative terms. On occasion, even the daily operation of the judicial system attracts the attention of the press and television and, therefore, public opinion.

The resulting interaction between justice and the news media is often troubled. Even though this is not a recent phenomenon, it is becoming an area of primary concern in many countries[3].

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[3] See for instance the papers presented at the international colloquium organised under the aegis of the Institut des Hautes Etudes sur la Justice on *"Justice,*

Sensationalised headlines, dramatic reports of high-profile cases, and prejudicial disclosure of information raise a range of specific problems. Given the technical nature of the matters involved, doubts have been cast on the media's ability to provide accurate and reliable information not only on individual cases but also on the whole functioning of the judicial system. Since the level of knowledge about the law and the legal process appears generally low, media coverage usually represents the citizens' main source of information (Slotnick, 1991). The ways in which the events are portrayed may thus jeopardise public understanding of the work of forensic actors and undermine support for the judicial system; moreover, disclosure of backstage information and pre-trial publicity tend to interfere with the conduct of criminal investigations. Also, it has been argued that media coverage before the formal proceeding may produce a phenomenon of "delocalization" of justice, bringing about the risk that trials be conducted out of courtrooms playing on the emotional reactions of the public at large (Garapon, 1996a: 232). Most important, the media are often accused of threatening the core principles of the judicial process: they may negatively affect the impartiality of the judge (and particularly of jurors), infringe on the rights afforded to defendants, undermine the guarantee of a fair and unbiased trial, destroy privacy, and harm innocent people (Surette, 1992: 184-185).

If it is obvious that the media actively seek to gain access to information in order to increase circulation or audience, the other side of the coin also deserves attention. The judicial system cannot be depicted as the passive target of press and television reports; in a number of cases media publicity seems to be actively sought by judges and especially the prosecutors themselves (Garapon, 1996b). On the one hand such a phenomenon can be viewed as the corollary of the media-courts link which itself suggests the need of greater openness and accountability in the exercise of judicial power (Robertson, 2000). Even English judges, who have traditionally

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opinion publique et medias" (Nantes, November 4-5, 1994). On that occasion Loic Cadiet recalled that the relationship between justice and media already appeared in the *cahiers dè doléance* as a matter of discussion at the time of the French revolution.

cultivated an approach to the media characterised by self-restraint, are beginning "to appreciate the need actively to promote the public support which once they took for granted" (Malleson, 1999: 2). However, in countries which have recently experienced a process of "judicialization of politics" (Tate and Vallinder, 1995: 13), the interaction between justice and media has gained a new momentum. This process is at work in many democracies, but in Italy it has acquired an intensity which has no parallel in other systems, and the magistracy has very often come to hold the spotlight.

3. The cases of political corruption

The sudden burst of judicial investigations into political corruption and their unprecedented impact on the political class and the party system is related to a complex interplay of social, political, and economic factors (Nelken, 1996a; Cartocci, 1997; della Porta and Vannucci, 1999). The analysis of the conditions that have favoured the proliferation of illegal behaviour in the Italian public sphere does not fall within the scope of this work. There is general agreement, however, that political corruption developed in the late 1970s and became a "systemic" phenomenon in the 1980s (della Porta, 1992). Throughout this period prosecutors' initiatives in this field were scarce or unsuccessful. Despite some remarkable exceptions, they did not usually go beyond the local level. Only at the beginning of the 1990s did the magistracy mobilise its conspicuous resources with the declared aim of restoring legality.

Investigations started in Milan in February 1992 and rapidly involved prominent politicians, businessmen, managers, and executives serving in public administration. As David Nelken (1996a: 191) has pointed out, in a couple of years "all the parties of government were swept away" in the course of a judicial campaign which unravelled a widespread and deeply rooted web of illegal financing of political parties. All major members of the political class which had governed the country were involved under the charge of having solicited or received bribes. Pending trials, most of them decided, or were in effect forced, to resign. In addition to the turnover of political personnel (Ricolfi, 1993), the old equilibrium of the party system underwent dramatic changes. Suffice it to recall that the Christian Democrats – the leading party of the governing majority for over forty years – split several times.

While the Socialists and the Social Democrats collapsed, other parties of the governing coalition, such as the Liberals and the Republicans, suffered severe electoral set-backs and lost much of their previous political weight (Pederzoli and Guarnieri, 1997). The increasing media-driven popularity of the Milanese prosecutors reached its peak when the Enimont scandal exploded and the related trial was televised in prime time[4]. Notwithstanding the critical stance adopted by some commentators, the fame of the prosecutors did not seem to fade even when two well-known people involved in that case committed suicide. According to the data presented by the General Prosecutor of Milan, by the end of 1994, 2,497 people were under investigation, and 593 of them were subject to preventive detention (Canosa, 1996: 207). Meanwhile, however, other prosecutors' offices had began to follow in the tracks of Milan and the scope of investigations expanded further.

Table 1

Categories and numbers of accused persons in the first two years of the Clean hands investigations (February 1992 – February 1994)

categories	*accused persons*	*persons in preventive custody*
deputies and senators	438	not available
regional, provincial, and municipal politicians	1,978	"
entrepreneurs, top managers, and executives	2,246	"
others	1,397	"
total	6,059	2,993

Source: adapted from A. Mincuzzi, Dalla mazzetta alla maxitangente tra mille arresti e suicidi eccellenti, *Il sole 24 ore*, February 17, 1994.

[4] Enimont was a large chemical corporation with private and public stockholders. For the issues raised by this televised proceeding see par. 5.2.

The quantitative dimension of the prosecutors' initiatives is illustrated in Table 1, which accounts for the number of persons involved in the first two years of the "crusade" against political corruption. On the whole, more than six thousand people were accused of serious crimes, mainly but not exclusively related to the illegal financing of political parties. The politicians were hit hard both at the national and local levels with heavy implications for the credibility and legitimacy of the whole political class. Data also show that about one half of the people under investigation underwent more or less prolonged periods of preventive custody[5]. Indeed, in late 1994 and especially thereafter some of the newspapers which had previously supported the judicial action against political corruption began to introduce some criticisms regarding the massive use, and the alleged misuse, of this coercive measure[6]. As will be discussed later on, this changing attitude toward the magistracy seems to mark a turning point in the relationship between justice and the media.

Of interest are also the figures concerning immunity granted to members of Parliament. Until 1993, deputies and senators could be prosecuted only upon authorisation of the legislative chambers[7]. Comparison of the various legislative terms over a period of about 45 years shows that the requests to waver parliamentary immunity

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[5] For serious crimes, preventive detention during preliminary investigations may range from six months to one year. However, when considering also the subsequent stages of criminal proceedings (trial, appellate judgement, and cassation), preventive detention may be requested for up a maximum of six years. Elaboration of the data supplied by the National Institute of Statistics (Istat) shows that in the period 1991-98 the detainees subject to this measure represented on average 82% of the total prison population.

[6] This point was already stressed by a special commission of the *Fédération Internationale des Droits de l'Homme*, an organisation of the United Nations. In 1992 the commission drafted a report on the administration of justice in Italy that raised concerns, among other aspects, about the high rates of persons kept in preventive custody pending trial. The media did not pay any attention to that report, notwithstanding their previous commitment to publicise similar denounces of human rights violations in other countries (Gismondi, 1996: 92).

[7] After that date, art. 68 of the Constitution, which regulates this procedure, was amended. At present, Parliamentary authorisation is required only when restrictions on personal liberties (such as imprisonment, wire tapping, etc.) are requested before the trial.

Table 2

Requests to Parliament of authorisation to prosecute its members and percentage of requests accepted

legislatures	*years*	*total requests N*	*accepted requests (%)*
I	1948-53	659	12.7
III	1958-63	398	16.3
V	1968-72	229	19.2
VIII	1979-83	277	33.2
IX	1983-87	406	29.3
X	1987-92	380	9.5
XI	1992-94	898*	23.3

* Only up to the end of 1993 (the new elections took place in April 1994).
Source: Cazzola and Morisi (1996: 23-24).

more than doubled in the period 1992-93 (Table 2). However, when considering the percentage of authorised requests, it is interesting to note that in the X legislature Parliament made a far more extensive use of its prerogatives than was the case both in the previous and following legislative terms in order to stop judicial investigation of its members[8].

4. The opening of the justice system to the media

The media furnished a massive coverage of the Tangentopoli affair during the course of its unfolding. This may come as no surprise, given the increasing magnitude of the events reported, namely the apparently unending succession of politicians and

[8] As Cazzola and Morisi (1996: 24) indicate, Parliament displayed a negative attitude toward the prosecutors' initiatives especially when the government coalitions were led by the Socialist party. During this period, characterised by confrontation between the Socialists and the magistracy, on average one request out of two was rejected or simply ignored.

businessmen publicly notified of being under investigation or even arrested. Also obvious is the fact that the media constantly sought to have access to confidential sources of information. What appears less obvious, however, is their rate of success in doing so. The journalists repeatedly succeeded in disclosing prejudicial information that under the existing rules of criminal procedure should be protected against public dissemination. Even less obvious, and most important, is the attitude that the magistracy has displayed toward the press and television. Interviews, official statements, press conferences, articles signed by members of the magistracy in newspapers and periodicals, and even autobiographies are almost countless.

Judges and especially prosecutors were not hesitant to voice their views (sometimes in quite unusual terms[9]) about the scandals and a number of scandal-related issues: the individual cases at hand and their prospects for development in the future, the causes explaining the emergence of systemic corruption in the country, and not least the proposal to enact a moratorium for the people involved[10]. In particular, the prosecutors did not refrain from using the media as a means of strengthening their personal prestige, increasing public support for the investigations they were pursuing, and challenging the reactions of the political class to those initiatives (Racinaro, 2000). Hence, via the media, they were able to establish channels of communication with public opinion on the one hand and the relevant political actors on the other hand. On many occasions, in the midst of the institutional crisis fuelled by the "judicial revolution", the prosecutors clearly attempted to rely directly on popular support so as to reinforce their own role and bypass, or at least dam, the influence of the political party representatives (Righettini, 1995). Although definite evidence is lacking, it is also

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[9] For example, Pier Camillo Davigo, one of the prosecutors in Milan, declared "we will turn Italy inside out like a sock".

[10] After having successfully contrasted the attempt of the Berlusconi government (July 1994) to enact a moratorium for people involved in corruption, the prosecutors of Milan elaborated a project of their own aimed at providing a legislative solution to Tangentopoli. The project was presented by the public prosecutor Antonio Di Pietro at a meeting of businessmen held in Cernobbio (September 4th, 1994) and was widely amplified by the media.

likely that in order to amplify the potential impact of their inquiries they have used "their ability to make public information about the bringing of criminal charges, sometimes (illegally) leaking the story to compliant journalists" (Nelken, 1996a: 196).

Needless to say, in the Italian case the traditional assumption according to which the third branch should speak exclusively through judicial acts has eroded – at least its descriptive value has. Judges and prosecutors have engaged in a proactive strategy characterised by widespread resort to non-judicial channels of communication which has allowed them to play a far from minor role in the *"cirque médiatico-judiciaire"*[11]. Due also to the growing public frustration with the ineffectiveness of politics and the decline of the classic political channels (Amoretti, 2000), this strategy has resulted in a self-sustaining and co-operative game between a considerable part of the news media and the magistracy (Marafioti, 1994). For a couple of years, this was a game in which both sets of institutions have gained benefits: increased audience or circulation, and the building up of a reservoir of public support for the judges' and prosecutors' work, a reservoir from which the magistracy has recurrently drawn during confrontation with the political branches. Along with other fundamental resources of institutional independence that will be considered later on, this has enabled the magistracy to operate as a relatively unconstrained actor and to successfully resist any attempt on the part of the legislature to enact reforms affecting the status of both judges and prosecutors (Di Federico, 1998).

Several scholars have remarked that the close interaction between the magistracy and the media is one of the keys to Tangentopoli, or at least one of the aspects to take into account in order to explain the wave of popular support for the prosecutors' initiatives (Righettini, 1995; Giglioli, 1996; Nelken, 1996b). With some exceptions, however, this point has not been closely examined. The next section explores the judicial side of this interaction by drawing on existing literature. Various elements account for the strategic use of the media by judges and prosecutors. Here, attention will be paid in particular to those features of the Italian

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[11] This is the title of a book by Soulez Larivière (1994).

judicial organisation that may illuminate changing patterns of the magistrates behaviour.

4.1 The organisational setting of the Italian magistracy: tradition and change

The opening of the Italian magistracy to the media can be understood as part of a more general trend toward judicial activism. In turn, this is related to the progressive emancipation of judges and prosecutors from institutional controls, both internal and external. Indeed, cross-country analysis shows that, compared to other democratic polities, the Italian magistracy enjoys particularly high levels of institutional independence (Guarnieri and Pederzoli, 1996).

The roots of this evolution are to be traced back to the 1948 Constitution. With the aim of shielding the administration of justice from the abuses that characterised the Fascist regime, the framers designed a peculiar institutional set-up. In particular, two distinct features emerge from the constitutional design. First, as mentioned above, judges and prosecutors belong to the same organisation, share therefore the same career, and are allowed to change roles if they so wish (and they often do). Second, they enjoy the same strong guarantees of institutional independence from both the executive and the legislature, thanks to an overarching mechanism of "self-government". While these general features are still in place, the institutional setting of the magistracy has undergone over the years a deep process of change in its internal structure. The bureaucratic arrangement of the judicial corps that Italy traditionally shares with the other civil law countries has been dramatically altered. This has produced long-term implications for the role the magistracy plays in, and the relationships it establishes with, its social and political environment[12].

For a long while the Italian magistracy has retained its traditional bureaucratic setting and, therefore, the social control structure typically associated with that institutional pattern. As is generally the case with pyramid-like organisations, hierarchy of

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[12] What follows relies mainly on Di Federico (1976, 1989) and Guarnieri (1992).

authority was the most important formal device to monitor individual conduct and to exert influence over professional performance. True enough, recruitment by public competition granted (and still grants) high levels of external independence, which protect judges and prosecutors from the intervention of other political branches. But the rigid hierarchy and the system of career advancement represented a source of pressure from within the judicial organisation, which undermined internal independence.

Promotions were the most significant variable for characterising the organisational set-up of the magistracy until the 1960s. Despite the emphasis on the principle that judges are subordinate only to the law, promotions operated in fact as a powerful vehicle of influence of superiors on their lower-ranking colleagues. Advancements were granted on a competitive basis according to formal criteria combining seniority and merit, and the higher echelons of the hierarchy assessed the latter with wide margins of discretion. Thus, the judicial elite was in a position to control the material and psychological gratifications connected with the advancement of the career. The researches undertaken on this subject indicate that senior judges were able to significantly affect the professional performance of their younger colleagues (Di Federico, 1976). Other relevant devices of direct and indirect influence of hierarchical superiors should be mentioned, such as discipline and the allocation of cases. On the whole, however, the bureaucratic frame made available a number of rather effective mechanisms of behavioural controls. In particular, this arrangement was instrumental in reproducing commitment to the traditional values of the profession, as they were represented by the predominant legal doctrine. These depicted the magistrate as the mouth of the law, namely a technician fulfilling an executive function "aloof from the social and political context" (Di Federico and Guarnieri, 1988: 165). The organisational set-up of the magistracy reflected, and to some extent concurred in, achieving those values. In sum, a complex net of bureaucratic constraints was likely not only to induce conformism to the prevailing professional ethos, but also to promote an organisation-oriented role perception. In Gouldners's terms, it could be said that the magistracy was mainly composed of "locals" (1958) seeking recognition within the judicial organisation, and especially its top, rather than outside it.

This picture began to change in 1959 when the Higher Council

of the Magistracy (*Consiglio Superiore della Magistratura*) was created. In fully achieving the principle of judicial self-government, the establishment of this institution marked the first step of an important evolution, which led to a substantial alteration of the traditional setting of the magistracy. Since that date, the Council is responsible for making all relevant decisions (recruitment, appointments, promotions, transfers and discipline) concerning the professional status of both judges and prosecutors. Moreover, such a concentration of tasks is placed in the hands of an institution where magistrates make up the overall majority. According to the Constitution, the Council consists of a two-thirds majority of judicial members directly elected by the whole corps, and one third of lay members directly elected by Parliament among university law professors and experienced lawyers[13].

Of crucial importance to understand the internal operation of the Council are some further elements. As a result of reforms altering the methods for electing the judicial members, the Council now consists of middle- and lower-ranking magistrates who nonetheless concur in making decisions affecting not only their peers but also their senior colleagues. Unquestionably, this implies a major breach of the traditional principle of hierarchy. Moreover, the Council activities are strongly affected by the internal factions of the National Associations of Magistrates (Anm), a union-like association that includes the vast majority of the whole judicial corps. These factions, which essentially reflect the Left-Right ideological spectrum[14], are able to control the lists of the judicial candidates who run for election, thanks to the adoption of a proportional system. As a consequence, they play a crucial role in the decision making process (including the appointment of the heads of courts and prosecution offices), a factor that also explains why the magistrates feel the need for affiliating with one faction or another.

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[13] Moreover, the Constitution provides for three *ex officio* members: the Head of State, who presides over the Council, the President and the General Prosecutor of the Court of Cassation. At present, there are twenty judicial members and ten lay members.

[14] From left to right of the ideological spectrum, the most important of them are: *Magistratura indipendente, Unità per la costituzione, Movimento per la giustizia*, and *Magistratura democratica.*

Finally, the lay members sitting in the Council, who represent the main institutional link between the magistracy and the political system, are chosen to reflect the strength of the various political parties represented in Parliament, including the opposition.

Another important factor in the dismantling of the hierarchical principle emerged from a series of reforms brought in from 1963 to 1979 which have transformed the previous pattern of career advancement. The traditional system of promotion, based on competitive examinations or on assessments of the magistrates' work performed by higher-ranking magistrates, has been replaced by a system of automatic career advancement. Formally, promotions should now follow from a combination of the two usual criteria, seniority and merit, the latter being assessed by the Higher Council and no longer by senior magistrates. In fact, professional evaluations now no longer hold any practical significance, as they are almost invariably positive or at least drafted in such a way as not to prevent promotion (Di Federico, 1987: 19-26). Mainly due to the way the Council has interpreted those reforms[15], career advancement depends exclusively on seniority. Obviously, the peculiar structure of the self-governing body of the magistracy goes a long way to explaining why promotions are actually managed in this way. However, the corporate logic permeates most of the Council decision-making, and appears particularly evident in the sphere of judicial discipline. Not surprisingly, the pressure toward conforming to the ethical rules of judicial conduct is significantly relaxed.

The evolution briefly described here points out that the bureaucratic setting of the Italian magistracy has undergone a deep transformation resulting in a momentous increase of institutional independence, both internal and external. The very conditions that fostered commitment to the traditional ethical values of judicial conduct are no longer operating and the mechanisms of behavioural

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[15] The lack of any effective selection is strictly connected with the cornerstone of the reforms, namely a clear separation of judicial rank from the functions magistrates perform. In other words, those who meet the seniority requirements are promoted, draw their pay at the higher scale, but can continue to perform the functions associated with their previous rank.

control underpinning the previous arrangement have weakened or disappeared. The higher-ranking magistrates have lost much of their former power to influence their younger colleagues. Automatic advancements have almost cut the connection between the unfolding of the career and professional performance. In particular, the certainty of promotions and of their economic gratifications has produced an apparent paradox: the levels of individual identification with the judicial organisation have lowered and external, additional gratifications are now quite actively sought. Indeed, judges and prosecutors do look for social and political support outside the judicial organisation. Such an involvement in a larger net of external relations is evidenced primarily, but not exclusively, by their propensity to engage in part-time and full-time extra-judicial activities[16]. As a consequence, the Italian magistrates appear now only loosely coupled with their own organisation and a "cosmopolitan" orientation (Blau and Scott 1962: 66) has slowly emerged. In other words, a displacement has occurred in the traditional points of reference of the magistracy. While in the past they were represented mainly by the judicial organisation and the higher-ranking magistrates, today they are found elsewhere: in the Higher Council, the factions of the Anm which monopolise the judicial representation therein, but also the political parties which are given a voice within the Council via its lay members, and increasingly in the larger social environment (Guarnieri and Pederzoli 1996). It is precisely in this deeply modified context that the opening of the magistracy to the media can be placed. The declining significance of organisational constraints, the strong guarantees surrounding both judges and prosecutors, along with the broad changes in the political environment (Guarnieri, 1992) have provided the conditions conducive to promoting a sort of justice-media partnership.

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[16] Institutions with magistrates on staff include Parliament, the central government (especially the Ministry of Justice), the Presidency of the Republic, regional and provincial governments, as well as a range of administrative agencies. This is a phenomenon that has grown substantially because such activities, even when full-time, do not prevent magistrates from being promoted or reassigned to their previous position (Zannotti, 1981).

5. The media and the Clean hands scandal

The interaction between justice and media may be analysed from two perspectives: in fact the attention of the media to crimes, investigations and judgements sentences is in itself a variable strongly influencing in turn prosecutorial initiatives and judicial decisions. Nevertheless, the research on the influence of the media on investigations and judicial decisions is fraught with methodological and practical difficulties. Certainly some indications may emerge at the macro level but so far very few empirical researches have been carried out.

Our research data and the available surveys on media coverage of Clean hands are limited but may provide a general overview of the "judicial storm" which since 1992 has involved local and national politicians at the highest levels of the government, both in the role of accused and as witnesses. As "all the observers agree that the media had a decisive role in publicising the affair and in influencing public opinion" (Giglioli, 1996: 383), we shall consider two main aspects: first, the press coverage of the Clean hands investigations in 1992-94, and then the TV coverage of the first criminal trial concerned with these investigations in 1994. It must be noted, however, that very often press and TV reports focus on the same issues: news which has been broadcast in prime time invariably occupies the most important place in the newspapers.

Some features of the Italian media must be taken into account. First of all, the newspapers are the megaphones of their respective sponsoring entrepreneurial groups. Among the dailies with the highest circulation, for example, *La repubblica* is leftist, supported by the Olivetti group; *Corriere della sera* is centrist, supported by the editorial group Rizzoli; *La stampa* is liberal, supported by the Fiat group and so on. Moreover, until 1992 the press and television supported the political parties which protected their economic interests. At the time the public broadcasting service RAI was divided in 3 sectors corresponding to the political areas of influence[17]. Consequently, TV news reports "were strongly ideologically biased, especially when dealing with political subjects"

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[17] In particular the TV news TG1 was dominated by the Christian Democratic Party, TG2 by the Socialist Party and TG3 by the Communist Party.

(Giglioli, 1996: 386). On the other hand the press itself did not appear totally "clean" and uncorrupted. Some authors remark that the negative features of the Italian press outlined in the 70s were still in place in the period 1992-94 (Castronovo and Tranfaglia, 1994). In particular "corruption of the press is simply a part of the endemic corruption in both the political and economic sectors in Italy (...) It unfortunately combines with the tendency toward the politicisation of practically everything making a raging cynism about all establishments" (Porter, 1983: 35)[18].

5.1 The press coverage in 1992-94

The number of articles regarding judicial initiatives on political and administrative corruption published yearly in dailies in the period 1992-94 is unprecedented. Suffice it to recall that in 1960 the dailies with highest circulation published no more than 30 articles on corruption issues. This figure doubled in 1970, and in 1988 one of the two major newspapers (*Corriere della sera*) published around 300 articles and the other (*La repubblica*) about 400.

The preliminary results of our research on the press coverage of the Clean hands scandal will be examined by grouping the data in two distinct periods, 1992-93 and 1993-94, since at this writing complete data are available only for *La repubblica* (Table 3).

The analysis of the 1992-93 press coverage was conducted in the period from February 17th 1992 to the same date in 1993, by examining 5,332 articles published in five newspapers (Table 3): *La repubblica* and *Corriere della sera* and three official organs of the main political parties – *L'avanti* (Socialist Party), *Il popolo* (Christian Democratic Party[19]) and *L'unità* (Communist Party[20]). At the time, the Socialist Party and the Christian Democratic Party were in the majority coalition while the Communist Party was in the opposition.

In 1992-93 the number of articles published by *La repubblica* (1,213) and *Corriere della sera* (1,150) was almost equivalent. It is

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[18] Quoted in Castronovo and Tranfaglia (1994: 562).

[19] At present it represents the Popular Party, a small portion of the previous Christian Democratic Party.

[20] At present named Democratic Party of the Left.

Table 3

Press coverage of the Clean hands scandal (1992-94): articles examined

newspapers	*articles 1992-93*	*articles 1993-94*
La repubblica	1,213	1,832
La stampa	*	1,366
Corriere della sera	1,150	*
Il popolo (Christian Democratic Party)	660	*
L'avanti (Socialist Party)	961	*
L'unità (Communist Party)	1,348	*
total	5,332	3,198

* not yet analysed.

not surprising that the newspapers owned by political parties reflected the political scenario. In fact, the lowest number of articles was published by the newspapers of the political parties heavily implicated in the corruption scandal (the Christian Democratic and Socialist parties) – *Il popolo* (660 articles) and *L'avanti* (961) – while the highest number of articles was published by *L'unità* (1,348), which used the information on the investigations instrumentally against its political opponents. We shall examine here the following topics: headlines, content and authors.

The headlines clearly show the different representations proposed by the five newspapers: three of them (*La repubblica, Corriere della sera, L'unità*) emphasised the information by means of sensational headlines (e.g. "rain of arrests", "crumbling of the bribes wall", etc.), while *L'avanti* and *Il popolo* used essential and descriptive statements and words (e.g. "Kickback city: three new arrests").

The content of the articles was mainly a description of the investigations and/or of the arrested and/or involved persons (83%). Very frequently the articles contained "gossipy" details concerning the private lives of those arrested or otherwise involved, patently disregarding their rights to the protection of honour and reputation. No criticisms were advanced by the five newspapers regarding the

investigations conducted by the Milanese prosecutors: instead, the focus was always on their initiatives and their persons. *La repubblica*, *Corriere della sera* and *L'unità* – more or less deviously – suggested to the readers a positive, quasi heroic representation of the public prosecutors as crusaders against a corrupted political class. Often the content of the articles was only generic information such as the announcement of a new wave of arrests on the part of the public prosecutors, or their menacing declarations regarding the future developments of the investigations: a Milanese public prosecutor, for example, declared that "new and unexpected fronts are about to be opened"[21].

The journalistic style of the articles shifted from an ironic and/or sarcastic tone to a moralistic and/or indignant one, giving also rise to some neologisms, including the well known "Tangentopoli"[22].

The analysis shows that 91% of the articles were written by journalists; the remaining 9% show interesting differences among the newspapers. *L'unità* and *La repubblica* appeared as the more favourable towards the magistrates, having published the highest number of articles written by magistrates themselves (respectively 18 and 13). Mainly they were articles by, and interviews of, the five most famous public prosecutors of the so-called "Milanese pool" (Borrelli, D'Ambrosio, Colombo, Davigo, Di Pietro). *L'avanti* published 12 articles by defence lawyers and only one by a magistrate; the *Corriere della sera* occupies an almost central position (with nine articles by magistrates and five by defence lawyers), while *Il popolo* did not publish any article by either group.

The simplified reconstruction of reality shaped by the press – and offered to public opinion – represented a sort of fight to the death between a handful of heroes and a great crowd of powerful and treacherous thieves. Such a dichotomous and stereotyped representation – the good and honest magistrates against the bad and corrupt politicians – was particularly effective in touching collective emotions. In particular the campaign carried out by *La*

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21 *"... stanno per aprirsi fronti nuovi, inaspettati ..."*, M. Brando, Interview to Gherardo Colombo, *L'unità*, August 2nd, 1992.

22 D. Messina, Si chiamava Milano, oggi è Tangentopoli, *Corriere della sera*, August 3rd, 1992.

repubblica stressed that the magistrates had to "sink" the entire political system, which was then labelled as the "First republic". Indeed, one year later, in Spring 1994, the results of the political elections confirmed that the previous political frame had completely vanished: the governing parties lost the elections, while the voters favoured new parties such as the Northern League (led by Umberto Bossi) and Forza Italia (led by Silvio Berlusconi who had founded the party only a few months before the elections).

The analysis of the following period – from February 1993 to February 1994 – was carried out by examining 3,198 articles published by *La stampa* and *La repubblica* (Table 3).

In this period *La stampa* published 1,366 articles while *La repubblica* published 1,832 articles, that is about 1/3 more than in the first year. The contents of the articles are widely consistent with those discussed above: 85% of the content of both newspapers regarded the description of the investigations (2,716 articles out of 3,198 were summaries of the investigations), the daily list of accused and arrested politicians and entrepreneurs, as well as gossip-laden details of their private lives. Often the articles were also concerned with judicial provisions not yet executed or notified to the accused, revealing direct interaction between the inquiring magistrates and journalists in absolute defiance of the law on secrecy concerning all pre-trial investigation. Very rare were the articles criticising investigative initiatives and procedures (5%). With respect to the previous period some new issues emerged: a few articles (17%) were concerned with the actual problems of the Italian judicial system, and with the new idea that the media had contributed to create an inquisitorial climate against the persons who were touched – even lightly – by the investigations, often by using information obtained illegally.

In particular in our corpus 195 articles (107 *La repubblica*, 88 *La stampa*) dealt with the behaviour of magistrates and the public's response to it. The content of these articles was checked against seven statements: 1. Magistrates do not respect the law; 2. Magistrates are partisan; 3. Magistrates use criminal initiative with persecutory intention; 4. Magistrates are not heroes; 5. Magistrates are the governing body; 6. Disapproval of the "rule" of the magistrates; 7. Magistrates are too "tough". Suffice it to stress that 70% of them express the conviction that the public prosecutors use criminal initiative with persecutory intentions, and the same

percentage denounce the illegal behaviour of the investigating magistrates. It is interesting to note a disagreement between *La stampa* and *La repubblica* regarding the magistrates' behaviour: the negative opinions expressed in *La stampa* were 76% but only 59% in *La repubblica*. Mistrust of the magistrates' impartiality reaches 60% in the first and 40% in the second newspaper. *La repubblica* was clearly more favourable by supporting – indeed like the leftist political wing – the magistrates' investigations.

Another 107 articles permitted us to explore one of the most controversial issues: opinions regarding the responsibility of entrepreneurs or politicians in the corruption process. The content of the articles was examined by means of the question: "Are the entrepreneurs victims of politicians?" The general results show a slight majority in agreement and a strong minority not in agreement (Table 4). But the two newspapers show different positions: according to the majority of articles published by *La repubblica* the entrepreneurs were responsible for corruption (i.e., 53.5% respond negatively to the question), while the majority of articles in *La stampa* offered the opposite representation stressing that the politicians were responsible (i.e., 55.1% agree with the statement).

Finally the analysis of a further 31 articles (*La repubblica* 13, *La stampa* 18) permitted us to check that 90% were in agreement with the identification of the "judicial storm" with a real "revolutionary" phenomenon. But if Clean hands was a sort of political revolution, one might ask whether there was in Italy a democratic regime. This issue appeared 52 times (*La repubblica* 36, *La stampa* 16) in the 3,198 articles examined and 98% of these were

Table 4

"Are the entrepreneurs victims of politicians?" (107 articles)

	La stampa		*La repubblica*		*total*	
	N	%	N	%	N	%
in agreement	27	55.1	26	44.8	53	49.5
not in agreement	20	40.8	31	53.5	51	47.7
no opinion	2	4.1	1	1.7	3	2.8
total	49	100	58	100	107	100

in agreement with the statement that in Italy there did not exist a democratic regime.

In conclusion, in the first period of investigations on political corruption, with limited exceptions, the media had been particularly supportive of the magistracy and in particular of the activities of the public prosecutors operating in the area. The scandal was represented to a large extent in moralistic terms, as a degeneration of political life, while the public prosecutors were the heroes "fighting" in order to establish a new public morality. According to Giglioli "the story of Tangentopoli told by the media was that of a cautionary tale, a moral drama where virtue triumphed" and where the "real heroes" were represented by the investigating magistrates of the Milanese public prosecution office (1996: 388)[23]. In the second year the same representation continued to prevail, but some timid criticisms of the working of criminal justice and of the work-habits of public prosecutors began to appear. Moreover, the media contributed to construct a representation of the people as honest, indignant and surprised by the scandal, exaggerating and emphasising the protest of small groups of citizens supporting the investigating magistrates in front of the *Palazzo di giustizia* in Milan.

5.2 The TV coverage of the Enimont trial in 1994

In discussing the issue of TV coverage we come to grips with the central issue of the reconstruction of reality[24], a phenomenon that happens in the courtroom as in many other situations. Obviously

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[23] Giglioli argues that the main reasons why the media favoured a representation of the reality of "Clean hands" in moral terms were: i) "the ease with which it can be symbolically condensed and expressed in short and effective phrases" (such as "Clean hands", "Tangentopoli", etc.); ii) the strong social and cultural resonance of the moral argument; iii) the economic benefits for the press itself (1996: 389).

[24] The sociology of knowledge has stressed that reality is a socially constructed phenomenon (Berger and Luckman, 1967). Without going deeply into this matter here – object of much research and discussion in the social sciences – mention must be made of a theoretical approach specific to social psychology which can be usefully applied to research on media and justice. European social psychologists introduced the concept of social representations, starting from the idea that individuals and groups create representations whenever and wherever

in the courtroom the defence lawyer will tell a different story from the public prosecutor, but reality is reconstructed also through the social interaction among different actors fulfilling various roles (defendant, witnesses, judges, etc.) by means of a series of formal and informal procedures. The TV story of the criminal trial, however, and the representations socially constructed in the courtroom will be very different for many reasons. Even setting aside any partisan or malicious interpretations, TV must shorten the amount of time dedicated to the representation of the event and keep it simple for the audience. Moreover, any interaction among individuals and groups is subject to alteration and filtered according to the media needs and objectives. Also the aims of the courtroom and TV reconstruction of the events are different, as the function of television is to inform and to keep viewers interested. Thus TV coverage of a criminal trial emphasises only some aspects of courtroom interaction and, in turn, will influence – more or less directly – interaction between the defence and prosecuting attorneys.

If the media represent the most powerful tools in the process of the construction of reality, it must also be underlined that each of them – press, radio and television – has its own distinctive "format" (i.e. guidelines for the selection, organisation and presentation of news reports). Some authors indicate that TV alters the logic and practices of professional sports, religion, and politics as well as the content of the news (Altheide and Snow, 1979). Certainly several studies have noted that as events are formatted for TV news presentation, their meaning and significance change, and as Altheide (1984) points out, "the research has documented the systematic discrepancies between numerous news reports of events and the meaningful and relevant dimensions of those events". Thus TV alters the criminal trial as it does every other event.

For our present purposes we shall briefly consider the special TV coverage of the first criminal process on political corruption held in Milan, the so-called "Enimont trial" concerned with the investigations on Clean hands. Research data on this subject have been provided by a careful sociological analysis of national TV coverage which started on December 20th 1993 (Giglioli, Cavicchioli and Fele, 1997). The trial immediately gained great public attention, similar to the O.J. Simpson trial in the United States. It was a real "media event" (Dayan and Katz, 1992) that the public RAI TV

offered daily for several months as a serial broadcast to the Italian population in prime time, with an emphasis recalling very different media events such as Royal weddings, Olympic games and so on.

The Enimont trial was represented – and perceived by the audience – as a "symbolic trial" channelling a strong emotional popular wave, and actually the public opinion interpreted it more as a moral and political judgement than as a criminal proceeding (Cavicchioli, 1997). Many of the politicians and heads of the governmental political parties who appeared on the TV screen very often played the role of witnesses, but de facto their testimony was perceived by the citizens as that of incriminated parties under questioning by the public prosecutor Antonio Di Pietro (now Senator) who acquired great fame and popularity. Giglioli and colleagues argue that the Enimont trial was a public ritual ceremony of degradation where moral rather than judicial problems played a role, but it was also "the last step in the social construction of the meaning of Tangentopoli" (Giglioli, 1996). It was a clear example of what we can define a real "joint venture" characterising the close interaction between justice and media in Italy which was aimed – more or less consciously – to build up a "social representation"[25] of the judicial media event named Clean hands.

What was the citizens' opinion about the TV coverage of criminal trials? In the course of our analysis of the press coverage we found 42 articles published by *La stampa* and *La repubblica* in 1993-94 concerned with this issue[26] and the majority was unfavourable.

In Italy the relationship between justice and media is the subject of much debate between two conflicting positions: those who think that the media damage the way of administering justice and those who think that they play a positive role both with respect to the

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they communicate and cooperate (Farr and Moscovici, 1984). According to Serge Moscovici, who introduced this approach, social representations are based on the theories and ideologies which collectivities "transform in shared realities, relating to the interactions between people" (1984: 19). All the research in social psychology has considered social representations as a means of creating and re-creating reality, recognising that in this process when issues of public interest are concerned the media play a significant role.

[25] See the note above.

[26] Most of these articles were published before the Enimont trial broadcasting.

citizens, and in encouraging a more transparent relationship among the institutional powers. Nonetheless the debate often neglected a third relevant aspect, that is, the individual rights of both the accused and the witnesses. In fact, the TV coverage of the Enimont trial not only shows the co-operation between justice and media but also the total disregard of the rights of defendants and witnesses to their reputation and honour. Indeed with few exceptions, and these from the academic world (Di Federico, 1998), very rarely did the protection of human rights become an issue.

6. The citizens' confidence in the justice system

After the judicial storm and the overwhelming presence of magistrates in the media, the second half of the 90s witnessed a new rise in the citizens' mistrust of the justice system, as may be seen in the official surveys carried out by Ispo[27] . Table 5 shows that in 1995, in the degree of confidence of Italian citizens in the media and institutions, the magistrates were in second position, preceded only by the police and followed even by the church. Since then they have continued to lose points until 1998: in 1997 the church moved to the second position and in 1998 the magistrates had lost 15% with respect to 1995 (from 59% to 44%). Confidence in the church appears steady while confidence in the government is highly unsteady. As far as the media are concerned confidence in television has grown (the State RAI by 2%, the private networks by 5%), while newspapers lose 3%.

Undoubtedly the surveys confirm a constant decline in the confidence in magistrates which took place between 1995 and 1998. This might be related to the TV coverage of the Enimont trial. Perhaps it was a specific event, itself showing the close interaction between justice and media, which caused the turning point of the new wave of citizens' mistrust of the justice system: the accusation of corruption made against Silvio Berlusconi by the public prosecution office in Milan in November 1994 while, as Prime

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[27] The surveys by Ispo (Istituto per gli Studi sulla Pubblica Opinione) were carried out only starting from 1995. Any comparable data are available on the previous period.

Table 5

Degree of confidence of Italian citizens in the media and institutions (national sample over 17 years of age; answers *much* and *very much*)

Institutions and media	% *May 1995 (N 2,894)*	% *May 1996 (N 4,635)*	% *May 1997 (N 4,556)*	% *May 1998 (N 3,557)*
Police	65	72	60	60
Judges and prosecutors	59	58	45	44
Church	57	56	56	58
Government	34	49	31	36
State TV (RAI)	25	32	25	27
Private TV (Fininvest)	23	30	28	28
Newspapers	25	27	23	22

Sources: adapted from the surveys by Ispo (Istituto per gli studi sulla pubblica opinione).

Minister, he was presiding over the "World Ministerial Conference on Organized Transnational Crime", held in Naples. Berlusconi read the news of the accusation of corruption together with all Italian citizens on the first page of the *Corriere della sera,* before receiving the formal communication of his indictment from the Milanese public prosecution office. This article aroused bitter controversy in the following months and a wide part of the public opinion was convinced that the news had been given by the magistrates first to the journalists and then to the accused person.

Popular favour and trust in the magistrates' investigations on political corruption has probably declined also because of the great and increasing number of acquittals in some of the cases most followed by the media in the first half of the 90s. The two most well known examples are those of Silvio Berlusconi and Giulio Andreotti. Criminal initiatives and trials had plagued Silvio Berlusconi, now head of the major opposition party, since he decided to present his candidature a few months before the political elections (April 1994). The main charges against him are those of corruption and of having illegally financed the Socialist Party in exchange for favours for his flourishing and multi-billionaire business. The endless succession of these cases in the last four years has sharply divided public

opinion between those who firmly believe in Berlusconi's guilt and those who have equally strong beliefs that he was unjustly persecuted in order to wipe him off the political scene. The latter seem recently to be increasing since many trials have resulted in acquittals.

Moreover, in recent years public mistrust might have been increased by the conclusion of the judicial trials involving Giulio Andreotti, one of the most prominent political leaders of the Christian Democratic Party during the last 45 years, many times minister and Prime Minister from 1946 to 1993. His judicial case has made the headlines and had a great impact on the public. It also follows in the wave of judicial attacks on important politicians, entrepreneurs and representatives of the institutions which since 1992 brought the investigating magistrates to the front pages of newspapers and in TV news headlines. In one of the two trials which were initiated several years ago Andreotti was accused of having inspired the killing of a journalist who was about to reveal Andreotti's wrongdoings. In the other trial he was accused of illegal dealings with the major *Padrini* of the Sicilian Mafia. Both trials have resulted in acquittals for lack of evidence and much criticism has been raised against the public prosecutors who initiated the investigations (Jannuzzi, 2000).

On the other hand, even magistrates and lawyers seem to share with the citizens a low confidence in the judicial system. In the first half of the 90s we conducted a research in a sample of 133 respondents of three professional groups: public prosecutors, judges and lawyers (Berti *et al.*, 1998; Palmonari *et al.*, 1998). The results have shown that the interviewees adopt the citizens' perspective when they answer to the question: *"On the basis of your experience may people have a reasonable degree of confidence in the judicial system of our country?"*. It is meaningful – and certainly distressing – that 50% of defence lawyers and 41% of judges and public prosecutors think that people cannot reasonably be confident in the Italian judicial system. Moreover criticisms and negative feelings emerged from 76% of responses, thus confirming a low degree of confidence in the justice system shared by the majority of interviewees and attributed to the citizens. According to the authors, these negative feelings of magistrates and defence lawyers may be traced back to a common sense factor: the widespread traditional lack of confidence of the Italian people in the justice system, judges,

prosecutors, lawyers and police. The same feelings have been noticed also in other European countries of similar judicial traditions. Suffice it to recall French citizens' well known distrust of the police and judicial institutions (Garapon, 1996b).

A crisis in the confidence in the legal system has emerged in many countries. However, in Italy the severe crisis in citizens' trust and confidence in the judicial system is longstanding. In the mid-80s a widespread popular dissatisfaction with the administration of justice even led to a referendum on the civil liability of magistrates, a unique event which had never before occurred elsewhere (Di Federico, 1989). The distrust was strongly mitigated by the new wave of popular favour and trust connected with the magistrates' investigations of political corruption which in the first half of the 90s gave rise to a different political scene, by striking the political parties which promoted the referendum. This event had broken in some way the long lasting pact between magistrates and politicians, and it created a new connection between the media and the magistrates, who were looking for legitimacy through the support of public opinion.

7. Concluding remarks

We have presented some preliminary results of a research in progress concerning the relationship between the Italian magistracy and the national news media during the development of the scandals on political corruption. Both sides of this relationship have been dealt with.

First, we have considered the role played by the Italian magistrates themselves in the relationship with the media. To be sure, their willingness to use the press and the television as channels for communicating with the public and the relevant political actors is not an entirely new phenomenon in Italy[28], but it reached unprecedented levels during the development of the

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[28] This point is stressed by Di Federico. The action undertaken against political terrorism in the 1970s and organised crime in the 1980s witnessed the "inclination of various public prosecutors to be visibly active and in search of fame through their criminal initiatives" (1995: 239).

scandals. The ability of the judges and prosecutors to engage in an active strategy of communication for increasing public support has been here interpreted as an integral part of a broader trend toward judicial activism. Among other relevant factors that have concurred in this evolution, attention has been paid in particular to the deep changes in the organisational setting of the magistracy, which have dismantled step by step the traditional structure of behavioural controls over the professional performance of the magistrates.

Second, we have focused on press coverage of the scandals in the years 1992-94 with regard to the frequency and content of articles published in some newspapers with nation-wide circulation and different political orientation. The sample provides a sufficiently reliable basis for beginning to explore a field in which empirical analysis remains largely absent, at least in Italy. As regards the quantitative dimension, the press has understandably devoted a massive attention to the cases of political corruption. In the first year of the Clean hands affair, the press reports examined here overwhelmingly and often acritically supported the intervention of public prosecutors. As could be expected, the main exception in this landscape is represented by newspapers owned by the political parties most involved in the investigations. Broadly speaking, an unbalanced representation of events has prevailed. In the most outstanding case, that of *La Repubblica*, this is documented by the much greater space dedicated to interviews and even articles signed by the magistrates themselves, than to those reporting the views of defence lawyers. It is likely that the reconstruction of Clean hands on the part of the media has concurred in channelling popular support to the magistrates' initiatives, also because the unfolding of the scandal has been often portrayed so as to strongly emphasise the action undertaken by the magistracy against a wholly corrupt political class apparently disconnected from the uncorrupt body of the society at large. Such a simplified representation of the scenario underlying the escalation of political corruption has been reinforced by the broadcasting of the Enimont trial in prime time, accomplishing thus the degradation of the whole political class (Giglioli, Cavicchioli, Fele, 1997). However, in 1993-94 concerns began to arise regarding a number of issues related to the rights of the defendants and the overall performance of the judicial system. The items discussed include the alleged misuse of criminal initiative on the part of the prosecutors, the high rates of preventive

detentions purportedly aimed at inducing guilty pleas and the involvement of other persons in the investigations, as well as the disclosure of prejudicial information potentially harmful to the rights of accused persons. As noted earlier, late 1994 can be said to represent a turning point in the relationship between justice and media. The declining confidence in judges and prosecutors that has taken place in the subsequent period may be interpreted as part of such a reversal of trend on the part of the media. In turn, this has been presumably fuelled by a stream of acquittals in the most publicised cases.

The close interaction established, at least for a couple of years, between the magistracy and a prominent part of the media is illustrated by the representation of events offered to the public opinion. As argued above, a sort of co-operative game has taken place in which both institutions have gained benefits. But this game has not been without costs. It might be asked whether the "fourth power" has been able to effectively fulfil its expected function, namely to check the political branches, including the magistracy itself. In this respect it has been argued that the Italian media have abdicated their prerogatives (Marafioti, 1994: 53), and this has occurred in the midst of a political crisis accelerated by the judicial revolution, and characterised by the decline of the legislature, the weakening of the executive, and the supremacy of the magistracy. Not less relevant have also been the implications for the actual operation of due process protections. The fact that judges and prosecutors belong to the same organisation is not without consequences for the way in which the media usually represent the operation of the justice system. The fundamental differences between those who are in charge of initiating criminal proceedings, supervising investigations, as well as pleading in the course of hearings, and those who have to make impartial decisions tend to disappear. In most cases, prosecutors are referred to as "judges", and their activities acquire therefore a judicial "flavour". Such a tendency toward conflating these two roles brings about the risk that the case of the prosecution appears to the uninformed reader much like a sentence. This major source of ambiguity in press and television reports is likely to seriously undermine the core principle of presumption of innocence and, more in general, the defendants' rights to fair and unbiased proceedings (Di Federico, 1995: 234). Last but not least, the individual rights of defendants to the

protection of their reputation and privacy, even though afforded by the Constitution and the law, have been recurrently overridden by a presumed unconstrained right of the media (and the magistrates) to free speech.

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HUMAN RIGHTS DEVELOPMENT IN MOROCCO: A NEW ERA?

TOM PIERRE NAJEM

Since the death of King Hassan II and the accession of his son Mohammad VI, human rights has become a very important and highly visible subject in Morocco. This paper has two basic purposes. First, I will examine briefly what has been happening in Morocco over the past year or so with respect to the development of human rights. Second, I will attempt to analyse the current reform agenda, both with respect to the government's sincerity and extent of commitment, and with respect to the limits of its viability in practical terms, by considering the influences which have contributed to shaping the process and by looking briefly at the potential ramifications of attempting to introduce what is effectively a Western-derived corpus of human rights into the Moroccan political, economic and social contexts.

1. Introduction

Since the death of King Hassan II and the accession of his son Mohammad VI, human rights has become a very important and highly visible subject in Morocco.[1] The Moroccan government has been quite vocal about the issue, both in the domestic forum and internationally, and, perhaps in keeping with the government's wishes, a number of positive developments have received considerable attention from the international media.[2] Among a considerable number of other initiatives that might be cited, the regime has made efforts: to extend the range of personal freedoms and to consolidate the rule of law; to amend press laws to allow

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[1] King Hassan, who ruled Morocco for nearly 40 years, died in July 1999.

[2] The new King received very positive coverage from the mainstream press during his trip to the US last June, and was warmly received by President Clinton and other government officials.

greater freedom; to release political prisoners, allow the return of exiles and compensate the families of victims of past repression; to introduce measures designed to educate the population about human rights and to foster the development of a culture of human rights; and to establish co-operative relationships with international human rights organisations and host international human rights conferences.

All of these developments have been well received on the international stage. In March 2000, UN Human Rights High Commissioner, Mary Robinson, publicly praised Morocco's resolve to promote human rights and consolidate the rule of law.[3] Shortly thereafter, the Human Rights International Federation, in recognition of the regime's human rights progress, announced that it was considering holding its 34th World Congress in Morocco.[4] In early October, a Cairo seminar on human rights hailed Morocco's experience in the field, particularly with respect to the measures they have taken to introduce education on human rights issues into the schools.[5] And finally, in late October, Rabat was scheduled to host a Mediterranean conference on human rights: "Human rights, cultural identity, and social cohesion in the Mediterranean", sponsored by the Moroccan Ministry of Human Rights and the North-South Centre of the European Council.[6]

Although the development of human rights was an issue under King Hassan, particularly during the latter years of his reign,[7] the current level of activity and the commonly and openly expressed priority being given to the subject must be considered a significant point of departure with respect to Morocco's former policies. Just a few years ago the regime was heavily criticised for its human rights record by a number of international commentators. For example, in an article in Middle East International in the summer of 1997, Reinhold Leenders outlined the recent history of Morocco's

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[3] Arabic News 3/24/00

[4] Arabic News 3/23/00

[5] Arabic News 10/17/00

[6] Ibid.

[7] King Hassan was under pressure from the EU to improve Morocco's human rights record. For an account of this, see S. Virginia, Cleaning the Face of Moroccan Human Rights Abuses and Recent Developments.

human rights violations, including the torture and execution of political prisoners and the "disappearance" of about 600 political opponents. He also commented on the brutal treatment being given to members of the growing *Association des Chomeurs Diplomes* (Association of Unemployed Graduates).[8] In June of 1997, the Geneva-based International Labour Organisation placed Morocco in the suspect company of Burma, Iran, Nigeria and Sudan for violating fundamental international labour standards and interfering in union activities.[9] The renowned novelist, and long-time resident of Tangier, Paul Bowles observed: "You never know who's listening. Everyone's suspected of being a spy. It's a police state, and very heavily policed, rather like Iran under the Shah."[10]

Obviously, all of the recent, apparently quite positive, activities in the sphere of human rights are potentially very significant for Morocco's future, and deserve closer examination. However, one must also introduce a few caveats and consider a number of questions about the extent of the regime's commitment to, the motivations behind, and even the ultimate viability of, the new impetus for human rights reform. For example, it should be noted that there are still a number of issues that are clearly not on the reform agenda, and, indeed, that are not even open to discussion. These include, most significantly, the dominant role of the monarchy, the Western Sahara issue and Islamism. In addition, there are a number of problematic areas such as open criticism of government ministers and women's rights. Furthermore, although it seems that, to at least some extent, the recent developments are the result of a sincere desire on the part of the King and his government to introduce reform, it must also be recognised that a number of other factors may figure prominently in their determination to make the human rights issue a major part of their agenda.

This paper has two basic purposes. First, I will examine briefly what has been happening in Morocco over the past year or so with

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[8] Brain Edwards, "The Obscure Language of Survival" *One World News Service* 9/29/1997

[9] Ibid.

[10] Ibid.

respect to the development of human rights. Second, I will attempt to analyse the current reform agenda, both with respect to the government's sincerity and extent of commitment, and with respect to the limits of its viability in practical terms, by considering the influences which have contributed to shaping the process and by looking briefly at the potential ramifications of attempting to introduce what is effectively a Western-derived corpus of human rights into the Moroccan political, economic and social contexts.

2. Recent Human Rights Developments

2.1 The Political Process and the Rule of Law

It should be observed briefly that there were a considerable number of positive developments over the last few years of King Hassan's reign with respect to the easing of censorship and the opening of the political process generally. In 1998, for the first time, the monarch allowed the opposition parties to form a government under the leadership of Abderrahmane Youssoufi, leader of the socialist party and one-time human rights attorney. Under the new political arrangement, termed *alternance*, the monarch and his allies agreed to form a partnership with respect to governing Morocco.[11] Clearly the monarchy remained the dominant partner in the relationship, controlling all of the key ministries, including the interior ministry, and defining the major points of policy. However, the traditional opposition elements were allocated a number of important ministries, and were allowed to pursue their own policies so long as these were not greatly contrary to wishes of the King or his more powerful allies. These policies included some progress on the development of human rights, such as an easing of censorship, the release of political prisoners and some measures taken to improve the plight of workers.[12]

Since the accession of Mohammad VI, these policies have been continued, and a number of further significant developments have

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[11] For a succinct, but excellent account of the alternance system, see Remy Leveau, "Morocco at a Crossroads" *Mediterranean Politics*

[12] Ibid.

occurred that are highly likely to improve human rights in the country. To begin with, even before his accession, the new King made an effort to develop an identity as a man concerned with humanitarian issues, particularly the plight of Morocco's poor.[13] Upon ascending to the throne, he immediately made a point of including the human rights issue as a very important component of his agenda, stressing it in his first speech from the throne. Some measures were taken very quickly to reinforce the impression that this was considered a very serious priority. For example, the King established an independent commission to deal with the compensation of the families of victims of past repression. A further development, and probably one of very great significance, was the King's decision to sack the long-time Interior Minister, Driss Basri, a widely despised figure strongly associated with excessive repression during Hassan's reign. Basri was long considered the second most powerful figure in Morocco after the King, and, in fact, many people consider him to be the true architect of the political repression Moroccans have experienced over the past quarter of a century. Suffice it to say, his departure was met with great enthusiasm by many observers of the Moroccan scene. The sacking seems to have been initiated as part of the new King's general desire to make a clean break with the excesses of the past and to demonstrate, both to the Moroccan people, and to outsiders, that he is serious about developing human rights in Morocco.[14]

The government's Human Rights Minister, Mohammad Aujjar, has gone as far as claiming publicly that the changes could be described as a "white revolution" and that they were being conducted on a new concept of "authority at the service of the people" developed by the sovereign.[15] These claims perhaps exaggerated both the real scope of the changes and the extent of the government's commitment to substantive change, but a public statement of this kind once again served to highlight the change of direction initiated by the King, and to portray him as a

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[13] *The Economist* 07/31/99

[14] The sacking of the former Interior Ministry was widely reported on, and celebrated throughout Morocco.

[15] Arabic News 6/28/00

progressive and modernising ruler, both to his people and to the outside world.

2.2 Freedom of Expression and the Press

Even under Hassan II, it should be noted that Morocco had a very active press, which, judged by Middle Eastern standards, was reasonably independent of government control, as long as certain critical topics were avoided. The new King, upon acceding to the throne, expressed his desire to allow for greater freedom of expression, particularly with respect to the Moroccan press, and there are some indications that measures are being taken to revise the press laws in accordance with this objective.

For example, the Journalists' Protection Committee indicated that the accession of King Mohammad has had a positive impact on freedom of the press, noting that he has broadened the easing of censorship initiated in 1998. The general climate of openness has allowed the Moroccan press to report on a range of sensitive issues such as joblessness, human rights, and, to some extent, corruption.[16]

Early in the summer of 2000, in a discussion with members of the Arab journalists' union in Cairo, Communication Minister Larbi Messari gave assurances that press laws in Morocco would soon be revised to cancel prison penalties for crimes related to publishing, and to shift some of the authority concerning press oversight from the executive to the judiciary. He indicated that the revised laws were being drafted and would be sent to Parliament once the cabinet approved them, and also suggested that further legislation allowing for privately run television and radio stations was being developed.[17]

However, the extent of positive developments in this area should not be exaggerated. Journalists still tend to avoid reporting on subjects that might be embarrassing to the government, and a whole range of issues, including criticism of the monarchy, the Western Sahara, and Moroccan Islamism are still classifiable as forbidden areas. Partly, this is a result of a long-standing cultural practice

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[16] Arabic News 3/24/00

[17] Arabic News 6/9/00

of self-censorship, which is not likely to disappear anytime in the near future, and partly it is the result of active measures taken by the government to clamp down on reporting in some areas.

For example, in May 2000, the international press watch-dog RSF (*Reporters Sans Frontieres*) launched an appeal directly to the King about lack of press freedoms, citing the censorship of seven Moroccan and foreign newspapers, and the treatment of two journalists who were threatened with prison sentences and forbidden to practice their profession (the latter penalty apparently being a first in Moroccan history).[18] There have been a number of specific incidents that have indicated that the Moroccan government is still prepared to pounce on any press elements that report on areas that they deem to be off-limits. To cite only a few of many possible examples: On 5 February 2000, two French-language weeklies were seized by police for having reproduced, partially or wholly, the text of a memorandum from the controversial Islamist leader Sheikh Abdelssalam Yassine, which was highly critical of the former monarch. On 15 February 2000, an issue of *Jeune Afrique-L'Intelligent* was banned for containing text from a dissident Moroccan intellectual who questioned the capacity of King Mohammad to bring about real reforms and to punish those who violated human rights under the reign of his father. On 15 April, the weeklies *Le Journal* and *Assahifa*, both printed in France, were forbidden entry into Morocco because the previous issue of *Le Journal* had published an interview with the president of the Western Saharan Polisario Front. [19]

2.3 Political Prisoners

One area where there has undoubtedly been a considerable number of significant developments involves the release of prominent political prisoners, decisions concerning the return of political exiles, and, probably most significantly, the establishment of an independent commission to compensate the past victims of arbitrary imprisonment and/or their families.

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[18] RSF (*Reporters Sans Frontieres*) 4/16/00

[19] Ibid.

With respect to the release of political prisoners, there were obviously developments of considerable significance. Between his accession to the throne last summer and March of 2000, King Mohammad released some 10,000 prisoners all tolled.[20] Perhaps the most significant prisoner release was that of the Islamist leader Sheikh Yassine, who had been under house arrest for ten years, in the Spring of 2000. This was quite perceived by many as being quite important, in terms of demonstrating the government's commitment to its prisoner release policy, because Yassine is, perhaps, the most vocal critic of the regime and has called for the creation of an Islamic state in Morocco. However, it should be noted that, even though Yassine has now been released, his Islamist movement, *Al Adl Wal Ihsan*, remains illegal, and it can be assumed that the authorities are continuing to monitor his activities very closely.[21]

Concerning the return of some political exiles, there were two particularly significant developments. The first was the announcement in late 1999 that the prominent Marxist-Leninist dissident Abraham Serfaty would be allowed to return to Morocco. The second was the announcement that the family of Mehdi Ben Barka would be allowed to return. Ben Barka was an opponent of Hassan II's rule who disappeared in mysterious circumstances in 1965, amid widespread speculation that the regime had him captured and executed.[22]

Perhaps the most significant development in this area involved one of Mohammad VI's very first actions as King, the setting up of an independent commission for compensating the past victims and/or families of arbitrary imprisonment by the regime. From its inception in August of 1999 until the last deadline for receiving complaints in January of 2000, the commission handled nearly six thousand complaints related to political events, trades union cases and financial compensation for persons secretly detained or killed for their political views since Moroccan independence in 1956. Early reports indicated that 68 cases had been settled, with compensations that ranged between $100,000 and $250,000 for each claimant,

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[20] Arabia On Line 02/06/00
[21] Arabic News 05/18/00
[22] Arabia On Line 02/06/00

coming to a total of around $14 million.[23] Regarding the subject of missing persons the non-governmental Moroccan Human Rights Organisation issued a statement indicating that they were encouraged by the monarch's frank admission and candid treatment concerning the history of abuse in this area, but observed that the independent commission suffers from a number of shortcomings, and does not, in itself, constitute an adequate policy for redressing the long-standing problems relating to political detentions, etc.[24]

2.4 Human Rights Education

I already mentioned in the introductory section that a seminar on human rights in Cairo in the middle of October 2000, praised Morocco for the steps that the government has taken to introduce education on human rights into the schools. The policy this referred to was an ambitious project that targets 5.5 million pupils in Moroccan primary and secondary schools over the next four years.[25] A pilot project is currently being implemented in some schools, while the government has taken steps to begin training sessions for 4,000 teachers and education executives. A parallel initiative has been introduced to eliminate racial and sexist stereotypes from school textbooks.[26]

The Moroccan government is ostensibly committed not only to the promotion of human rights education in the short and long-terms, but also to the long-term creation of a human rights culture in Morocco. Obviously, it remains to be seen just how feasible such a goal is given Morocco's existing cultural and political circumstances.

2.5 Contact and Co-operation with International Human Rights Organisations

In order to help promote the development of human rights in Morocco, and to publicly demonstrate the regime's concern and commitment in this area, the government has established contacts

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[23] Arabic News 06/22/00
[24] Arabic News
[25] Arabic News 10/17/00
[26] Arabic News 9/11/00

and co-operative links with a number of international human rights organisations, and has either attended, or offered to host, a significant number of human rights conferences and meetings. I will cite a few prominent examples.

The most recent was the Mediterranean conference on human rights, held in Rabat at the end of October, and co-sponsored by the Moroccan government and the North-South Centre of the European Council. The conference included a number of high-profile participants, including the former Portuguese president, Mario Soares and former Spanish premier Philipe Gonzales.[27] In August, Prime Minister Youssoufi received a delegation from the Human Rights Watch to discuss women's rights.[28] In July, the Moroccan Human Rights Ministry and the Swedish Human Rights Institute of Raul Willingbourg discussed co-operation in matters dealing with human rights promotion and training.[29] Another important event, was the International Workshop on Human Rights in Geneva in March, in which, as I have already noted, UN High Commissioner for Human Rights, the former Irish president, Mary Robinson, praised Morocco's progress in the development of human rights.[30] As I also mentioned previously, the Human Rights International Federation announced that it was considering holding its 34th World Congress in Morocco, in recognition of the recent progress being made by the regime.[31] Finally, Amnesty International held a youth forum for the promotion of human rights awareness in Morocco over the summer.

2.6 Women's Rights

One of the more controversial aspects of the Moroccan government's drive to develop human rights in Morocco has to do with the proposed introduction of legislation to give women more rights, particularly in areas traditionally governed by Islamic family law. For example, the proposed legislation would ban polygamy,

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[27] Arabic News 10/17/00
[28] Arabic News 07/08/00
[29] Arabic News 06/15/00
[30] Arabic News 03/24/00
[31] Arabic News 03/23/00

would raise the minimum legal age of marriage from 14 to 18, would allow women half their husband's wealth in the event of divorce or death, and would put the right to divorce in the hands of a judge rather than the husband.[32] Obviously, all of these measures would be considered fairly minimal by Western standards, but in Morocco they have drawn a great deal of criticism, particularly from Muslim theologians who have argued that the plan would be against Islamic law. The Islamic movement was able to rally 500, 000 people for a mass demonstration in Casablanca against the proposed legislation. It could be observed that the issue was probably being used as a pretext by the Islamists, to demonstrate their potential influence to the government. The rally was timed to coincide with a government-organised rally staged in Rabat to support the women's' reform legislation. The government rally attracted only 40,000 supporters.[33]

The King managed to stay above the fray concerning this particular issue, letting the socialist government and the conservative elements argue the matter. I would note at this point however, that this is one example of the kind of Western-derived human rights issue that the government has to be very careful with, due to their potentially very unpopular and socially disruptive consequences. I will return to the consideration of this issue in the final section of the paper.

3. Human Rights Developments in Morocco: A New Era? — Some Caveats and General Observations

Obviously the list of positive initiatives presented in the last section is quite impressive, particularly given that King Mohammad has only been in power in Morocco for a little over a year.[34] However, as I have observed previously, the scope of the reforms is somewhat limited by design. Important issues such as the

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[32] Arabia On Line 03/14/00

[33] Ibid.

[34] A far more pessimistic account of the new regime can be found in K.Mezran, "Morocco after
Hassan II" *Middle East Intelligence Bulletin* vol.2, no.8 (September 5, 2000).

continuing dominance of the monarchy in the Moroccan political system, criticism of, or substantive change with respect to, the government's policies in the context of the Western Sahara conflict, and the inclusion of Islamist elements into the "legitimate" opposition, are clearly not on the reform agenda, and probably will not even be open to discussion for the foreseeable future. In addition, as the above review of developments clearly demonstrated, the government's policies even in the areas that they are avowedly committed to improving, such as freedom of the press and the resolution of issues pertaining to political prisoners, have gone only so far to date, and have been criticised by independent observers as being less than adequate. It should also be noted that there seems to be considerable popular opposition to, or at least concern about, some of the proposed reforms, such as those in the sphere of women's' rights. Furthermore, while there have been some encouraging developments in the sphere of basic political rights, whole classes of social human rights have so far been neglected. To cite just one critical comment advanced with respect to this potentially huge issue, the *AMDH* (Moroccan Human Rights Association) chairman Abderrahmane Benamar publicly indicated in June this year that a report by his organisation on human rights violations in the Garb Area of West Central Morocco highlighted the lack of government policies to guarantee rights to free education, health care, social security and employment, as provided for by the Moroccan Constitution and international conventions signed by Morocco.[35]

The point of raising these caveats is not to denigrate the welcome progress that has been made in a considerable number of areas, but rather to make some attempt to define the apparent limits of the current government's reform agenda, both with respect to the sincerity and ultimate extent of the regime's commitment to improve the human rights situation in Morocco, and with respect to the agenda's overall viability in practical terms. In this section, I will first consider the sincerity and extent of the government's commitment by looking at the different forces that have helped to shape the reform agenda. I will then proceed to consider some

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[35] Arabic News 06/09/00

factors related to the ultimate viability of the reform program in the current Moroccan political, economic and cultural contexts.

3.1 Influences Shaping the Development of Human Rights

The point that needs to be emphasised with respect to the sincerity and ultimate extent of the government's commitment to human rights reform is that the policy initiatives introduced recently were certainly not purely the result of idealistic altruism on the part of the Moroccan regime. Although one should take care not to overstate the issue by dismissing entirely the possibly quite sincere desire of the new young King and his advisers to bring about positive changes and establish a more genuine rapport between the regime and the people of Morocco, one must also recognise that a number of different forces, some relating to foreign influences and some to domestic political imperatives, also played a role in shaping the new human rights agenda.

The first influence which has undoubtedly played a quite considerable role in shaping the new reform agenda is the active impact of the ongoing globalisation process, specifically the establishment, by many Western countries, aid donors, and investors, of human rights reform as a basic precondition for unrestricted trade and full integration into the emerging world economic system. Since the end of the Cold War, it is no longer possible for countries to establish healthy trade relations with, and to attract massive development aid from, the major economic powers simply by adopting the appropriate rightist or leftist political stance. Countries that wish to be competitive in the new international economic system have to take measures to ensure potential aid donors and investors that they have sound economic potential and are politically secure in the long-term. Whether or not long-term developments will bear out the validity of the theoretical linkage, human rights reform is often perceived by Westerners as an important component of long-term political stability, and developing countries, including Morocco, have had to adjust their policies accordingly.[36]

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[36] The EU has long pressured Morocco into adopting a more liberal human rights policy. See P. Magnarella, Paul J. Middle East and North Africa: Governance, Democratization and Human Right; W. Zartman, The Political Economy of Morocco.

The second influence is the development within Morocco of a considerable concern about human rights issues among some segments of the general population. This is probably partly a result of the more passive impact of globalisation, that is, the transmission of Western cultural values into the Moroccan context that has inevitably followed both in the wake of greater economic integration, and more importantly, the late twentieth century revolution in electronic communications.[37] Unlike a number of other developing countries in the Arab and Islamic worlds, satellite communications and the Internet have not been significantly restricted in Morocco, and this could potentially have a great impact on popular values and expectations. The growing calls among segments of the population for greater rights in some areas is also probably related to developments more indigenous to the Moroccan context. Greater political awareness is a classic feature of societies that have been pursuing the kind of educational and economic development agendas that have been features of Moroccan policy for some time now. In any case, however one accounts for the origin of the increasing awareness of, and concern about, human rights issues, this is clearly a development that the Moroccan government had to respond to in some way. It might also be observed that, given the current international circumstances outlined above (i.e., with respect to the importance of improving Morocco's international profile and image in order to attract aid and investment, to develop trade relations, etc.) a policy of greater accommodation in this area was probably a more viable option than the more effective coercive policy that might have been adopted in other circumstances.

Finally, one must also consider the influence that other domestic political imperatives probably had on the development of the new human rights policy. Again, without questioning that the King's emphasis on human rights is at least partly the result of genuine conviction and concern for his people, I would suggest that the policy generally, and some of the specific measures that have been taken to advance it, probably had something to do with certain political advantages that accrued to the King as a result. To examine this point very briefly, the establishment of human rights as an important

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[37] See K. Mills, Human Rights in the Emerging Global Order: A New Sovereignty?

priority certainly has helped the new monarch to move out of his father's shadow, to add to the popular legitimacy of his regime, and to represent himself on the international stage as one of a new young generation of dynamic, progressive Arab leaders. Another general advantage of the new emphasis on human rights is that it helps to distract from some of Morocco's ongoing problems, particularly the struggling economy. In addition, to look at just one of many possible specific examples, it might be observed that the dismissal of Driss Basri from the Interior Ministry, which greatly encouraged many supporters of the human rights agenda, was almost certainly not solely motivated by this issue. In effect, that was probably an added bonus of a political move that King Mohammad would likely have considered desirable in any case, in order to eliminate a potential rival and to secure his own dominant position in the Moroccan political system from a very early stage in his reign.

3.2 Western Human Rights and the Moroccan Context

Clearly, a great deal could be written concerning the long-term viability of introducing what is effectively a Western-derived human rights corpus into the Moroccan political social and economic contexts. Because a more thorough consideration of this issue is beyond the scope of this paper, I will limit myself to introducing a few general observations here.

First, I have some serious reservations with respect to the current conventional wisdom that human rights reform contributes to political stability, and that the promotion of human rights in developing countries is therefore a practical as well as a desirable policy. One must question the extent to which the introduction of Western-style human rights alone will contribute to the stability of an otherwise closed political system. Since the Moroccan regime, for the present time at least, clearly has no desire to broaden participation in political decision-making to any great degree, the King and his government will have to carefully balance the benefits, in terms of popularity, foreign investment, etc., of any given reform, with the potential risk that it will lead to increasing demands that may become unsustainable without a complete reform of the political system.

Second, I would observe, particularly with respect to the social human rights issue, that it would hardly be just to expect the short-

term emergence of a Western-style state-welfare network in the context of a relatively disadvantaged developing economy like Morocco's. Anyone who expects that the Moroccan economy will soon be able to support the widespread provision of free education, medical care, social security, etc., is expecting too much.[38] Even Western economies are struggling with such burdens at present.

Finally, there is the question of the potentially socially disruptive content of some the Western human rights corpus when it is applied to the Moroccan cultural context. I have already alluded to the government's attempts to introduce legislation to improve women's' rights,[39] and the massive backlash against this policy.[40] If the government is intent upon pursuing this policy and other potentially controversial Western-derived human rights policies, they run the risk of creating bitter divisions in Moroccan society. Moreover, one might argue that it is not really in keeping with the spirit of human rights to forcefully impose even the most well intended policies on cultures that are, at least for the time being, fundamentally opposed to them.

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[38] For an analysis of the Moroccan economy, see C. Henry, The Mediterranean Debt Crescent: Money and Power in Algeria, Egypt, Morocco, Tunisia, and Turkey.

[39] L Brand, Women, the State, and Political Liberalization: Middle Eastern and North African Experiences.

[40] See: Washington Post 03/12/00; Panafrican News Agency 03/17/00; Arabia On Line 03/14/00.

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THE SUBJECTS OF HUMAN RIGHTS: HUMAN INDIVIDUALS AND THE HUMAN COMMUNITY

PETER SERRACINO INGLOTT

The recognition of the human rights of the individual should be complemented by the recognition of rights belonging to humanity as a whole. Human rights should not continue to be regarded as constituting a binary relation between an individual and the State, but as necessarily a ternary relation between the individual, the State and Humanity as a whole. The need to recognise humanity as a whole as a subject of human rights derives its relevance from the problems of developing human rights enforcement in the Mediterranean region, partly due to Arab-Muslim objections that the current legal treatment of human rights is based on a concept of man as an atomistic individual. Humanity as a whole would have a special type of legal personality; similar to that enjoyed by the type of human association that Roman law termed a *universitas*. The implications of this argument are illustrated by the paradigm case of property, where the human right to private property would carry with it the correlative duty not to trespass against the Common Heritage of Mankind. This notion that humanity as a whole is a subject of human rights could be further generalised to provide a rational foundation for the rights of future generations and environmental rights. The key issue of representation has to be tackled, since some individual or grouping (such as the UN General Assembly) must be considered as the representative of mankind as a whole. The philosophical foundations of this thesis rest on the claim that humans are part of an organically linked whole, including both ancestors and successors. This is both a biological and a cultural reality. Its neglect has led to such bad consequences as the disintegration of the most fundamental values of non-Western cultures under the pressure of imposed Western legal ideas, which over-emphasise the pursuit of individual interests. This conceptual framework may assist in the construction of a platform for the Euro-Mediterranean dialogue on human rights envisaged in Barcelona.

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1. Introduction: Putting the argument into focus

The main concern of this paper is putting forward the argument that the recognition of the human rights of the individual calls for the recognition of complementary rights belonging to humanity as a whole both in the light of the philosophy of man and for the sake of justice.

However, before considering the substance of the argument, it will probably be useful in the first instance to give some slight indication of why the argument is of topical importance generally throughout the world and more particularly in the Mediterranean region. Moreover, also in a preliminary way, the question of the collective rights of humanity as such (conceived of as the obverse side of the single coin – human rights – of which the more visible and established side is that of the individual) needs to be distinguished from that of group (human) rights, whatever the kind (or level) of the group (family/ethnical, cultural/voluntary, political). Although, in order to highlight the differences, the nature of the group issue (based on the strength of the analogy between physical and moral personality) is evoked through reference to a few major contributors to its discussion, it is not pursued beyond notice of its existence and importance.

On the contrary, the central theme of the paper – the indissolubility, except at traumatic cost, of individual and specific human rights – will be picked up and illustrated with reference to the theme of property and its converse and allusion to that of life and the genetic system. Then the philosophic grounds of the thesis will be laid out as concisely as possible, with a recalling of its particular relevance to the Mediterranean context in conclusion.

2. Topical and Mediterranean relevance

Although there appears to be universal acceptance of not only the Universal declaration of human rights adopted by the United Nations in 1948 but also of the two international covenants related to human rights adopted by the United Nations in 1966, this appearance is deceptive to a considerable degree.

In fact as long as there is no tribunal entrusted with the implementation of the agreed principles, it cannot be said that there is effective respect of human rights.

This assertion is made without any wish to deny the unquestionably beneficial effects of the mere declaration of principles stressed by, for instance, M-A Sinaceur in his fascinating article on "Islamic Tradition and Human Rights":

> *"For them to be proclaimed in declarations should ensure that they are honored as a promise made, which would be broken alike by failure to fulfill and by indifference. It is in this declaratory character that the contemporary aspect of Human Rights is seen at its most dynamic and productive. Herein it derives its mystic sustenance. And it is for this reason that proclaimed Human Rights are the concern of each and every one; they apply a constant pressure to facts in order that they may give rise to rights; they provide a norm against which the efficacy of legal codes may be gauged; and they compel the authorities to substantiate their faithfulness to the principles they profess. A continually renewed reflection on Human Rights is therefore necessarily bound up with a view of such rights as based on values that it does not suffice to lay down in written form, as it were lex lata, but that have to be guaranteed by recognizing by law the existence of a parallel lex ferenda which points to the need for their reformulation and the emergence of new rights."*[1]

Moreover, it is unlikely that there will be universal assent to the constitution of any tribunal similar to that set up by the Council of Europe but with worldwide jurisdiction or even with a limited pan-Mediterranean scope, before there is agreement on reviewing and improving – not rejecting or cosmetizing – the present system of exposition and codification of human rights.

The desired modifications are as various as their proponents, but it is probably true that there is one central and very widely felt difficulty. This is the firm belief that the present system has been conceived on the basis of a concept of man as an atomistic individual: undoubtedly the prevailing concept at the time of the European Enlightenment which provided the philosophic basis

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[1] In Philosophical Foundations of Human Rights, UNESCO, 1986

for the development of the current legal treatment of Human Rights.

The ground of an exclusively individualistic concept of man as an objection to the present U.N. codification of Human Rights is advanced often vehemently by Arab-Muslim critics. As Professor Joseph Mallia has written: "The ideal of a greater solidarity, the duties of the individual towards his community, the affirmation of a social function of property are frequently advanced as needed correction of a liberal and individualist vision of human rights."[2]

Perhaps the institution of two covenants i.e. the addition of a second group of so-called "economic and social" (including cultural) rights to the first group of so-called "civil and political" rights was really an attempt at meeting the criticism that the original U.N. Declaration presupposed a defective over-individualistic or at least one-sided concept of man. However the adjunction of "social and economic" rights to the "civil and political" rights of the individual does not really do anything to meet the central philosophical point of the criticism of the Enlightenment concept.

This criticism is not essentially that a human being is also a social and economic animal besides being a civil and political individual, but more basically that human beings do not only exist unlike other animals as relatively autonomous individuals, but that like all other animals, they exist also as members of a biological species. For instance in the case of human beings, it is deemed appropriate to speak of a species consciousness as well as of an individual consciousness. The implications of this double belonging of the human being, to himself and to the species, which in itself is not contested by any school of thought of which I am aware, admittedly need some considerable spelling out.[3]

At this stage of discussion it is only necessary to acknowledge that the species being of the human individual is not sufficiently recognized through the recognition of economic and social rights as

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[2] In Jose Vidal-Beneyto and Gerard de Puymege (eds), La Mediterranee : Modernite Plurielle, UNESCO, p. 260.

[3] The Kantian concept of "self-ownership" has been devastatingly attacked by Professor G.A. Cohen of Oxford University, in his book Self-ownership, Freedom and Equality, Cambridge University Press, 1995. It is not implied in the use of the word "belonging" in the present context.

well as of civil and political. Indeed, it has been cogently maintained that there was no valid basic reason but only grounds of contingent convenience for dividing human rights into these two kinds at all.[4]

The concrete contention which is being advanced here is that the criticism of the Enlightenment based approach is not to be met either by the reformulation of the terms of the usual declarations nor by the addition of other individual rights but rather by the acknowledgement of a complementary dimension of *specific* rights of humanity. This complementary dimension might be susceptible to formulation as a set of obligations or responsibilities of individual human beings to the species as a whole. It seems, however perverse to seek to formulate them as a "third generation" of individual human rights (as so-called "environmental" rights have often been referred to, following the chronicler style description of the social and economic rights as the "second generation" of human rights). There should rather be recognition that human rights should have two sides to them: the individual and the species that of each part and that of the whole humanity.

3. Excursus on moral (or collective) Personality

It is necessary to make here another preliminary point. Humanity as a whole is a grouping (if it is even permissible to use that term about a whole) of a different kind from those which have traditionally been said to have a "legal personality", where obviously the word "personality" is not being used in its usual everyday sense (meaning characters, classifiable by psychological traits) but in a special technical sense meaning "subject of rights and duties", by analogy with individual "natural" or "physical" persons.

Roman law did not only recognize the type of human association which was called a *societas*, consisting of a partnership between individuals who promised each other to condition their respective actions in terms of an agreement reached between them. It also recognized a second type of human association called "Universitas",

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[4] For instance by Nicos Valticos in "Faut-il re crire les Pactes Internationaux Relatifs aux Droits de l'Homme?" in S. Busuttil, Mainly Human Rights,Studies in Honour of J.J. Cremona, Fondation Internationale, Malta, 1999, pp. 279-291.

consisting of the "incorporation" of individuals in a collective entity with its own proper identity and capable of acting on its own. This type of association was deemed to constitute an "artificial" person and be the subject of rights and duties.[5]

It does not, of course, follow immediately that such a "person" should be the "subject" of what are today termed "human rights". However the complexities of this issue with regard to corporations as against physical human beings are perhaps better discussed in connection with the question about the rights of such collectivities as "peoples" vis-a-vis states.

In the present context only a few remarks need be made, mainly to separate this related issue from the main argument being pursued here. Of course states or analogous political entities are rightly considered *sui generis* among human associations, both by natural law as well as by social contract and other political theorists. Indeed some notorious political philosophy practitioners have considered them to be "organic", in some logically analogous sense of the word, and comparable to such primal human groupings as family and tribe in the context of discussions about human "rights". But leaving aside, at least for the moment such metaphysical theories, even well known liberal philosophers of Law such as Ronald Dworkin (the "integrity" theory) require:

> *"a particularly deep personification of the community or state... The community as a whole can be committed to principles of fairness or justice or procedural due process in some way analogous to the way particular people can be committed to convictions or ideas or projects, as if a political community really were some special kind of entity distinct from the actual people who are its citizens... I attribute moral agency and responsibility to this distinct entity. For when I speak of the community being faithful to its own principles, I do not mean its conventional or popular morality, the beliefs and convictions of most citizens. I mean that the community has its own principles it can itself honour or dishonour, that it can act in good*

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[5] See, for instance, Micheal Oakeshott, On human conduct, Oxford, 1975.

> *or bad faith, with integrity or hypocritically, just as people can... I really mean to attribute to the state or community principles that are not simply those of most of its members."*[6]

Nevertheless, because of the distinction between human beings and persons, Dworkin is clearly not to be taken as quite assimilating States to Human beings. He is using metaphorical language. It is quite another matter with human groups, which are, so to say, intermediate between the individual and the state. For instance, Professor Nathan Glazer, of Harvard University, has written a celebrated article entitled "Individual Rights against Group rights".[7] In it he argues that the Civil Rights Act of 1964 in the USA, like almost all human rights declarations, is formulated " as if the problem of discrimination is one of action against individuals". In that way it does not really provide adequate redress in a situation which is one of the violation of the (human) rights of groups.

Glazer also points out that it is not only in the language of the U.S. constitution (notoriously written under the influence of the unilaterally individualist concept of man typical of the Enlightenment) and other related legal instruments that " the problems of group prejudice" are tackled "by guaranteeing the rights of individuals"; it is also in that of liberal philosophers such as John Rawls. In his famous *A Theory of Justice,*[8] Rawls eliminates the consideration of group rights by reducing them to individual rights.

An analysis of Rawls's position is quoted from an article by Vernon Van Dyke.[9] Van Dyke argued that freedom of religion cannot be reduced to freedom of the *individual's* conscience belief and practice. It involves the freedom of a *group* as such, precisely because any *universitas* type of group has features which cannot be assigned distributively to its individual members, as perhaps no

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[6] Law's Empire, Harvard University Press, 1986, pp. 167-8.

[7] In Eugene Kamenka and Alice Erh-Soon Tay (eds), Human Rights, Arnold, London, 1978, pp. 87-103.

[8] Cambridge, Mass., 1971. Rawls actually discusses "natural duties", but says next to nothing about natural or human rights.

[9] 'Justice as Fairness: For Groups?' in the American Political Science Review, LX1X (1975). pp. 607-14.

philosopher of Law has emphasized with as much stress as Dworkin. Glazer points out that in some countries (Canada, Belgium, India, Malaysia) approaches based on group rights have been adopted.

Perhaps the answer to Glazer's query as to why the American approach has stuck so strictly both to the language (and associated procedures of vindication) of *individual* rights is precisely the belief that human rights were exclusively individual and could not belong to a group. The consequence, however, is that an individual often does not have the means to vindicate what is essentially a group right.

Glazer is actually of the opinion that groups have "human rights" only when their status is comparable to that of the state (or the family) in the sense that they are deemed to be of a kind not geared to contingent dissolution or, in other words, that they are entitled to preserve their identity when the conservation of its essential features are not ensured by the ordinary rights of common citizenship.

Clearly the issue of group rights assumes importance proportionately as cultural pluralism increases and comes to be increasingly respected as a positive human value. On this issue, the two positions can be summed up as follows:

The "individualists" who wish not to depart from the Enlightenment tradition maintain that there is a contradiction between respect for the individual and respect for the identity of cultural (possibly ethnic) groups.

The "Communitarians", on the other hand, hold that the identity of a human being is not constituted either by himself on his own or by his belonging to mankind as a whole but by his belonging to an intermediary group or community (such as a "nation" or "culture") hence, that there is a (human) right attributable to the group as such (a " droit de la communaute a la difference", as the French Canadians often put it), when for example there is a minority group besides a majority within the state (as against the other claimed alternative that used to be expressed in the dictum: every nation has the right to become a state).

To conclude this excursus, two quotations will have to suffice. Hans Joachim Tuerk has written:

> *"It would be fatal to consider the universalistic and equal respect for every individual and the recognition of group identities and particularities as an alternative. We must*

not choose between universal and particular values. We have to hold to them both. And this is not only a question of political opportunity, but also of ethics, which consists of universalized norms as well as of particular values and habits".[10]

Charles Taylor has distinguished two forms of ethics and politics:

"These forms do call for the invariance of certain rights, of course. There would be no questions of cultural differences determining the application of habeas corpus, for example. But they distinguish these fundamental rights from the broad range of immunities and presumptions of uniform treatment that have sprung up in modern cultures of judicial review. They are willing to weigh the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favour of the latter. They are thus in the end not procedural models of liberalism, but are grounded very much on judgements about what makes a good life, judgements in which the integrity of cultures has an important place".[11]

Anyhow, it should be clear that neither human associations which are unquestionably voluntary in kind, nor others like states, are on a par with humanity itself in relation to human rights. This is self-evident because the very concept of a human right is essentially that of a right appertaining to a member of humanity as such, generally exercised precisely against violations by human associations such as states. What is being argued here is that individual human rights are always qualified by the part-whole relationship which exists between a human individual and the human species, even though this relationship (not necessarily subordination) has all too often been ignored both by Enlightenment and by contemporary liberals.

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[10] 'Justice as Fairness: For Groups?' in the American Political Science Review, LX1X (1975). pp. 607-14.

[11] Multiculturalism and "the Politics of Recognition". An Essay by Charles Taylor, with commentary by Amy Geutman, Steven C.Rockefiller, Michael Walzer and Susan Wolf, Princeton 1922 (with an additional contribution by Jurgen Habermas, in the German version, Frankfurt am Main, 1993), p 61.

4. The Paradigm Case Of Property

At this point, I think that the best way of progressing the argument is through illustration, and perhaps the clearest illustration comes from the sphere of the right of property, although it can also be almost symmetrically illustrated from the right to life.

Philosophers, aware of humanity's identity as a single species of animal, have generally felt the need to justify (or at least explain) the general human practice of private appropriation of natural/ cultural resources. These resources have come to appear to belong to three kinds.

The *first* kind consists of things which are deemed to be extensions of the human body (signs of the incompletion of the human individual) such as clothes, tools and houses; because of the nature of their use, such items should be private property of every human individual (sometimes possibly family).

A *second* kind consists of things about which there could be debate as to whether they are best used and managed by individuals (or private groups) or the State or partnerships between them or as "commons".

But there is a *third* kind of thing the proper management of which clearly requires that it should never be privately appropriated (or made subject to state sovereignty) because it can only be properly used on behalf of mankind as a whole.

There has been international recognition of this third kind of resource at least in the Law of the Sea Treaty (Montego Bay, Jamaica 1982). The Treaty declares such resources to be "The Common Heritage of Mankind"- a phrase which, through the Treaty has thus acquired a technical and legal meaning.[12] Article 137 of the Treaty lays down, first that "no state or natural or juridical person shall appropriate any part" of the Area designated in the Treaty as being the Common Heritage of Mankind. Secondly "All rights in the Resources of the Area are vested in mankind as a whole on whose behalf the Authority (set up by the Treaty) shall act..."

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[12] See Arvid Pardo: The Common Heritage: Selected Papers on Ocean and World Order: 1967-74, University of Malta Press, 1975.

A great authority on International Law, the late Jean Rene Dupuy, Professor at the College de France, declares that this article undoubtedly made humanity as a whole a subject of ("sovereign") rights at international law.[13] The point which I am trying to make here is different. It is that the (human) right to private property (over certain resources) should be seen to carry with it a correlative duty: not to trespass against the Common Heritage of Mankind. In other words, the declaration of the (human) right to private property requires complementing with the declaration of the non-appropriatability of resources belonging by nature to the human species as a whole, if the two-fold being of humans, individual and specific, is to be duly recognized.

The principle of non-appropriatability of certain resources – declared moreover to be appropriately manageable only by a representative of humanity as a whole duly appointed according to International Law – has been so far most clearly enshrined in the law of the sea, but it is also invoked in other international conventions such as the so-called Moon Treaty, which was actually signed before the five-year long negotiations on the law of the sea were terminated. Besides there have been several other resources which have been claimed to belong to the Common Heritage of humanity.

Obviously there are many resources which at one time or another in history have been made subject to private or public ownership or to national sovereignty but which would otherwise have fallen under the definition of Common Heritage. For instance in a famous debate in the French Parliament, Mirabeau presented an argument to the effect that underground mineral resources should not be privately appropriated. However there can be no practical question now of reversing the past.

There are nevertheless many other resources which are still available for certification as belonging to the human species as such, including not only so-called "extra-territorial spaces"(ranging from the atmosphere and outer space to Antarctica) but also non-spatially determined resources (ranging from the genetic heritage to certain intellectual resources).

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[13] As quoted by Elisabeth Mann Borgese in The Oceanic Circle, United Nations University Press, Tokyo, 1999, p. 121.

Unfortunately there has been a quite understandable reluctance on the part of some powerful states to allow the further determination of which resources should be declared to fall under the concept of Common Heritage under International Law. Nevertheless, it seems logically clear that the principle applied to the seabed should on the ground of consistency if on no other ground be extended to at least those resources which qualify even more manifestly than the seabed as not appropriable if they are to be rationally managed.

Their recognition as such would raise the principle of the vesting of all rights over certain resources "in mankind as a whole on whose behalf" a legal representative "shall act", from application in just one concrete instance (the seabed) to a level of generality. Its incorporation in the system of human rights would result in the system taking account of a more complete and acceptable picture of the reality of human beings.

Professor Alexander Kiss, President of the European Council on Environmental Law and Vice-President of the International Council on Human Rights, has written that the concept of the Common Heritage and that of the Rights of Future Generations (which has been derived from it) "appear bound to be situated at the final meeting place of Human and Environmental Rights". He explains that: "the protection of the environment is not conceivable except in function of the future which has to be preserved for future generations". But it seems to have emerged out of the UNESCO sponsored discussions on the Charter for the Rights of Future Generations that the only solid, rational foundation for them is the recognition that there are *specific* human rights, besides individual.

Professor Kiss has noted a similarity of development between Human Rights and the Right to the Environment, actually resulting in a convergence, in a text of the Subcommission on the protection of minorities of the UN Commission on Human Rights. This text, after declaring that human rights, environmental health and security, sustainable development and peace were interdependent and indivisible, goes on to spell out the constituent elements of an "ecologically sound environment" to which it is declared every person has a right. (It actually even speaks of "fundamental rights of persons or *groups*" inhabiting certain areas in relation to those of all other persons).

Professor Kiss concludes that the similarity and convergence of

the two domains (individual human rights and environmental rights) is due "to the fact that a world-wide consensus has been reached on the fundamental character of the two domains for humanity and on the need to protect them". However, Professor Kiss, after having duly noted that, following the Stockholm Conference Declaration of 1972, which hardly amounts to more than an awareness raising exercise, the first foundation stone to be laid in the construction of international environmental law was Part X11 of the 1982 Law of the Sea Convention, goes on to note that no international legal instrument (unlike many national constitutions) has so far accepted the inclusion of environmental rights among human rights, not even the Rio declaration of 1992.

At first, they were proposed as a subdivision of the right to health, but more recently they have generally come to be proposed as having a procedural, and not substantive, nature – that is they are couched in some such formula as that " every person has a right to the conservation of the environment". Perhaps the most explicit text, the Sofia declaration of 1995, however, still does not use the formula explicitly, but spells out its threefold application in the rights ascribed to every individual to have relevant information, participation in decision making and access to judicial or administrative redress.

The almost palpable reticence and hardly concealed embarrassment with which this "new" human right is enunciated may perhaps have a similar explanation to the answer previously suggested to the query as to why there was such a sense of juridical straining and such an ineffective provision of remedial possibilities in the attempts to reduce group to individual rights. It is not being realised or admitted that the species is just as entitled to the epithet "human" as the individual and can just as logically be considered the subject of "human rights".

In reality, the "preservation" of the environment cannot be legally or logically secured in terms of rights of (living) individuals. In fact, Professor Kiss began his article by asserting very categorically that the protection of the environment was inconceivable except in terms of the rights of future generations. More precisely, it can only be justified in terms of heritage concepts, i.e. of the duty to transmit to successors what has been received from ancestors; besides, the most plausible way out of the difficulties of attributing rights to the dead and the unconceived is the recognition of the biological

unity of the species and its complementary nature with regard to its individual components.[14]

5. The Parallel Case Of Life

It is not, I think difficult to see how the parallel argument concerning life is to be developed. Each individual has the (human) right to the safe guarding of his individual life; but the health of the genetic system itself (its species-affecting properties in particular) is something to which it is humanity as a whole which is entitled against possible abuse by individuals.[15]

6. The Key Issue Of Representation

An important point to note in the quoted article from the Law of the Sea treaty is that when attributing a right and responsibility to humanity as such a representative of humanity is very clearly identified ("the Authority"). It has been said that a human right could be defined as being the right to have the possibility of possessing rights.[16] It would not be possible to attribute rights to a subject that would be incapable of exercising them. Hence a representative with some power of initiative has to be appointed.

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[14] "La protection de deux valeurs fondamentales de l'humanite': les droits de l'homme et l'environmement" in Mainly About Human Rights, op.cit. pp. 109-118 see also: E.Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, Transnational Publishers, Inc., Ardsley Hudso, N.Y. 1989; L. Vischer (ed.), Rights of Future Generations, the Right of Nature, Studies from the World Alliance of Reformed Churches, no.19; M. Golding, "Future Generations, Obligations to" in Encyclopaedia of Bioethics, W.T. Reich (ed.) Vol. I, the Free Press, 1978, pp. 507-512; R.1. Sikora and B.Barry (ed), Obligations to Future Generations, Temple University Press, Philadelphia, 1978; E. Partridge (ed.), Responsibilities to Future Generations, Prometheus Press, N.Y. 1980.

[15] See Emanuel Agius, "Patenting Life", in What Future for Future Generations? Ed by E. Agius and S Busuttil (eds), Foundation for International Studies, University of Malta, 1994, pp. 99-118, for an extensive development of the basis for this argument.

[16] For instance, by Professor Vittorio Mathieu in "Prolegomena to a Study of Human Rights from the standpoint of the International Community", in Philosophical Foundations of Human Rights, op.cit.

Without wishing to labour the point in the present context I will only allow myself to point out that according to Thomas Hobbes, in *Leviathan* (1651) the means by which "a multitude of men are made *One* person", is the institution of "representation" of the many by *One* i.e., the constitution of the sovereign whom Hobbes calls "the person of the Commonwealth". The point of interest here is not that the coming into being of a "representative" of the multitude marks the passage from brutish to civil (i.e. really human) existence but that humanity as a whole would, according to Hobbesian theory qualify to be considered a person if and only if someone were to be appointed as its representative, and Hobbes allows that "someone" to be an assembly. Consequently even in Hobbes's conceptual framework, if, say the United Nations general assembly were recognised by universal consensus and acceptance as the "representative" of humanity, it would by that very fact qualify both as the subject of rights and the possessor of the *essential* human right – viz., the ability to exercise rights in a manner analogous to that of an individual (natural) person. Hobbes is, of course, the reputed founder of what had been classically called "possessive individualism".

7. The Argument In A Nutshell

It hardly needs saying at this point that concrete illustrations of the practical implications of the thesis that human rights should not continue to be regarded as essentially a binary relation between an individual human being and a *sui generis* human group, namely the State, but as necessarily a ternary relationship, involving an individual, the State and Humanity as a whole, cannot today be simply accepted as sufficient support for the thesis. It has become necessary today to proceed in the matter of human rights, from merely (possible) pragmatic agreement on what is to be defined a human right in International Law to some degree of philosophical agreement about the *rationale* if progress is to be made. In 1948, it was possible to some extent to by-pass philosophical disagreement (at the time mainly between the Western establishment and Marxist powers, with Marx's own criticism of the Enlightenment formulation of human rights at the back of their minds). But a stage has now been reached in the world-wide conversation about human rights, involving non-western world-views and anthropologies on the one

hand, and the setting up of tribunals with judiciaries in need of clear criteria for the interpretation of principles, on the other, when dissatisfaction is bound to result if there is only vague agreement about the existence of a right without any general agreement about its fitting into a broad conceptual framework capable of trans-cultural acceptance.

It is therefore now necessary to provide in as small a nutshell as possible the philosophical argument, which is the basis for asserting that an individual human right is bound to carry with it a collective counterpart. Mohammed Allal Sinaceur has written that: "the value (of life) is absolute because the individual is in axiological terms, mankind as a whole, in itself and in the infinitude of its actualisation". Sinaceur is trying here to bring out the non separation of the individual human being and the total community of human beings which is a characteristic of Islamic thought as it is also of other non-western world views (e.g. the coincidence of atman and Brahman in Hinduism).[17]

However the relationship between the human individual and the human species cannot be simply one of identity. It is true that all animals other than the human appear to be governed by a stronger species preserving instinct than humans and that even humans are a biological species; therefore they do not exist together like a box of matches with the existence of one match completely independent of the other. Their reflexive power however, enables human beings to put individual above species interest. Nevertheless, the double pull is internal to the human being. It is therefore defective to fashion a system of human rights which does not take into full account the fact that a human individual is whatever the degree of autonomy possessed, part of an organically linked whole, including both ancestors and successors.

Not only are human beings physically constitutive of a single species, but their solidarity is especially manifest in the cultural

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[17] Gandhi has written that in the India of My Dreams, Bombay, 1947: "Life will not be a pyramid with the apex sustained by the bottom, but it will be an oceanic circle whose center will be the individual..... till at last the whole becomes one life composed of individuals.....sharing the majesty of the oceanic circle of which they are integral units."

sphere. Whatever the merits of individual genius in discoveries and innovations, hardly any progress in knowledge would be possible without the inter-generational transmission of information. Quite generally in calculating the desserts due to human individuals justice requires recognition of the fact that the bulk is due less to individual creativity than to the heritage of the species. That, in brief, is ground enough to sustain the assertion that the enunciation of human rights, if the epithet "human" is to be deserved should be in the form of a diptych, balancing the individual with the specific.

An argument with the simple appearance (even if two-phased) of that just formulated with deliberate extreme brevity is likely to seem to some banal and to others Hegelian. Banal, because the existence of the human race as a distinct species is taken by many to be a self-evident fact, as also its irreducibility to the aggregate of its individual members, whose present numbers are approximately known; however H.C. Baldry, the classical scholar, wrote a whole book to trace the emergence of the idea, in a very complex and gradual manner, from early glimmerings in Homer to the fullest perception of it reached in ancient times in Cicero. In fact it was probably easier to realise that a human being was distinguishable among known animals by his rationality than by the other necessary criterion of proof-the ability to procreate with other human beings if we can go by the history available to us of how the human species came to be distinguished from the gods on one hand and animals on the other, by the Ancient Greeks.[18] It was always a temptation to assume that there could be a human being on his own in virtue of having a "mind" or other immaterial characteristic, and occasionally one finds that it still is, but today it has become so easy to be convinced that part of what it means to have a human mind is belonging to a definite animal species that its assertion seems banal to some.

On the other hand, the philosophically erudite will be reminded of the dialectic by which Hegel sought to integrate the free individual into an organic Totality. Hegel avoided speaking of the rights of man, but spoke of those of the individual, by which Hegel

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[18] The Unity of Mankind in Greek Thought, Cambridge University Press, 1965.

wished to denote neither an abstract universal nor an embodied specimen, but man as part of the "concrete life of the State."[19] It is certainly not necessary to follow Hegel any further along this path in the present context, but it might avoid some real danger of confusion to re-emphasize at this point that the group which has been proposed all along the present discussion as necessary for the significant completion of individual human rights is not the State, national or universal, nor anything mystical, but simply humanity as a biological species with precisely those specific traits which distinguish it from the many other species who belong to the same (animal) genus.

8. The Bad Consequences Of Its Neglect

The consideration of human rights as not so much a bilateral relationship between individual citizen and State but rather as a multilateral relationship, involving at least a third actor, namely humanity, but also possibly other groups ranging from natural associations such as family and clan to cultural associations such as religions and other voluntary organisations, is not only of theoretical interest, but of very practical concern.

Many anthropologists and social observers have illustrated by numerous case-studies the fact " that imposed Western legal ideas have contributed to the disintegration of the most fundamental values by pursuing individual interests at the expense of consideration of the collective".[20] They first illustrate how, in the West, from the Age of the Enlightenment onwards, there occurred "a transition from a legal system which protects the interests of the group, the clan, to a legal system which protects the interests of the individual". For instance, in family law, while as late as 1924, it could be said in a legal textbook that: "family relations do not bring about rights proper to the individual. The focus is on the duty

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[19] See Bestrand Binoche, Critiques des Droits de l'Homme, Presses Universitaires de France, 1989m pp.82-94

[20] Rie Odgaard and Agnete Weis Bentzon, in "The Interplay Between Collective Rights and Obligations and Individual Rights" in The European Journal of Human Rights, 10, 2, December 1998, pp 105-116.

to use rights for the benefit of the family. The rights are given to make possible the fulfillment of the duties and obligations to the family", in 1993, it is said in a doctoral thesis, that the law has "changed significantly mainly by exalting the "primacy of the individual", which has "brought about a marked distillation of the family principle; the development now tends towards "a sum of individual rights."

The authors of the study then point out that although Western laws of the same individualist tendency were imposed by colonial rulers in territories as different as Greenland and Tanzania, yet in both these countries: "the family and the clan are still coherent groups which generate and uphold their own rules." Moreover, "decisions are still taken in the interest of the whole."

On the contrary, "where the state has introduced individual rights, without providing the services and fulfilling the obligations once secured by collective rights and obligations, the result has been disaster for some."

However, the two anthropologists do not recommend any "return to the precolonial situation" nor the "abolition of individual rights" but attempts "to find a third alternative". Perhaps the integration of individual and specific human rights could be the answer, although it would be too complex to seek to illustrate here the family-species nexus which makes specific human rights relevant to family issues.

9. Conclusion: Return To The Mediterranean

Finally, to return to the Mediterranean perspective, the issue of Human Rights implementation has been placed squarely in the contents of the Barcelona (1995) baskets. As Professor Mailla said: "It is not a question, definitely, of 'imposing' Human Rights (i.e a Western version on different cultures) but of rethinking them out together as a shared vector of evolution and a platform of dialogue."[21]

A conceptual framework that might be of some assistance in the construction of such a platform of dialogue is all that this

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[21] Op. cit. p.263.

contribution was intended to provide. It consists of an essentially simple idea suggested by the Mediterranean context to produce an exemplary result in the global context. As Sinaceur has brilliantly written:

> *"...When values that have originated in one mode of discourse are allowed to take up their abode in another without losing any of their clarity or distinctness, then new paths are opened up that can be explored in all their ramifications without fear of going astray or losing one's way: for by this means communication among all systems, all spheres, is grounded in the foliated structures of each civilisation"*[22]

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[22] Op. cit. p.219.

FREEDOM OF RELIGION, APOSTASY AND HUMAN RIGHTS: AN APPRAISAL

ABDEL SALAM SIDAHMED

The issue of apostasy is closely linked to the dispute over the shari'a as Islamists contend that under its rule an apostate should be killed. Consequently, they contend that as punishment of apostates is a religious duty, then article 18 of the UDHR which gives Muslims the right to change their religion, ie become apostates, is indeed not compatible with Islam. I would argue here that the religious foundations of this position are not as straightforward as it seems; that there is no clear cut rationale behind apostasy punishment, and that it may after all be in the interest of Muslims to endorse the principle of religious freedom as formulated in Article 18 of the UDHR.

1. Introduction

As the human rights agenda assumed greater importance in recent years, a recurrent debate centring around the universality of these rights and the possibility of their application in all cultural milieus kept unfolding at various levels and forums. The occasion of the 50th anniversary of the Universal Declaration of Human Rights (UDHR) (1948 -1998), seems to have re-focused once again the attention on this debate. Doubts about, and challenges to the universality of the Universal Declaration are being cast from various corners. Our concern here is with the Islamic context of this debate.

By the Islamic context I mean Islam itself as a religious and ideological framework, and the geo-political entity(s) which make up the predominantly Muslim societies, and the corresponding religious and cultural correlations of both. Within this context there are common terms of reference grounded primarily on the shared faith of Islam including certain aspects of its history and polity. On the other hand, however, Muslims as individuals, communities or countries are indeed characterised by significant diversities

owning to their differing historical experiences, divergent local cultures and influences, and the way they associate with and interpret Islam.

It is within this framework that the debate on Islam and human rights must be constructed and addressed. As for the substance of the debate itself, it touches first on the divergent philosophical foundations between the Islamic values and morality, and the values which underlie the principles contained in the UDHR. In this regard it has been argued that the UDHR as a product of the Western liberal tradition is inherently incompatible with the divinely ordained Islamic faith. Furthermore, while the former emphasises rights, the latter is primarily concerned with duties of the individual members of the Muslim community towards themselves and towards *Allah* who has a monopoly of rights.

Although these points are constantly made in theoretical debate, this wholesale approach misleads rather than clarifies. It is important at the outset to address the question of who speaks in the name of Islam. For the purposes of this article I will concentrate here on two parties: governments of Muslim countries on the one hand; and the leaders and activists of Islamist movements on the other.

Owing to their divergent political structures and ideological orientations the governments of Muslim countries do not share a uniform position towards human rights. In this regard one must first point out those governments which are engaged in a process of Islamicization of state and society (such as Iran and Sudan), or which maintain traditional systems of shari'a based legislation (such as Saudi Arabia) and which are likely to invoke Islam as a pretext to curtail the scope of rights enjoyed by their citizens. Yet, reservations on the basis of cultural relativism are increasingly raised effectively by all governments of Muslim countries, secular states included, mostly to deflect criticisms of human rights violations. The same pretext of cultural particularity is sometimes also deployed to express reservations on particular articles of the UDHR or to decline commitments to certain international standards or UN resolutions (such as the ones pertaining to women's rights).

Notwithstanding degrees of variation between them, a common element among Islamist groups, is their claim to represent the cultural authenticity of Muslims and hence their insistence on a

distinct discourse devoid of secular underpinnings. In this context their views on human rights seem to be fluctuating between an outright rejection of the whole scheme as originated in Western culture and the claim that Islam is a more suitable framework for human rights protection and promotion. In general the views of contemporary Islamist on human rights may be summarized along the following lines:

- Islam knew human rights in theory and practice some fourteen centuries before the West;
- The *universality* of the Universal Declaration of Human Rights is questionable as it is just a product of western culture and philosophy;
- The West, which claims to be the champion of human rights, has double standards[1].

Although these and similar points are constantly made – by both governments and Islamist groups – in theoretical debates and political disputes, the reality is somehow different. For all practical purposes, the majority of Muslim states joined the family of nations without reservation to the UDHR and many of them subsequently accepted to become parties to the UN mechanisms of human rights protection. Likewise the Islamist movements which rose in prominence during the last two decades or so, did not campaign for their countries' repudiation of the UDHR and the rest of the human rights treaties. Rather, as most of these movements are primarily opposed to their respective governments and are at the receiving end of state arbitrariness, they stand to gain from these mechanisms despite their Western origin and framework.

In practical/pragmatic terms therefore, the UDHR seems acceptable to Muslim leaders and activists, notwithstanding the theoretical reservations outlined above. However, there are objections to particular articles, which are regarded as incompatible with Islam. The number of such articles differs depending on the

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[1] Rudwan Zeyadah: *al-Islamyyun wa huquq al-inssan* (Islamists and Human rights) *al-Mustaqbal a-'Arabi, markazdirassat al-Wahda al-'arabiyya*, See also Ann Elizabeth Mayer: Islam and Human Rights, Westview Press, Boulder San Francisco, 1991 for and insight in the some Islamist human rights projects.

ideological orientation of the disputants[2]. Yet, there are two articles of the UDHR – 16 and 18 – which are regarded as incompatible with Islam by the majority of Islamist leaders, extremists and moderates alike. In this essay I will be addressing the controversy-surrounding article 18.[3]

Article 18 of the Universal Declaration of Human Rights states:

> "Everyone has the right to freedom of thought, conscience and religion; this right *includes freedom to change his religion or belief*, and freedom either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice worship and observance."(Emphasis added).

During the drafting process of the UDHR 1948, the representative of Saudi Arabia expressed his reservation regarding the formulation of article 18 and was initially supported by some representatives of other Muslim countries present at the time. Their preoccupation related less to the issue of changing one's religion and more to the danger of opening the door for Christian missionaries, thereby increasing the interference in internal affairs of Muslim countries[4]. Currently, for some Muslims engaged in debates about the universality of human rights, and for members of Islamist groups in particular, this article is not compatible with Islam for religious reasons. The underlying argument for this incompatibility is that it is not acceptable for a Muslim to change his/her religion after embracing Islam. Such an act is generally referred to as

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[2] According to some views there are at least five articles in the UDHR: articles 4, 5, 16, 18, and 19, which apparently contradict Islamic injunctions. See al-Sadiq al-Mahdi: a paper presented to the seminar on *Islamic Perspectives on the UDHR*, November 1998, Geneva. Al-Mahdi, leader of the Sudanese Umma party (an Islamic oriented party) and former Prime Minister of the Sudan believes in the compatibility between Islamic obligations and human rights.

[3] Article 16 of the UDHR states: *"Men and women of full age, without any limitation due to race nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution"*. Muslims who oppose the provision of this article argue that in Islam while a Muslim man can marry a Christian or Jewish woman, a Muslim woman may not marry a follower of another religion, and that men and women do not have the seem rights with regard to divorce.

apostasy, which is considered, at least for some Muslims, a crime punishable by death. This view seems to have gained more popularity with the rise of Islamist movements, which became the main opposition groups contending for political power in many Middle Eastern countries. An important feature of the dispute between Islamist opposition groups and their respective governments are the persistent campaigns of the former for the application of Islamic shari'a laws. The issue of apostasy is closely linked to the dispute over the shari'a, as Islamists contend that under its rule an apostate should be killed. Consequently, they contend that as punishment of apostates is a religious duty, then article 18 of the UDHR, which gives Muslims the right to change their religion, ie become apostates, is indeed not compatible with Islam.

The issue is not just an academic dispute but something that is closely linked to practical matters pertaining to law and society in contemporary Muslim societies and in particular linked to issues of shari'a application. Consequently, punishment for apostasy is either explicitly or implicitly provided for in Muslim countries which follow shari'a-based legislation[5].

I would argue here that the religious foundations of this position are not as straightforward as they seem; that there is no clear cut rationale behind apostasy punishment, and that it may after all be in the interest of Muslims to endorse the principle of religious freedom as formulated in Article 18 of the UDHR.

2. Jurisprudential and political considerations

Apostasy (Arabic: *ridda*, or irtidad), refers to the act of renouncing Islam after having embraced it or for a born Muslim to renounce to Islam either explicitly or by implication. It is generally believed that although Islam does not compel any

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[4] See Asbjorn Eide, et al (ed): The Universal Decleration of Human Rights: A Commentary, Scandinavian University Press, 1992: p 265.

[5] Article 13 of the Sudan Criminal Code, 1991 provides for apostasy punishment. Other countries like Iran seem to inflict punishment for apostasy without a codified provision in the penal code. See the example of the Baha'is below.

individual to embrace Islam, once one becomes a Muslim they are not allowed to forsake it.

Although there is no explicit Quranic injunction which specifies a particular *worldly* penalty for apostasy, the overriding opinion of traditional Islamic jurisprudence was that an apostate should be killed after allowing him/her time to repent. The jurists tended to support such a ruling by reference to certain prophetic traditions such as: "Whosoever changes his religion, slay him"; and "the blood of a fellow Muslim should never be shed except in three cases: That of the [married] adulterer, the murderer and whoever forsake the religion of Islam"[6]. Whether these traditions are authentic or not is beside the point here. What matters is that the Islamic jurisprudence, which developed during the classical era of Islam, seems to have agreed, in theory at least, that apostasy is a crime punishable by death. This position seemed consistent with a jurisprudence that was the product of a political Islamic order with imperial domination, as well as a product of its own time when political boundaries were to a great extent synonymous with religious boundaries.

Such has been the consensus of the traditional jurists in principle. In practice, however, execution for apostasy had rarely been invoked throughout the history of Islam until the punishment was abolished by the Ottoman Empire, which was also the seat of the Islamic Caliphate at the time. (1844 AD (1260 AH).[7] On 21 March 1844, sultan Abdul-Majid decreed that "The Sublime Porte engages to take effectual measures to prevent henceforth the death of the Christian who is an apostate". The decision was apparently in response to pressure from the Ambassadors of Britain, France and Russia following the execution of an Armenian youth in 1843 in Constantinpole on grounds of apostasy (S. M. Zewemer, *The Law of Apostasy in Islam*, The Christian Literature Society for India, 1924: pp 23-24).

Modern and contemporary Muslims disagree on the manner of

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[6] See S A. Rahman: Punishment of Apostasy in Islam, Kitabbavan, New Delhi, 1996: pp 56ff

[7] Cyril Glasse: The Concise Encyclopaedia of Islam, Harper San Francisco, 1989: p44.

classification of the penalty for apostasy within the scheme of shari'a criminal justice and whether it is to be classified as a hadd sanction (specific penalties provided for in the Qur'an), or a'uqubah ta'zeeriyya (a discretional penalty which is not categorically provided for in the Qur'an, or where the evidence is lacking in a hadd offence)[8]. In the absence of a categorical Quranic sanction, some Muslim scholars argue that the penalty for apostasy is only discretional to be inflicted by the ruler or judge as appropriate. Accordingly, this school of thought tends to argue that an apostate should be killed only if he declares war on Muslims, and not just on grounds of forsaking Islam without resort to force [9]. Others argue that an apostate should be killed on the authority of the prophetic tradition and in view of the consensus of classical jurisprudence.

Proponents of apostasy punishment tend also to quote from the Qur'an verses which deal with apostasy and seek to interpret them as imposing punishment for apostasy in this world as well as in the Hereafter[10]. Opponents of the death penalty for apostasy, however, tend to argue that although the Qur'an spoke about apostates in a very harsh way, there are numerous verses which emphasise freedom of choice, non-compulsion, and that in the end all human beings will be judged individually. Therefore, those who argue in favour of *ridda* punishment by quoting from the Prophetic traditions or referring to the verses which speak harshly about apostates are confronted with counter quotes from those who oppose such a position[11].

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[8] S Safwat: *'Offences and Penalties in Islamic Law'*, Islamic Quarterly, pp 149ff

[9] M S. *al-'Awa: al-haqq fil ta'beer* (Freedom of Expression), Dar al-Shruruq, Cairo, 1998.

[10] See for example *al-Mukashfi Taha al-Kabbashi: al-Ridda wa Muhakamat Mahmoud M Taha fil al-Sudan* (Apostasy and the Trial of Mahmoud Muhammad Taha in the Sudan) Dar al-fjker, Khartoum, no date.

[11] S A Rahman argues:
"... [N]ot only is there no punishment for apostasy provided in the Book but that the word of God clearly envisages the natural death of the apostate. He will be punished only in the Hereafter. The Qur'an also visualises the possibility of repeated apostasies by a person, thus negativing the justification or necessity of enforcing the punishment of death on a person who declines to revert to Islam within a limited time" Rahman: Punishment of apostasy pp

Religious and jurisprudential controversies apart, it may be useful to ask whether it is justified for the community of Muslims to consider it crucial to kill a Muslim who decides to adopt another religion or become an atheist. In addressing this question one should try to look at the possible implications of apostasy on the community of Muslims in today's world.

Islamic legislation covers two dimensions: the relationship between God and human beings as individuals, and the relationships between human beings themselves as a community. The first class of legislation regulates matters of worship (*ibadat*), while the second regulates inter-community matters covering issues of civil transactions and criminal justice. Although, the question of apostasy is essentially a matter relating to the first dimension ie the Man-God relationship, its punishment in this world is a matter for the community. So what are the implications of an individual becoming an apostate on the community of Muslims? Unlike other offences punishable under *al-hudud* or *al-qasas* there are no direct physical implications for apostasy. A Muslim who turns into a non-Muslim and declares him/herself as such without any attempt to convert others would have affected the community of Muslims only in terms of reducing its number by one. Indeed his/her action may be deplorable by the rest of the community, but on what logical grounds could such a person be incriminated and punished!

Again if the same person attempts to convince other Muslims, albeit without resort to force or any controversial method, to follow his/her example, the matter would remain in the intellectual/theological domain and concerned members of the Muslim community can mount a counter campaign without resort to violence either. However, if a person who turned into a non-Muslim attempts to win others by force or other unlawful means, the natural course of action for the state or community in question is to try to stop him/her by all necessary means. Yet, the offence in this case would not necessarily be the act of apostasy itself, but the means chosen by the apostate to convert others to his/her new creed.

Sometimes it is argued that an apostate should be killed on the ground of having committed the crime of treason, as his act of forsaking Islam can only be interpreted as such for someone who decided to desert the rest of the community and go

astray[12]. This is perhaps an attempt to forward a 'modern' justification to the apostasy punishment, which essentially rests on pre-modern jurisprudential tradition. Yet, it removes the rationale behind apostasy punishment from the religious to the political domain. In effect that is what the apostasy punishment is all about in reality: a political punishment usually pursued by the state either in defence of its own version of Islam, or of the interests of its power holders, or both. Indeed, even during the classical era of Islam, punishment of apostates has been primarily guided by political rather than religious considerations. Such was the case of the "apostasy wars" of the early Islamic period, which are often cited as the more authoritative examples of apostasy punishment[13].

3. Who is the apostate?

According to traditional Islamic Jurisprudence a Muslim would be declared an apostate if s/he explicitly renounced Islam, has expressed disbelief by words or deeds either explicitly or by necessary implication, or has repudiated what is *necessarily* known to be part of Islamic religion [*ma 'ulima min ad-Din b'l darurah].* An example of a contemporary and codified definition of apostasy may be found in the shari'a criminal bill enacted by the Legislature of the State of Kelantan in Malaysia in 1994:

> (1) Irtidad is any act done or any word uttered by a Muslim who is a mukallaf, being act or word which according to Syraiah Law [shari'a], affects or which is against the 'aqidah (belief) in Islamic religion: provided that such an act is done or such word is uttered intentionally, voluntarily and knowingly without any compulsion by anyone or by circumstances.

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[12] Hyder I. *'Ali: al-Tayrat al-Islamiyya wa qadiyyat al-dimoqratiyya* (Islamist Movements and the Question of Democracy), markaz Dirassat al-Wahda al-'arabiyya, Beirut, 1996: p181

[13] Following the death of prophet Muhammad (632 AD) a number of tribes, particularly in Southern Arabia, refused to pay *zakah*, alms -in-tax, to the Prophets successor, Abu Bakr and rejected the authority of Medina. They were declared apostates and fought until the authority of the caliphate prevailed.

(2) The acts or the words which affect the 'aqidah (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to be known and believed by every Muslim as part of his general knowledge in being a Muslim, such as matters pertaining to Rukun Islam (Pillars of Islam), Rukun Iman (Articles of Faith) and matters of halal (the allowable or the lawful) or haram (the prohibited or the unlawful)[14].

A straightforward apostate is therefore a person who converts to another religion or become an atheist or non-believer. Other types of apostates are individuals who may be regarded as such by fellow Muslims because of the way they interpret Islam which is then taken as denying what is *necessarily* known to be part of Islam. Accordingly one may classify possible apostates as:

a) A non-Muslim who converts to Islam and then forsakes it after a reasonable period of time;
b) A Muslim by birth who after consideration choose to become a non-Muslim,
or;
c) A Muslim who adopts a particular interpretation of Islam and its main sources which is regarded by others as heretical or a repudiation of what is necessarily known to be part of Islamic religion.

Let us try to examine these categories further. The first category relates to the place of Islam in a multi-religious milieu and touches on the all important question of the relationship between Muslims and non-Muslims. Essentially it highlights the principles of freedom of religion and worship-principles in relation to which contemporary Muslims are usually at pains in asserting that they are well protected under an Islamic order. Hence, if as all Islamic scholars and activists would agree, Islam does not compel anyone to become

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[14] Clause 23 of the *Kelantan Syriah Criminal Code (II) bill 1993*, Reproduced as appendix 1 in Rose Ismail (ed): Hudud in Malaysia: The issues at Stake, Kuala Lumpur, 1995: pp 105ff

a Muslim, then on what grounds would it prohibit a person from leaving it. This question assumes a particular importance in societies where Muslims represent a majority, since it raises issues touching on the principle of equality before the law of all citizens, regardless of their religious affiliations. Yet, as is clearly reflected by the apostasy punishment, a non-Muslim is welcome to convert to Islam, but is not allowed to forsake it. Neither is a Muslim allowed to convert to another religion. If such logic is justifiable in the eyes of Muslims on grounds that Islam is inherently better than other religions, it is hardly acceptable to followers of these religions or to secularists. Rather, it perpetuates the image that Islam is a creed, which seeks to protect the community of its followers by force and coercion. A more plausible position therefore is the suggestion that the same spirit, which governs the act of conversion to Islam -free will and choice -, should also regulate the continuity in the faith. Otherwise the postulation that there is no compulsion in Islam becomes an empty phrase[15].

Moving to the second category, apostasy of a born Muslim: would a person born to a Muslim family and choosing to become a non-Muslim be regarded as an apostate? If so, on what grounds? Again this question raises the possibility of contravention with the fundamental principle of non-compulsion in Islam. If Islam does not compel any person to become a Muslim, and does not allow the killing of a person simply because s/he is not a Muslim, then there is freedom of choice in Islam. Consequently, it seems reasonable to argue that a person who has not chosen his/her religion as s/he has been born into a Muslim household, but then choses to become a non-Muslim out of his/her own accord and after attaining adulthood is just practising his/her right of choice. Otherwise why should a non-Muslim who chooses *not to become a Muslim* be permitted to do so, while a born Muslim who *chooses to become a non-Muslim* be punished?

An example of apostasy converts is the case of the Baha'is in Iran. The Baha'i is a religious sect breakaway from Islam who apparently adhere to certain views that are regarded as un-Islamic

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[15] See Abdullahi A An-Na'im: Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law, Syracuse, Syracuse University Press, 1990

by the followers of mainstream Islam. The Baha'i faith is not recognized as one of the legitimate religions under the Iranian constitution. Members of the Baha'i community have been subjected to continuous harassment and persecution since the establishment of the Islamic Republic of Iran in 1979, and over 200 Baha'is were executed mostly during the 1980s.[16]

Significantly, however, the Iranian authorities never admitted that the Baha'is have been prosecuted because of their religious beliefs as apostates but for other 'secular' criminal political offences such as espionage and subversive activities. The apostasy element emerged when these mostly trumped up charges, were dropped where accused Baha'is were willing to repent and proclaim their adherence to Islam[17]. In other cases charges of apostasy were pressed by the state prosecution when there appeared to be insufficient evidence to back up charges of secular political crimes.[18]

The insistence of the Iranian Establishment in denying the fact that Baha'is are persecuted because of their religious beliefs points to the difficulty of applying the apostasy punishment and the immense problems that such a penalty may create for the concerned state with regard to contemporary international law. On the other hand, the persecution of the followers of Baha'i faith in contemporary Iran demonstrates that even descendants of people who were regarded as apostates from Islam may themselves be liable to apostasy punishment. The principle here resembles the same one which used to govern the status of slaves in classical jurisprudence; namely that the descendants of slaves are slaves.

To sum up this part, it is indeed impossible to assert the principle

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[16] Amnesty International: *Iran:* Dhabihullah Mahrame Prisoner of Conscience (AI Index MDE 13/34/96), October 1996: p2

[17] Ann Elizabeth Mayer: Islam and Human Rights, p178

[18] An *Urgent Action* issued by Amnesty International on 30 January 1997 called for appeals on behalf of the Iranian citizen Musa Talibi who was sentenced to death in July 1996. The document states that Musa Talibi who was arrested in June 1994 on unknown charges was initially sentenced to 10 years, and then to 18 months' imprisonment following a re-trial. However, the prosecution objected to this lighter sentence on the grounds that Musa Talibi was an apostate who should be punished by death.

of freedom of religion while at the same time maintaining apostasy punishment.

4. Interpretation of Islam

Charges of apostasy based on divergent views with regard to interpretation of Islam, the implications of its message in this or that aspect of life, or interpretation of its main sources such as the Qur'an and the Prophetic traditions, are the commonest forms of apostasy charges. The main question associated with the problem of apostasy on grounds of varying interpretations of Islam, is who has the authority to decide on what constitutes true Islam and the correct interpretation of its main texts, particularly in today's world?

From the classical period of Islam onwards, there were various schools of thought and groups built around differing views and interpretations of Islam. Charges of infidelity were somehow common among followers of various groups and sects, though incidents of individuals who were executed on charges of apostasy were rather few [19]. Nonetheless, all were operating within the framework of a more or less universally accepted Islamic order. Dissenting opinions were therefore either tolerated, rejected or penalized in accordance with the wishes of the political authority at the time – the Caliphate.

In the contemporary world things are more complicated than just the prevalence of divergent views and interpretations of Islam within a generally accepted Islamic order. In today's world Muslims are generally operating within the context of a secular international order and governed by the secular entities of their respective nation-states. Responses to such a state of affairs may vary but one can identify three groups: Secularists, or people who generally endorse secular institutions and regulations of state and society; second the Islamists who call for comprehensive Islamization of state and society, and finally, Reformists who try to strike a compromise or a balance between the dominant secular institutions and the Islamic heritage and teachings.

It is within this context that the question of apostasy may arise,

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[19] *Concise Encyclopaedia of Islam*, p. 44.

particularly in areas such as the role of Islam in public life, or how its main textual sources are interpreted. Charges of apostasy are normally advanced by Islamists against secularists, and in some cases even against the reformists' attempts to come to terms with present day realities. Their main contention is that these are people who are holding views that can only be regarded as implying infidelity, or who have denied what is necessarily known to be part of Islam. The main problem here is where one draws the line. What is necessarily known to be part of religion is sometimes stretched to include such things as the immediate implementation of shari'a law, particularly in criminal justice and /or the state's own brand of Islam. Hence, a secularist who endorses application of secular laws, or a reformist who holds dissenting views regarding the shar'ia law and its implementation may be found guilty of apostasy in the eyes of Islamists. In this connection charges of apostasy were actually mounted by proponents of shari'a application to silence their opponents, hence equating their own legalistic projects with the totality of Islam[20].

Last but not least, who has the right to pass verdicts of apostasy and to implement its punishment? Is it the political authorities in the respective Muslim countries, the religious institutions (such as the *'ulama* (jurists), or al-Azhar [the most renowned institution of Islamic learning in the Sunni world), or are they the Islamist groups who appropriated for themselves the prerogatives of champions of true Islam and who advocate the immediate application of shari'a. Although, each of the above claims a certain legitimacy in representing the community of Muslims in matters of religion as well as other matters, each has a deficiency of a sort.

The legitimacy of the respective political authorities is challenged in a number of countries and their religious credentials in particular are questionable. The religious institutions on the other hand are accused either of succumbing to the will of those in power, or of clinging to a traditionalist and outdated view of Islam, and therefore not equipped to pass an appropriate judgement. In any event they do not have the necessary authority to impose their verdict. The Islamist groups, diverse as they may be are mostly engaged in a

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[20] See *al-Mukashfi, al-Ridda*, pp. 19/20; Rose Ismail, Hudud, pp. 19/20.

political dispute and the majority of them are likely to invoke charges of apostasy mostly in relation to their own interpretations of Islam which are not necessarily shared by the majority of Muslims.

Nonetheless, as the following examples will reflect, charges of apostasy are not just verbally pronounced but actively pursued resulting in grave consequences on the individuals in question.

5. Examples of contemporary cases of apostasy

a) **Mahmoud Muhammad Taha**, a Sudanese religious reformist leader, was executed on charges of apostasy on 18 January 1985. In December 1984 the Repulican Brothers group, a neo-Islamist party founded and led by Taha, issued a leaflet criticizing the enforcement of the shari'a penalties in the Sudan by the then president Ja'far Nimeiri in September 1983.[21] Following the distribution of the leaflet Mahmud M Taha and four of his followers who happened to be around were arrested and charged with the misdemeanour of incitement of disturbance of public order; but the charge was increased by the Minister of Criminal Affairs to the capital offence of undermining the constitution and waging war against the state, – an offence which was punishable by death. The whole process was accomplished in less than two weeks. Mamud Muhammad Taha and his co-accused were arrested on 7 January 1985 sentenced by the Umdurman Criminal Court to death on 8 January, the sentence was confirmed by the Special Criminal Court of Appeal on 15 January, endorsed by the president of the Republic on 17 January and Mahmud M Taha was hanged in public on 18 January 1985.[22]

The whole trial was indeed a grossly unfair and politically motivated one. However what concerns us here is the apostasy charge which provided the basis of the execution of

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[21] See *al-Mukashfi, al-Ridda*, pp. 167ff

[22] For more on the incident and Taha's ideas see *Abdullah An-Na'im:* 'The Islamic law of Apostasy And its Modern Applicability' Religion (1986) 16, pp. 197-224.

this 76 year old reformist Muslim, and led to the imposition of a ban on his books and organization. The apostasy charge was not mentioned at all in the indictment, and was only implicit in the verdict of the Omdurman Criminal Court which based its ruling on the defendants' "peculiar interpretation of Islam" and gave them time to repent. In its confirmation of the sentence the Criminal Court of Appeal laboured mainly on the apostasy charges and gave its verdict accordingly. The court argued that Mahmoud M Taha was guilty both by his sayings and "deviationist views" which "are known to everybody", and by his deeds such as the fact that he does not pray. More specifically, the court argued that Taha's views which claimed that the shari'a, as known and practised during the time of Prophet Muhammad, is incapable of solving the problems of the 20th century, should be taken as sheer heresy.

b) **Nasr Abu Zeid** – In 1995 the Cairo Court of Appeal, in Egypt ruled that Nasr Hamid Abu Zeid, a university lecturer and a writer, should be divorced from his wife Ibtehal Younes on the grounds that he has been found guilty of apostasy and as such could not be lawfully married to a Muslim woman. The case had originally been raised by some individuals before a court in Gezza, which rejected it on 27 January 1994, and hence came the appeal. The ruling was upheld by the Court of Cassation on 5 August 1996. Therefore the verdict became final as it has been endorsed at the highest judicial level.

Nasr Abu Zeid, who was a professor of Arabic and Quranic studies in the faculty of Arts of the University of Cairo, has published a number of works on Islam and contemporary Islamism. His main publication which provoked wide controversy and eventually led to apostasy charges against him was his book *mafhum al-Nass – dirassah fi 'ulum al-Qur'an* (What can be understood from the Text – A study in the Quranic Sciences) which was first published in 1993.

Both Courts which looked into Abu Zeid's case reviewed extracts of his books and research studies concerning the main textual sources of Islam; Qur'an and the prophetic Tradition, and concluded that he has interpreted these texts in a way that can only be regarded as un-Islamic. Accordingly

the verdict was that Abu Zeid has been found guilty of apostasy, *murtad*, and as such should be separated from his wife[23].

d) **Salman Rushdi** – In September 1988 Salman Rushdi published a novel entitled "Satanic Verses". The novel contains certain references and analogies, which were regarded by the majority of Muslims as insulting to Islam and Muslims. Demonstrations were staged by Muslims in the UK as well as elsewhere calling for the book to be banned and its author penalized. On 14 February 1989 the late Ayotallah Khomeini of Iran issued a *fatwa* calling on Muslims to kill Salman Rushdi as an apostate. In February 1997 the Iranian charitable Foundation 15 *khordad* was reported to have increased the reward for the murder of Salman Rushdie to $ 2.5 million. The head of the foundation Ayotallah shaykh Hassan Sanei, a senior member of the religious establishment and personal representative of the leader of the Islamic Republic Ali Khameini, was reported to have declared that anyone who killed the "apostate" writer could claim the reward, including non-Muslims and his bodyguards[24].

After the *fatwa*, a number of individuals lost their lives or were the targets of attempted murders because of their connection with "Satanic Verses", as in the case of the Japanese translator Hitoshi Igarashi, and the Italian translator Ettore Capriolo who were stabbed in their respective countries in July 1991. The former died instantly while the latter suffered serious injuries. In 1993 the Norwegian publisher of the book William Nygraad, survived an attempt on his life. Salman Rushdie himself has been living under constant police protection since the time of the *fatwa*.

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[23] A summary of Abu Zeid's court cases may be found in M. Salim al-Awa, *huryyat al-ta'beer*.; cf Johannes Jansen, The Dual Nature of Islamic Fundamentalism, Hurst and Company, London, 1997: pp110-13.

[24] See Amnesty International, Iran: Eight Years of Death Threats: Salman Rushdie (A1 Index 13/17/97), London, May 1997.

6. Reflections

Both cases of Taha and Abu Zeid were obviously linked to their respective attempts of Islamic reform, each in his own way and methodology. While Taha was the founder of a movement, Abu Zeid had mainly worked within the confines of the intellectual and academic sphere. Yet, despite their divergent social and political background, both aimed to reconstruct a concept of Islam, which is more compatible with the notions of human rights, equality, women's rights etc. However, what is at issue here is not the substance of their ideas but the response generated by their unorthodox interpretation of the main textual sources of Islam. The fact that both were prosecuted shows that very little room is allowed for differing views or approaches, which seek to look beyond the literalist meaning of the Scripture.

Indeed people are bound to differ with regard to interpretation of the primary texts of Islam and the question of religious reform, but which authority is entitled to pass judgement on these views and on what ground?

The examples of Taha and Abu Zeid show that apostasy charges are often used for political purposes. The trial of M Taha and his followers was clearly a political one with direct involvement of the ruling establishment at the highest level. In the Abu Zeid case, although the political authority was not behind the prosecution, the case was nevertheless part of the dispute between the Islamist groups and their opponents. In their attempts to silence those who disagree with their version or interpretation of Islam, some groups tended to charge others with infidelity, which for them is punishable by death. Although the case against Abu Zeid was a civil one concerning the separation between him and his wife, the verdict of apostasy was in effect an incitement to the fanatics to assassinate him. This is not a mere speculation. In 1992, Faraj Fouda, another Egyptian secularist and a writer known for his relentless opposition to Islamism was assassinated by a fanatic member of one of these groups.[25]

If the incitement to murder was implicit in the case of Abu Zeid, it was directly pronounced by the highest political and religious

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[25] See Johannes Jansen, The Dual Nature of Islamic Fundamentalism, pp113ff.

authority in a Muslim country, Iran, in the case of Salman Rushdie. Indeed one may understand that the majority of Muslims all over the world were outraged by the Satanic Verses, and that the book has been banned in all Muslim countries, but what was the rationale behind seeking the author's head? If the rationale was the substance of his book, then this could have been addressed otherwise, and it was in fact addressed by countless writings and responses. However, if the grounds for seeking punishment of the author was the fact that he was a Muslim, what then would be the position if the same book had been written by a non-Muslim? Obviously, the question of apostasy would not arise, but rather the subject of the book, and a possible response to it.

The *fatwa* on the other hand raises the issue of the boundaries of the Muslim community in the contemporary world. The fact that the *fatwa* was issued in relation to a citizen of a non-Muslim country presumes that the Islamic community is universal. Yet, if that is true in religious terms on the ground that there are Muslims all over the world, it is not so in political terms. This dilemma was resolved by the Iranian decision to pay to the would be assassins, regardless of their religion. Why should a *universal* community find it necessary to protect its 1500 year-old faith through hiring assassins?.

Rather a universal community, which extends across borders of geography, politics, and nationalities, should essentially be more accommodating and tolerant by its very interaction with various groups and situations.

7. Conclusion

To summarise this discussion, I would argue that apostasy punishment opens the door widely not just for religious discrimination, but also for the possibility of imposition of a states' own brand of Islam or orthodoxy. Furthermore, the threat of persecution on grounds of apostasy would invariably tend to narrow the scope of reform and independent interpretation of Islam in the light of the problems of the contemporary world. Additionally, and as we have seen in the above examples, the apostasy punishment is bound to be a weapon in the hands of states or Islamist movements to silence their opponents who would be merely expressing a dissenting political opinion.

There are other important considerations apart from the purely political sphere. In today's world Muslims live in and interact with followers of other faiths, creeds and ideas, and are bound to influence and be influenced, directly or indirectly, as a result of this interaction. Co-existence is no longer a question of choice but rather a living reality, and co-existence can only be governed by mutual respect and appreciation of differences rather than mutual hostility. If such a principle is to be translated into freedom of opinion, including freedom of religious beliefs, and conscience, this must invariably include freedom to change one's religion without persecution.

A significant feature of today's realities is the existence of Muslim minorities in the majority of countries, including the expanding Muslim communities in Europe and North America. Members of these communities have over the years sought and in most cases achieved rights to practice their religious obligations and values both as individuals and in groups, including the right to convert others to Islam. This is exactly the provision of article 18 of the UDHR. Now if we are to turn the table and look into a situation where Muslims are a majority; would they accord the same rights to a non-Muslim minority? If the answer is yes, as one would expect, would such a right cover recognition of the right of individual Muslims to forsake Islam should they so choose? The answer may not be a simple one for an Islamist or a proponent of apostasy punishment, but the point is clear: religious freedom is a double-edged standard and has to be accepted in its entirety. Otherwise it becomes an empty phrase.

In this context one may ask what would be the situation for Muslims, especially Muslim minorities, if conversion to Islam in the societies they are living in were to be outlawed!

One final note. Article 18 is not about preaching apostasy or licensing the hegemony of missionaries in the world of Islam. Rather it is simply about tolerance. As followers of every religion are bound to think of their faith as the one and only Truth, mutually acceptable principles of human rights may be the only common ground for all.

GLOBALIZATION AND HUMAN RIGHTS

JANUSZ SYMONIDES

Globalization has various dimensions. Three of them are of particular importance: economic globalization, communication globalization and cultural globalization. Economic globalization opens new opportunities for economic growth and development. At the same time it has been accompanied by poverty, unemployment and the disregard of human rights in particular economic, social and cultural contexts. However, not all human rights are endangered. Those which may be qualified as "market oriented" like the right to private ownership or the right to the protection of intellectual property, are promoted and protected. Communication globalization has a rather positive impact on human rights. However, the use of the Internet by paedophiles, for the dissemination of pornography, for the advocacy of racism, xenophobia and violence raises a number of ethical and legal questions. The culturally homogenizing effect of globalization reinforces the universality of human rights and helps to eliminate certain discriminatory practices. The contradictory blessings of cultural globalization are linked with its negative consequences for the cultural rights of vulnerable groups. It may also undermine existing cultural identities and weaken ethical norms and social cohesion.

1. Introduction

1.1 The notion of globalization

At the dawn of the XXIst century, the term «globalization» is one of the most used, analyzed, referred to and quoted. Despite an impressive number of publications and numerous conferences dealing with this subject, it is still impossible to find one generally accepted understanding or definition of this term. This situation may be explained by the fact that the phenomenon or the process of globalization is very complex, multidimensional and is generated by multifarious factors.

In a very general way, globalization may be characterized as the

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process of growing interconnection and interdependence in the contemporary world. It is generated by the accelerating development of international economic, cultural and political co- operation and links, by the emergence of new global institutions and actors, as well as by the need to respond together to global problems which can be solved only on a planetary scale. In the economic sphere, globalization means the widening and deepening of the international flow of trade, finance and investments and the creation of a single, integrated global market. The world is shrinking as a result of increased human mobility, and the intensified contacts between the people, possibly with the aid of cheap and speedy travel, the telephone, fax and the Internet. Artificial barriers have been eased with the reduction in trade limitations, the expansion of capital flow and the transfer of technology.[1]

1.2 Different dimensions of globalization

Globalization has various dimensions. Three of them are of particular importance:

(a) economic globalization, in other words, the creation of a global market, the liberalization of trade and finances;
(b) communication globalization linked with new developments and possibilities in the field of information, the mass media, transfer of knowledge and inter-personal contacts; and
(c) cultural globalization brought about by the development and advances of a new popular culture, universal values and changes in the behavioural patterns of people.

There is also a fourth dimension of globalization – ideological. Neoliberal philosophy and policy have now become a driving force behind economic globalization. The end of the Cold War and the collapse of communism in Central and Eastern European have meant the triumph of the market economy, competitiveness, jobless

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[1] A New global Agenda,. Visions and Strategies for the 21" Century, SID's Global Labour Summit, Copenhagen, 31 May to 1 June 1997. http;//www.iqc.org/lalabot/new-global-agenda.html, p. 3.

growth, deregulation, privatization, cutting down of social programmes and drastic limitations of States' involvement in economic activities.

However, by the end of the XXth century, we may also speak about another global ideology – that of human rights. Individuals are having rights not as citizens but as human beings whose dignity should be respected. International human rights standards are adopted and protected by the United Nations and by the international community. They do not belong anymore to the internal competence of States and States may be, in the case of alleged violations, brought before international justice.

1.3 The United Nations agenda for sustainable human development

The universal recognition and importance of human rights has resulted in the emergence of parallel trends aimed at the integration of human rights into economic development. This has been clearly reflected in a series of United Nations conferences which took place in the 1990s.

The United Nations Conference on Environment and Development (Rio de Janeiro, 1992) in its *Agenda 21* took into account the need to improve the situations of vulnerable groups, and underlined the necessity to satisfy basic human needs (rights). The Conference used the term "sustainable development" which covers economic development, social development and environmental protection, which are interdependent and mutually reinforcing components.

The World Summit for Social Development (Copenhagen, 1995) adopted the Copenhagen Declaration and Programme of Action which underlined the urgent need to address profound social problems, especially poverty, unemployment and social exclusion which affect every country. The Declaration stresses: "... that people are at the centre of our concern for sustainable development and that they are entitled to a healthy and productive life in harmony with the environment". Commitment 1 speaks about the promotion of equality and equity between women and men and full respect for all human rights "... including those relating to education, food, shelter, employment, health and information, particularly in order to assist people living in poverty".

The Declarations, Programmes and Platforms of Action adopted

by the World Conferences and Summits which took place in the 1990s[2] together with actions foreseen by International Years and Decades create an ambitious agenda which, in fact, can be recognized as an agenda for the twenty-first century. It emphasizes the importance of all human rights and puts human beings and human needs at the centre of all national and international actions and efforts.

Can the United Nations agenda be reconciled with globalization? What are its challenges and targets for human rights? Can a "human face" be added to globalization?

Is globalization a process which escapes any control which cannot be regulated by everybody and does not and cannot respect existing norms and standards? The answer to this question is formulated by Federico Mayor:

> *"Globalization is neither good nor a bad thing. It is devoid of any emotional content, it is what the human community makes of it – either further proof that fortune smiles on the well-off, the egoists and cynics among us or, on the contrary, a sign that justice, dignity and solidarity have not entirely deserted this word... in that sense, it is like knowledge, neutral in itself, it acquires meaning and values through the use that is made of it". (Mayor, (1997), p.1)*

2. The impact of economic globalization on human rights

The economic globalization linked with the liberation and great increase in trade and capital flows opens new opportunities for economic growth and development of the world economy,

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[2] To the already mentioned conferences, one can also add: the World Conference on Education for All (1990), the World Summit for Children (1990), the International Conference on Population and Development (1994). The Fourth World Conference on Women took place in Beijing, China, from 4 to 15 September 1995. Its main theme was "Action for equality, development and peace". In the Beijing Declaration, adopted on 15 September 1995, governments stressed their determination to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity.

particularly in developing countries. At the same time, the rapid processes of change and adjustment, the implementation of neoliberal principles have been accompanied by poverty, unemployment and the disregard of human rights, in particular economic, social and cultural rights. (Copenhagen Declaration, (1995), para 14)

Thus the right to work and the right to just and favorable conditions of work are threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights formulated by the International Bill of Rights. The right to form trade unions and the possibility of collective bargaining, including the right to strike, may be restricted in the "interests" of the global economy. Privatization may weaken social security, endanger the right to education and limit the right to participate in cultural life, if cultural and artistic activities are subordinated exclusively to market principles.[3]

However, not all human rights are endangered by globalization. Those which may be qualified as "market-oriented", like the right to private ownership or the right to the protection of intellectual property, are promoted and protected. In fact, they have recently become a major issue in international relations.

The benefits of globalization should exceed the cost. During 1995-2001, the results of the Uruguay Round of the GATT are expected to increase global income because of greater efficiency and expansion of trade by an estimated US$212-510 billion. However, those benefits are spread unevenly. Gaps among developed and developing countries are widening. In many industrial countries, an increase in overall income is accompanied by a rise in inequality and in unemployment which has reached a very high level and is rapidly growing.

The mixed blessings of economic globalization lead to drastically opposed opinions expressed by those who can be qualified as winners and those belonging or representing losers. Thus, for the Vice-Chairman of Goldman Sachs International, R. Holmats:

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[3] Statement on globalization. United Nations Committee on Economic, Social and Cultural Rights, 11 May 1998. http://www.globalpolicy.org/globaliz/define/unstate.html, p. 1

"The great beauty of globalization is that it is not controlled by any individual, any government any institutions... one of the great benefits that globalization has provided to the world is improvements in human well-being. Globalization has raised living standards in many parts of the world, particularly in Asia, and Latin America as well as in other industrialized countries ".[4]

The President of AFL-CIO, J. Sweeney, turns attention to the fact that:

" Workers are suffering. They are losing their jobs or they are being exploited, and it is about time that these leaders of Congress and industry hear the story of what working conditions are like, and that they are reminded that they have a role to play in terms of addressing the issues of workers".[5]

In the opinion of R. Nader, a consumer advocate:

"The essence of globalization is subordination of human rights, labour rights, consumer and environmental rights [and] democracy rights to the imperatives of global trade and investments ".[6]

Globalization in its present form not only cannot eliminate inequalities in the world but, in fact, is increasing them. It favours those who are at the centre of the system – providers of capital to the detriment of those who are at the periphery – receivers of capital. Though the latter are also benefiting because they get badly needed investments, their profits are smaller in comparison with the gains of the providers. This leads to the concentration of capital and increases disparities.

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[4] Globalization and Human Rights. Complete Interviews. http://www.pbs.org/gloablization/holmats.html, pp. 1-7.

[5] Globalization and Human Rights. Complete Interviews. http://www.pbs.org/globalization/sweeney.html, p. 1

[6] Globalization and Human Rights. Complete Interviews. http://www.pbs.org/globalization/nader.html, p. 1.

The share of world income of the lowest fifth of the working population has gone down from 2.3 per cent to 1.4 per cent, while the share of the top fifth has gone up from 70 per cent to 85 per cent. In 1997, the combined wealth of the 350 billionaires of the world was greater than the annual income of 45 per cent of humanity. The three richest individuals have assets exceeding the financial resources of the 48 least developed countries.

In order to see in a more comprehensive way the impact of globalization on human rights, there is a need to look more closely at the diminishing role of the nation-State, the increasing importance of transnational corporations and to analyse the state of poverty in the world.

2.1 Weakening of States

Globalization has profound implications for States. The autonomy and policy-making capability of States is being undermined by economic and cultural internationalization and by the prevailing neoliberal doctrine. Everywhere the demands to liberalize, to limit State's control over the economy and to privatize, bring a shrinking of the State's involvement in national life. Many governments see their role as not to regulate markets but to facilitate their expansion. Global and regional interactions are wiping out national borders and weakening national policies. States' sovereignty is gradually limited not only as the consequence of the existence of supra-national political and economic organizations but, in many cases, because of the asymmetry of bargaining power between transnational corporations and small, poor developing countries.

The limitation by globalization of the State's ability to determine national policies to intervene in economic activities has also manifold negative impacts on human rights for the implementation of economic, social and cultural rights. Weaker States may be more immune from authoritative or totalitarian deviations, but the limited governmental ability to run deficits as a result of the opening of financial markets forces them to slash social and cultural programmes, health services and food programmes. As underlined by the United Nations Secretary-General in his report presented at the special session of the fifty-first General Assembly in June 1997: "Globalization affects, and sometimes reduces, the ability of governments to achieve desired outcomes. While governments

continue to provide the overall framework in which the private sector must operate, many important decisions are made by the private sector, especially by companies operating in an international context".[7]

In the 1990s, corruption has become a subject for the attention of the United Nations and regional organizations. It has been recognized that systemic corruption endangers economic, social and political development and can have serious negative consequences for social justice and human rights. The United Nations in a series of resolutions adopted by the Economic and Social Council and the General Assembly[8] pointed to the links between corruption and other forms of crime, in particular organized crime, and stressed that this phenomenon crosses national borders and affects all societies and economies, therefore international co-operation to prevent and control it is essential.[9]

The General Assembly adopted an International Code of Conduct for Public Officials which formulates the duty of public officials to refrain from using their official authority for the improper advancement of their own and their families' personal or financial interests. In the context of globalization, it is worth noting that the United Nations addressed a particularly pernicious type of corruption – bribery in international business transactions which leads to the perpetuation by the industrialized countries of the climate of corruption in the developing world.[10] Questions of organized transnational crime and corruption are of special relevance for Central and Eastern Europe. These examples show that many non-economic capabilities of States linked with keeping law, order and "human security" need to be strengthened rather than decreased. Therefore, though States are losing power, at the same time paradoxically their citizens are becoming more demanding.

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[7] Doc. E/CN.1711997/2, 31 January 1997, p. 23.

[8] The first of these resolutions 4511221 was adopted by the General Assembly on 14 December 1990, followed by resolution 461452 on 18 December 1991. The Economic and Social Council adopted similar resolutions in 1992, 1993 and 1994.

[9] General Assembly resolution 51/59: Action against corruption of 12 December 1996.

[10] General Assembly resolution 53-176: Action against corruption and bribery in international transactions of 25 January 1999.

States still bear the main responsibilities for the implementation of human rights. Markets cannot replace governments in the determination of economic, social and cultural policies, in providing social services and infrastructures, eradicating of poverty, protecting of vulnerable groups and in defending of the environment. Weak States cannot guarantee the rule of law which is *conditio sine qua non* for the full implementation of human rights.

2.2 Transnational corporations: the rising stars of globalization

The most crucial development in the last decade has been the enormous expansion of transnational companies (TNCS) which now play a decisive economic role. They may be large multinationals or small entrepreneurial firms operating in many countries. Corporate strength is enhanced by mergers, acquisitions and strategic alliances that increase their reach and power. To acknowledge present corporate strength suffices to show that among the top 200 economic players in the world, about 160 are corporations and only about 40 nation-state governments. (Valaskakis, (1999), p.142). Profit-driven transnational corporations are accused of looking for the best places for their investments which often means the cheapest labour and lack of respect for fundamental labour rights's.[11] Transnational corporations do not limit their role to the economy but try to influence governmental policy in various areas. The negative role played by Shell in Nigeria which was involved in the violation of the environmental laws of the country and in support for anti-democratic, authoritarian regimes of General Abadie and even of collaborating in the death of Ken Saro-Wiva, are very well known. Thus globalization means control of world economics and influence of political life by giant corporations that do not have any allegiance to a community or to a particular country, even to that where they are domiciled inasmuch as they can have more profit elsewhere. In times of democratization, it is not without importance that they are run by executives who are not elected and whose activities are far from the respect of principles

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[11] The expansions of Export Processing Zones – with appalling working conditions, no health and safety measures and no respect for even the most basic ILO standards – are an example of the lack of respect for basic workers' rights.

of accountability and transparency. Therefore a code of conduct for transnational corporations, their responsibility for the respect of labour standards, elimination of child or forced labour becomes absolutely necessary.

2.3 Globalization and poverty

Although, thanks to economic globalization, poverty has been reduced in many parts of the world, a quarter of the world's population remains in severe poverty. In a global economy of US$25 trillion, this is really "a scandal – reflecting shameful inequalities and inexcusable failures of national and international policy " (Human Development (1997), p.2). About 1.3 billion people live on incomes of less than US$1 per day. Nearly a billion people are illiterate. More than a billion lack access to safe water and over 800 million go hungry or face food insecurity. Poverty may then be described as a denial of chances to lead healthy, creative and long lives and to enjoy a decent standard of living, freedom and dignity.

The rise of poverty in regions where it had long been in decline, in the industrial countries of Western and, particularly, Central and Eastern Europe, together with the persistence and ever-worsening of the problem in parts of the developing world like sub-Saharan Africa, has brought poverty to the forefront of the international agenda.

The World Summit for Social Development (1995) recognized the goal of the eradicating poverty as an ethical, social, political and moral imperative of humankind. The General Assembly declared 17 October as the International Day for the Eradication of Poverty; it then proclaimed 1996 the International Year for the Eradication of Poverty and the years 1997-2006 as the United Nations Decade for the Eradication of Poverty.[12]

The Vienna Declaration, in its paragraph 2, affirmed that "... extreme poverty and social exclusion constitute a violation of human dignity". It stressed the need to achieve better knowledge of extreme poverty and its causes in order to promote the human rights of the poorest people, and to foster their participation in the decision-making process by the community in which they live.

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[12] Respectively: resolutions 471196 of 22 December 1992; 481183 of 21 December 1993; and 501107 of 20 December 1995.

The General Assembly, in a series of resolutions on human rights and extreme poverty, reaffirmed that extreme poverty and social exclusion constituted a violation of human dignity and that urgent national and international action is required to eliminate them. In resolution 5 1197 of 12 September 1996, it recognized that widespread extreme poverty inhibits the full and effective enjoyment of human rights and might, in some situations, constitute a threat to the right to life. The reduction and in a longer perspective the elimination of extreme poverty has to be seen from the human rights point of view as an ultimate test of the success of economic globalization.

3. Challenges of communication globalization

The new information technology, which is at the basis of communication globalization, has already had a profound impact on human beings, civil societies, States and international organizations. These changes are characterized by the use of a new term "the emerging global information society". This term articulates the fact that now many areas of economic, social, cultural and political activities are influenced and permeated by new information technologies. In economy, teleservices, teleshopping, telebanking, telecommuting, various data banks and web-sites change traditional management (organization of companies and banks and their *modus operandi).* The information and Communication sector is expanding at twice the rate of the world economy.[13]

Communication globalization has a rather positive impact on human rights. Thus, interactive long-distance education and learning can strengthen the right to education and enables reaching out and delivering education services to people in isolated countries and localities, to provide quality education and create lifelong learning opportunities for all, which otherwise would not be possible.

The right to participate in cultural life acquires a new dimension

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[13] Statement on Universal Access to Basic Communication and Information Services adopted in April 1997 by the Administrative Committee on Co-ordination (ACC). Doe. 151 EX/16, Ad. p. 1.

with the possibility of easy access to the world cultural heritage, the possibility to visit, through Internet or CD-ROM, the most prestigious museums and exhibitions or to attend concerts of the best orchestras and conductors. The right to benefit from the scientific progress is reinforced by rapid access to the latest results of research, to libraries located in other countries and regions, to scientific publications and periodicals.

However, the information highways can bring positive results only when they are accessible. At present the gap and inequalities between industrialized and developing countries are widening. A new type of exclusion and poverty, information poverty and exclusion, can be noted.

Among human rights which are endangered in cyberspace are the right to privacy and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production. Computer memories contain impressive amount of the most personal data concerning finance, health, family relations, work and career records, etc. More data, including electronic mail, may be exposed or misused. Protection of electronic privacy and confidentiality becomes one of the most pressing requirements.

The use of Internet by paedophiles, for the dissemination of pornography, for the advocacy of racism, xenophobia and violence raises a number of ethical and legal questions concerning the limits to the freedom of information and expression. Some countries have introduced prior registration of users, some countries filter with severity the flow of data accessible to their citizens. In 1996, the United States adopted the Communications Decency Act which foresees punishment of up to two years' imprisonment and heavy fines for posting "indecent" information on a web-site.

Should Internet fall under the law of the press and mass media or should it be governed by laws regulating private correspondence? Is cyberspace a private or a public area? Is State control and censorship justified?. It seems that, in many countries, already existing legislation concerning the struggle against racism and paedophilia permits reacting to and evaluating individual responsibilities as well as punishment for acts prohibited by law. There is no need for state censorship and preventive control. Freedom of expression and information should be a guiding principle for Internet. This is the most effective guarantee of cultural and linguistic pluralism and diversity allowing, *inter alia*,

to expose human rights violation. Therefore the freeflow of information should be fully preserved and defended.[14]

4. Positive and negative consequences of cultural globalization, dialogue or clash of cultures?

Although the economic and to a lesser degree the communication dimension of globalization is the most evident and observed, cultural globalization – the international spread of cultures has been at least as important as the spread of economic processes (Human Development 1997, p.83). Through the mass media international ideas and values are being mixed and imposed on national cultures. A homogeneous world-wide culture is developing in the process and is sometimes qualified as the creation of a "global village". Advances of popular culture means that throughout the world peoples are dressing, eating, and singing similarly and that certain social and cultural attitudes have become global trends.

If culture is understood not only as the highest creative activities and intellectual achievements of human beings articulated through music, literature, art and science but in a broader way as the sum total of human activities, as the totality of knowledge, values, the demand for a way of life and the need to communicate (Symonides J. (1998), p.7). This means that culture is influenced by economic and communication globalization. The spread of the same goods: cars, computers, mobile telephones, etc., the proliferation of the same hotels or fast food restaurants like McDonalds in all parts of the world, the fact that people see the same films and TV programmes, that they admire the same rock stars, sports disciplines or Nobel prize winners, have a profound impact on their behavioural patterns and systems of values.

What is the impact of cultural globalization on human rights? The culturally homogenizing effect of globalization, the gradual process

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[14] During the debate in the Executive Board on "The challenges of the information highways. The role of UNESCO", the President of the General Conference, Mr. T. Krogh said: " ... we have the fundamental principles to guide our decisions on the new information technology. They could be summarized in two central notions. Promoting freedom of expression and expanding the sharing of knowledge". Manuscript, p. 10.

of adopting common values and behavioural patterns, reinforces the universality of human rights, establishes ties and linkages between various aspects of the world and helps to eliminate certain traditional practices which may be qualified as discriminatory.

However, the contradictory blessings of cultural globalization are linked with its negative consequences for the cultural rights of vulnerable groups like persons belonging to minorities, indigenous peoples or migrant workers. It may also undermine existing cultural identities, weaken various ethical norms, social cohesion, as well as the feeling of belonging and, by this, contribute to the proliferation of various internal conflicts. As stated by the Director-General of UNESCO in November 1997: «Just as the protection of biological diversity is indispensable to the physical health of humanity, so the safeguarding of cultural diversity – linguistic, ideological and artistic – is indispensable to its spiritual health".[15]

The individual and collective right to a cultural identity may be seen as an articulation of the right provided by Article 1 of the UNESCO's Declaration on Race and Racial Prejudice (1978): "All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such".

During the World Conference on Cultural Policies (Mexico City, 1982), delegates emphasized people's growing awareness of their cultural identity, of the pluralism stemming from it, of their right to be different and of the mutual respect of one culture for another, including that of minorities. They observed that the affirmation of cultural identity had become a permanent requirement, both for individuals and for groups and nations.

At present, the right to cultural identity is recognized by human rights instruments and national constitutions. Article 29 of the Convention on the Rights of the Child provides that the education of the child shall be directed to: "*(c) The development of respect for the child's parents, his or her own cultural identity, language and values...*".

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[15] UNESCOPRESS, 29th session of the General Conference, N' 97-219. In his closing speech the President of the General Conference formulated an opinion that cultural cleansing is maybe more dangerous than a biological one. Wherever it occurs, the thermometer of intellectual competition registers a drop in temperature.

The right to respect for cultural identity means that everyone alone or in a community with others may freely choose his or her cultural identity in its various aspects such as language, religion, heritage, traditions, etc. That everyone may have one or several cultural identities and may freely decide whether or not to identity with one or more cultural communities. Nobody can be subjected against his or her will to forced assimilation.

The danger which globalization creates for the preservation of cultural identity has brought about the strong opposition in developing countries where cultural globalization, not without reason, is seen as the westernization of their cultures. The popular culture of the West is at the forefront of the cultural debates about globalization. One may also add in the name of the protection of diversity that cultural globalization is also opposed in many European countries where it is seen as the Americanization of their culture due to the expansion of Anglo-American language and the strength and impact of American cultural scientific and technological production and goods.

However, the rejection of the popular western culture, the defence of "Islamic" or "Asian" values (Symonides J., (1998), p.27-28) may also be criticized for different reasons. The exclusion of Western news, films, videos or satellite TV by some authoritarian Arab and Asian regimes is in fact an attempt to control the behaviour, to stop the modernization, liberalization and democratization of their political and social systems. The banner of defence of traditional values may cover in fact the refusal to change the traditional place of women in their societies or to accept democratic participation of the population in government.

The existence of cultural differences should not lead to the rejection of any part of universal human rights. They cannot justify the rejection or non-observance of such fundamental principles like the principle of equality between women and men. Traditional practices which contradict human rights of women and children have to be changed.

Nevertheless, all cultures can contribute to the general discussion concerning the human rights concept. The establishment of a proper balance between rights and responsibilities, between individual rights and their collective dimension, between individuals and groups, is far from being achieved, not only in the Asian or Arab regions but also in Western societies. It is not accidental that in

recent years, such attention is given to the preparation of various declarations of human duties or responsibilities and the elaboration of a global ethics which are seen not as a rejection but as a reinforcement of universal human rights.

5. Concluding remarks

Globalization is a process which cannot be stopped or simply rejected. Nevertheless, it is a process driven by human beings and human interests. It can be shaped and controlled. What should be done to use the positive sides, the great potential of globalization for the promotion of human, sustainable development – development determined not exclusively by the market forces but taking into account human rights and fundamental freedoms already formulated by the Universal Declaration of Human Rights the International Covenants and the ILO Conventions.

Despite the diminishing role of States in the economic spheres, they still bear the main responsibility for the implementation of human rights. Public economic, social and cultural policies are necessary to correct market failures, to complement market mechanisms, to maintain social stability. Setting and enforcing the rules of market competition, providing the information essential to the private sector, encouraging education and technology and assuring a social safety net for those incapable of caring for themselves – these are crucial roles of the State (Turner F.C., (1963), p.72).

Secondly, global governance cannot be built up without the active participation of intergovernmental organizations. The United Nations should continue its crucial role in standard-setting, monitoring and enforcement of human rights. The United Nations Committee on Economic, Social and Cultural Rights called upon the International Monetary Fund and the World Bank to pay enhanced attention in their activities to respect for economic, social and cultural rights through their explicit recognition, assisting in the identification of country-specific benchmarks to facilitate their promotion and development of remedies in case of their violations.[16]

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[16] During the general debate on globalization and its impact on the enjoyment of economic, social and cultural rights, 18th session, 11 May 1998, the

Effective social monitoring should be an integral part of the enhanced financial surveillance and monitoring policies accompanying loans and credits for adjustment purposes. Similarly the World Trade Organization should decide appropriate methods to facilitate more systematic consideration of the impact upon human rights of particular trade and investment policies. It is worth noting that increasing importance is already accorded to human rights in the activities of the United Nations Development Programme and the United Nations Conference on Trade and Development. Among regional economic organizations, the European Union is one of those seriously promoting and respecting human rights and the ideals of democracy.

Thirdly, non-governmental organizations and all actors of civil society have an important role to play in exercising pressure on private business in order to obtain full respect for human rights. At the dawn of the XXIst century, the important role of non-governmental organizations in the promotion and protection of human rights and in tackling various problems of humanity is increasingly recognized by the international community (Symonides J., (1999), p. 879). By mobilizing public opinion against human rights violations, by a "mobilization of shame", through their campaigns in the media and on the Internet, by their reports, they have become important players in the promotion not only of civil and political but also of economic, social and cultural rights.

Fourthly, transnational corporations and private businesses have to fully recognize their responsibility for the protection and implementation of human rights. As the High Commissioner for Human Rights put it, the corporate sector should neither be asked to, nor expected to, assume government responsibilities but it should be encouraged to make informed business assessments of the relevance of human rights to the environment in which they do

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representative of the IMF stated that this Organization is already making efforts to protect human rights through provisions for social, programmes in its structural adjustment programmes, operation of special lending facilities for the "poorest of the poor", and attention to labour rights in the context of lending agreements, United Nations Committee on Economic, Social and Cultural Rights. Report on the eighteenth and nineteenth sessions, Economic and Social Council, Official Records, 1999, p. 75.

business (Robinson M., (1998), p. 14-15). Due to the pressure of the informed consumer and shareholder, the increasing importance of information and knowledge and the rise of transparency, driven by the explosion of information technology, human rights are gradually anchored in the corporate agenda. A step in this direction has been made by the adoption of corporate codes of conduct. Among corporations which have adopted them are Levi Strauss, Reebok Corporation and the Timberland Corporation (Leary V., (1998), p. 276-278).

Why should transnational corporations and private business respect social justice, social development and human rights? The answer is quite obvious. They are indispensable for the achievement and maintenance of peace and security within and among nations. Drastic economic inequalities, poverty and exclusion, violations of human rights create serious threats to international stability and peace. The first warnings were sent by those protesting in Seattle, Davos and Indonesia, or those destroying the McDonalds in France. As G. Soros says there are capitalists threats. One because the system is unstable, liable to breakdown and the other because it is so successful and powerful that it penetrates into areas of life of society where it does not really belong.[17]

One may agree with K. Valaskakis that:

> *"It would be a pity if the capitalist system, which has managed to assert its economic superiority over other systems, would then proceed to self-destruct for lack of foresight and self-discipline. The danger is real – and yet is entirely avoidable if proper corrective action is taken" (Valaskakis K., (1998), p. 164).*

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COMMENTS

FOREIGN LAW IN INTERNATIONAL LEGAL PRACTICE: AN ITALIAN PERSPECTIVE

GUIDO ALPA

The article discusses the impact of foreign law on the Italian legal system. Initially, consideration is given to the role of foreign law in the overall historical development of Italian jurisprudence from the nineteenth century onwards. Then the focus shifts to the use of foreign law by Italian judges in cases other than those where the reference to foreign law is required by the rules of Private International Law or by the choice of the contracting parties. Foreign law, in this perspective, is envisaged as a reference to foreign models, rules and experience, which help to find the best solution in national cases. It considers also the use of foreign contractual models in national and international commercial relationships, particularly the use of names and formulae, references to *Lex Mercatoria* and the Unidroit Principles, the importation of principles and rules from economically more developed countries and the impact of EU legislative activity.

1. "Foreign Law" in Italian Legal Culture. Fashions and models from the nineteenth century to the present

In Italian legal culture, the expression "foreign law" has quite a restricted meaning, in as much as it refers either to the law in force in other countries necessarily applied by the Courts by virtue of the rules on the conflict of laws, or to the law chosen by agreement of the parties to govern the relationship created between them.[1]

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[1] The same perspective is adopted by U.DROBNIG, "The Use of Comparative Law by Courts, a General Report," in U.DROBNIG & S. van ERP (eds.), The Use of

However, the expression may also be used in a wider sense, that covers not only the statutory rules applied but also the other sources of law; namely "doctrine" (legal literature) and case law, according to the teachings of Rodolfo Sacco;[2] one of the most eminent Italian scholars of comparative law. From this perspective, we must take into consideration the cultural models, legal institutes and judgments, which derive from foreign experiences and are used by individuals or courts to help solve domestic legal problems. In this wider meaning, the use of foreign law in Italy is the subject of a very rich history, still awaiting its narrator.[3] This history can be summarily classified into five periods:

(i) the first period comprises the whole of the nineteenth century,
(ii) the second, the first half of the twentieth,
(iii) the third, the period which spans roughly two decades (from 1950 to 1970),
(iv) the fourth regards the following two decades (from 1970 to 1990), and
(v) the fifth, the final years of the twentieth century. Each subdivision into periods is arbitrary and each period cannot be assumed to be so monolithically homogenous that a sole and consistent approach took hold. However, taking a bird's eye view of the formation of law in Italy, certain trends – which correspond to the periods previously mentioned – appear

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Comparative Law by Courts, XIVth International Congress of Comparative Law(Athens,1997), The Hague, London, Boston, 1999, at p. 6. However, what is striking is the use of foreign models to solve domestic cases: see B.MARKESINIS, "Reading Through a Foreign Judgement" in Essays in Celebration of John Fleming, P.Cane & J Stapleton eds., Oxford, 1998, p.261ff.

[2] R.SACCO & A.GAMBARO, Sistemi Giuridici Comparati, Turin, 1996, at p.6 ff.; G.ALPA (ed.) Corso di sistemi giuridici comparati, Turin, at p.10.

[3] G.GORLA had studied the use of *lex alii loci* in the Middle ages (*ius commune Europeum*) : see ID., "Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo", in Foro Italiano, 1973, V, 89 ff. For further details see P.GROSSI, L'ordine giuridico medievale, Rome & Bari, 1998, passim. Roman Law is still mentioned in Italian decisions, but only *exornatione gratia* (G.MICALI, "Il diritto romano nella giurisprudenza della Corte suprema di cassazione", in Giurisprudenza Italiana, 1993, IV, 489 ff.), while, accordino to the Spanish Civil Code, Roman Law is the basis for interpreting the law through general principles.

prevalent, thereby lending scientific credit to this temporal sub-division.[4]

(i) The first period witnesses the preponderant influence of French law, which reverberates over all aspects of our legal system, including statutory law, legal literature and court decisions. As regards statutory law, the *Code Napoléon* initially constitutes the law imposed by the General's armies in the provinces conquered from the Piedmontese, Austrians, Lorraines and Bourbons. After the fall of Napoleon, his model of Civil Code is transplanted to several of the states into which Italy was divided (the Civil Code of the Kingdom of Two Sicilies, the Civil Code of the Duchy of Parma; the Civil Code of the Kingdom of Sardinia or "Albertine" Code) and is subsequently chosen as the model for the first Civil Code of the unified Italy born in 1865. As for legal literature, the *Ecole de l'Exégèse* becomes the method for the analysis and application of universal law; so much so that the majority of the treatises and manuals of French law are first translated and then imitated by Italian legal writers. More than six hundred of these works are translated over the whole century, which sees the coming into being of the Italian "Scuola dell'Esegesi" (School of Exegesis – Interpretation), which holds that law is only the statutory state-enacted law and the legal writer's role is limited to an analytical commentary of its provisions. With reference to case decisions, given the proximity of French and Italian Law, the judgments of the *Cour de Cassation* and of the French tribunals are liberally quoted by legal writers and employed by judges, without regard for the fact that they have been rendered by foreign judges. Italian jurists do not consider French Law as a "foreign" law, belonging to a *ius alienum* (i.e. to the system of a different state) and applied by judges belonging to the administration of a foreign state.

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[4] Unfortunately the literature in English language about this proceeding is very poor: see, among others, M.BELLOMO, The Common Legal Past of Europe (1000-1800), Washington, 1995; for new comments see P.GROSSI, "La scienza giuridica" in Italia nell'Ottocento, Milan, 2000; G. ALPA, La cultura delle regole. Storia del diritto civile italiano, Rome & Bari, 2000.

(ii) The second period records a repudiation of the "Scuola dell'Esegesi" (the interpretative school) and the triumph of the Pandectist model, (the historical school of Germanic origin, introduced in Italy by the scholars of Roman law). Even Roman law was not considered then, as it is not today, as properly speaking a "foreign" law. It is not only the primary source of the Italian legal language, but also of many of the institutes governing natural persons, property, contracts, torts and associated remedies. Roman Law is so widely diffused among the sources of our own legal culture that it constitutes, to this very day a fundamental subject matter of study for the formation of lawyers, is often quoted in decisions of the courts and is studied in a "current" dimension; almost as if it were not a body of rules and principles to be historically placed in the context of its bi-millennial evolution, but is rather a *corpus* of rules still in force.

The choice of moving from French to Pandectist culture was not only the product of a fashion, but rather born of what at the end of the nineteenth and the beginning of the twentieth centuries was perceived as a necessary requirement. The aim was to dogmatically reconstruct Italian civil law and consequently the method for studying it. Savigny, Arndts, Dernburg, Windscheid, among others, peep out from the bookshelves of lawyers, top the reading lists in civil law courses, constitute the staple diet of jurists and therefore of judges, who, having received a Pandectist training, flaunt this in their judgments. So much was this the case, that a jurist of those times, Biagio Brugi, a famed author, veritable scholar of Roman and Private Law and editor of one of the manuals of Institutions of Private Law most widely studied by generations of students,[5] could well state, in a lecture held in 1919, that: "perhaps no foreign scholars have ever exerted an influence in Italy which can be compared to that of the Germans in our day and age." This was not a simple reckoning of historical accounts. It was a *cri de coeur* aimed at fostering awareness among Italian jurists of the bi-millennial history of

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[5] Istituzioni di diritto civile, Milano, 1915.

which they were heirs and which he now saw as being ignored in favour of the books copied from the German jurists, and an attempt to recover the originality of the Italian approach. It was also an invitation not to disregard the other aids of foreign legal science. The Italians, he suggested: "may indeed look as far away as to the English *common law* (in which our own authors are often still quoted) and to the decisions of North American Courts, which are in certain respects inimitable."[6]

Brugi's invitation was to remain unheeded. The influence of German culture was to remain unaltered up to the formulation of the new Civil Code in 1942, and further still for several more decades. However, due to the strange vicissitudes of legal history, at the end of the 'twenties, an extraordinary event occurred, which reflects the cosmopolitan climate that pervaded Continental Europe during that period. In 1927 a bilateral commission, officially set up between Italy and France, drafted a uniform Code of Obligations. This initiative is due to Vittorio Scialoja, another great jurist, who was a scholar of Roman and Private law and to the Frenchman Francois Larnaude. Jurists from other countries, such as Belgium, Rumania, Greece and Canada, took part in the initiative at the beginning, but it was the two founding nations who concluded it.[7] The purpose of the *Projet de Code des Obligations et des Contrats*, consisting of 739 articles, drafted in the two languages by the scholars of the "sister Nations", was to: "create, with the consensus of all their united strengths, a body of laws which, within each of the two states, would represent the most perfect legal regime which legal science wished for and legal practice required."

With the changing political balances at the end of the 'thirties, the German influence makes itself felt again; but the scholars of comparative law also continue to study the *common*

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[6] B.BRUGI, "I danni dell'imitazione straniera nella nostra giurisprudenza", in Atti della R.Accademia Lucchese di Scienze, Lettere ed Arti, vol. XXXVI (1919), at B.BRUGI p. 7.

[7] Commissione reale per la riforma dei codici/commission francaise d'etudes de l'union legislative entre les nations aliees et amies, Progetto di Codice delle Obbligazioni e dei Contratti, Testo definitivo approvato a Parigi nell'Ottobre 1927-Anno VI, Rome, 1928.

law models, taking into account not only institutes such as trusts which are unheard of in Italy, but also Company law.

(iii) From the nineteen fifties onwards, after the introduction of the new Civil Code which also incorporates commercial law in a unified whole, we record a sort of closure on the part of Italian jurists towards foreign experiences. Everyone is busy understanding, commenting, interpreting the new text, and comparative references to foreign laws are quite rare, both in legal literature and in Court rulings.[8] The most notable exception is that of Gino Gorla, who already in 1955 published a prodigious treatise on contract law, in which, in addition to the historical perspective, a comparative approach is also adopted. This takes the form of a reliance on cases: reference to cases, then as today, becomes a way to seek in other experiences, in particular in common law, the similarities, convergences and more useful practical solutions.[9] We too can pride ourselves, as the United Kingdom can also nowadays do, thanks to the works of Basil Markesinis, on having scholars who are more concerned in studying what unites than in what divides us. Scholars who emphasise "convergences" more than "divergences", the formulas adaptable to practical cases, rather than erudite musings which are an end unto themselves: scholars, in other words, animated by the longing for research, not to produce a sterile form of culture, but with the aim of seeking immediately functional, practical solutions.[10]

(iv) The fourth period is the most lively and we shall devote more time to it. It includes the influences recorded in court decisions, deriving from cases and other sources of foreign law, the influence of legal practice in other countries, especially the United States and the deployment of remedies derived from those experiences.

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[8] G.ALPA, La cultura delle regole, supra at n. 4.

[9] G.GORLA, Il contratto, Milano, 1955.

[10] This is the leitmotif through the essays collected by B. MARKESINIS (ed.), The Gradual Convergence. Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century, Oxford, 1994.

(v) The current period records, in addition to the tendencies which developed during the fourth period, above all the incidence of the law of the European Union, and therefore the necessary circulation of the models of the Member States of the Union, which are merged in the regulations, in the directives, in the very language used by the European legislator and by the Court of Justice of the European Community.

2. Examples of foreign models used by Italian Courts

Instances of the explicit use of models derived from foreign judgments (or legal rules) by Italian judges are still rare. Usually it is the lawyers who use these foreign elements in their defences and the judges, if they take them into account, make use of them in their motivations. But the recourse to foreign models is not only left to the culture of the lawyer or the judge, but also depends on the extent to which the quotation may be instrumental in bringing about the favourable decision of a dispute. However, it cannot be said that the use of comparative law is a usual and standard way of working for the Italian lawyer. Furthermore, many cases have been decided in which, while taking foreign models into account, the judge does not reveal the sources of his reasoning, nor does he expressly quote them. Closely investigating some of these cases, however, we can clearly observe the influence of foreign experiences. Here are some examples:

2.1 Privacy

One of the first Italian cases in which the problem arose of the safeguarding in our system of the right to privacy[11] regards the tenor Caruso, whose family life during childhood had been depicted in the film "Leggenda di una voce" (Legend of a voice). Certain sequences showed scenes of violence committed by his father, and Caruso himself was portrayed as a short-tempered, heavy drinking man, of dubious morality. To uphold the right of Caruso to obtain

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[11] G.ALPA, "The Protection of Privacy in Italian Law", in B. MARKESINIS (ed.), Protecting Privacy, Oxford, 1999, at p. 105 ff.

compensation on the basis of tort law, the judges posed the question whether there should exist the judicial protection of a general right "to confidentiality or privacy", qualified in English court rulings as a "right to privacy". The judges' reply – we are in the mid 'fifties – is negative. Their reasoning is formalistic, because it is based on the search for a legal provision aimed at protecting this specific right, and since the judges only discover rules aimed at safeguarding the use of a person's name or image, or her decorum or reputation, but not privacy *per se*, they conclude that the search is fruitless and gives a negative result. Therefore, the judges conclude that:

> *"in our legal system there is no right to privacy, but only individual subjective rights of the person are acknowledged and protected, in different ways; therefore, it is not forbidden to communicate, either privately or publicly, events, especially if imaginary, of another person's life, when knowledge of the same has not been obtained by means unlawful in themselves, or which impose an obligation of secrecy."*[12]

Gradually, however, the right of privacy made its way through the Italian courts: this time, through the utilisation of the "European Convention on human rights and fundamental liberties", signed in Rome on the 4th November 1950 and ratified in Italy by Statute n. 848 of the 4th August, 1955. The Convention – whose article 8 sets forth that *"toute persone a droit au respect de sa vie privée et familiare, de son domicile et de sa correspondance"* (every person has the right to the respect of his/her private and family life, home and correspondence) is quoted as the basis for the decision which upheld, both on appeal, and in the Court of Cassation, the right for damages of the family of Claretta Petacci, the unfortunate lover of Benito Mussolini, who had been executed along-side him, trying to shield him with her own body. In this case, it was a book, in which Claretta Petacci's personality was described in a scornful and disparaging way, which prompted the family to

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[12] Tribunale di Roma, 14.9.1953, in Foro Italiano, 1954,I,115.

claim the infringement of their right to privacy. The judges upheld this claim despite the fact that the injured party was deceased.[13]

2.2 Expropriation

Although no cases were expressly mentioned, nor was the legal theory of German origin relating to the subject matter, the Constitutional Court, in a landmark decision regarding the regulation of ownership, held that the legislator cannot, without compensation, compress the powers of the owner on a thing beyond the limits "naturally attached to the right of ownership" such as they are acknowledged at the current time. The case regarded certain owners of land situated in the centre of the town of Palermo, which fell under a zoning ordinance excluding the possibility of building on it. The town plan complied with the zoning law, which envisaged no compensation for zoning ordinances or encumbrances that limited or compressed the rights of the owners. The court applied – as was immediately pointed out by the scholars of the subject matter – the German concept of *Einzelakttheorie*, according to which the individual right, the right of ownership in particular, must be considered as a sphere, on the surface of which the legislator can carve, that is can impose restrictions on the owner without compensation; but when restrictions carve onto the essential nucleus, and reach into the "vital core" of the right, the sacrifice imposed on the owner must be compensated.[14]

2.3 Leasing

Leasing contracts made their appearance in an Italian court – according to the records – only in 1972. A small Tribunal in the province of Pavia, which is full of small businesses led by able and tireless entrepreneurs, had to solve the question of whether the machinery given by the lessor to the lessee for the manufacture of shoes should be considered the property of the lessor or of the lessee. The contract utilised was a leasing contract, unknown until then in the Italian experience, where according to tradition, use of a

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[13] Corte di Cassazione, 22.12.1956, n. 4487, ibi, 1957, I, 877.

[14] Corte Costituzionale, 29.5.1968, n. 55, ibi, 1968, I, 1365.

thing can be the subject of a contract of rental or of a contract of sale, or of a contract creating property rights. The Tribunal instead referred to commercial practice – without however quoting the experience from which this type of contract had been imported – to acknowledge the possibility of having such a contract in our own system, by virtue of the principle of freedom of contract.[15]

2.4 Liability for Prospectuses

Even for the presentation to the public of financial products, in the absence of statutes which would be enacted only in 1983, and then more comprehensively in 1991, the judges – in this case the judges of the Tribunal and of the Appeals Court of the town of Milan, which is the main financial centre of the country – relied on foreign experience, in particular the English and U.S. experience. They did not take care to mention any cases, but simply proceeded to follow the reasoning of these courts. On that occasion there was a prospectus prepared by the issuer to favour the underwriting of debenture securities by investors; the issuer was the client of a bank, American Express Bank, subsequently American Service Bank s.p.a., which was in charge of placement of the securities on the Italian market; it had invited its clients to underwrite the debentures and assured them that the issuer was in an economically sound position; the investment, however, proved disastrous, because a few months later the issuer went bankrupt. In the first instance the bank was not held liable, because the judge ascertained that there was no contract of guarantee with clients.[16] On appeal, instead, the bank was held liable in tort, because it had spread groundless information on the economic soundness of the issuer. In defining the limits of liability, the judges refer to liability for (misrepresentation in) Prospectuses, well known to common lawyers.

2.5 Nervous shock

In the Italian legal system, there has been great discussion as to the extent and qualification of personal injury. In addition to

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[15] Tribunale di Vigevano, 14.12.1972, in Banca e borsa, 1973, II, 287.

[16] Tribunale di Milano, 11.1.1988, in Giurisprudenza Commerciale, 1988, II, 585.

physical injury and so-called moral injury (which corresponds to the "pain and suffering" of common law) a different type of injury, consisting of injury to health (so-called "biological damage") has been ascertained. The purely psychic damage, due to the nervous shock produced by an accident, had never been taken into consideration as a legally relevant injury. However, the Constitutional Court, taking into account the English experience, specified by an *obiter dictum,* in a case in which the issue was whether compensation was due to the relatives of the victim, that such psychic injury, if caused by fault (negligence) or wilful damage, gives rise to compensation. The writer of the judgment was one of the most noteworthy scholars of Private law, Luigi Mengoni, a former Professor at the Catholic University in Milan, subsequently appointed to the Court. The judgment sets forth that liability for nervous shock must be tied to fault. It cannot be strict liability. On the other hand, the English Courts which admit this principle, in order to avoid arbitrariness, and so as not to burden the risk of the insurance companies with an overly large amount of claims, make a distinction depending on whether the claimant suffered shock as an occasional onlooker at the time of the accident, or if he was told of the event far away from the scene of the accident, upholding the claim in the first instance, but rejecting it in the second.[17]

2.6 Trusts

The last example regards trusts, a typical institute of equity, originally only available in the systems of English descent, and subsequently introduced, with different legal configurations, and on the basis of special statutes, also in countries having different legal traditions. Trusts were the subject of the Hague Convention of 1.7.1985, rendered executive in Italy by statute n. 364 of 16.10.1989, which entered into force on 1.1.1992. The Convention deals with the applicable law, but contains certain provisions which give the definition of a trust, for the purpose of extending the rules to all the types of this category, in the various forms in which the signing countries acknowledge the existence of the same. It is definitely

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[17] Corte Costituzionale, 27.10.1994, n. 372 in Foro Italiano, 1994, I, 3297.

accepted, in the Italian legal system, that a trust established abroad with a foreign trustee, relating to property located in Italy, is valid, even if the settler is an Italian citizen. Italian citizens who intend to set up a trust mostly use foreign legal systems, mainly the rules applicable in Jersey, but also those applicable in Ireland. This choice is preferable for succession purposes, for fiscal reasons, for reasons of confidentiality, but also because the purposes achieved through the establishment of a trust are not equally available using the institutes of civil law, such as fiduciary contracts, fiduciary nomination or registration, etc. Usually the following transaction takes place: the property is registered in the name of an Italian company, whose quotas or shares are in turn registered in the name of a foreign trustee.

After the approval, ratification and entering into force even in Italy of the Hague Convention, the problem arose as to whether it was possible to set up a trust, obviously governed by a foreign law, with an Italian trustee. This because the Convention, as it contained provisions on the definition of "trusts", introduced in Italy rules of substantive law; trusts (in their structure at equity) governed by a foreign law, which would now be fully compatible with Italian law, but only provided that the trustee be a foreigner. Decisions of the courts, extremely rare, are divided.

The first case concerned compulsory purchases, promoted in Sardinia, in the 'fifties, in order to enact the agrarian reform. The land subject to compulsory purchase had been set up as a trust by an English national, by will and testament. The expropriating body had instituted proceedings against the surviving spouse, designated as the trustee, and not against their children designated in the will as "beneficiaries". The Tribunal of Oristano, a town on the island, had acknowledged the validity of a trust set up abroad on property located abroad, but had deemed incompatible with Italian law (in particular with the principles of so-called "public policy") the institute of trust, when the same consisted of property located in Italy, as this would have been in contrast with the so-called "numerus clausus" of property rights. The basic point of the ruling was the idea that in trust, ownership is split between *cestui que trust* and the trustee, and that this gives rise, therefore, to a form of property right which is not compatible with the fullness of the right of ownership envisaged in the Italian Civil Code. For the judges, therefore, the alternative was between considering as owners either the surviving spouse or

the children. By holding that the surviving spouse, as trustee, had only apparent title to the property, with powers to dispose of the same, but only in accordance with the aims of the trust, the Tribunal decided that the children had right of ownership, and therefore they should have been the recipients of the expropriation procedures, which, thus, had not been effected properly.[18]

The second case regarded a trust set up by an English national on property situated in Italy; the executor trustee had applied to the Italian judge (of the Tribunal of Casale Monferrato, a small town in the northern region of Piedmont) for an authorisation to sell the property; the judge, maintaining that the trust in question was similar to a fiduciary agreement "cum amico" under civil law, refused authorisation, and held that the same was not necessary, as the fiduciary agent was already the owner of the property, albeit on a fiduciary basis.[19]

The third case regarded a trust set up in Jersey by Italian nationals. The trustee was the settler's wife, an Italian citizen, who held the property (that is the shares in two companies) in the interest of the beneficiaries, her children and her husband, the settler himself. Having deposited the shares to take part in the Annual General Meetings of the two companies, the Directors of the companies then refused to return them to her. She had therefore acted to re-acquire possession of the shares; the Directors had objected, claiming that "trusts" were not recognised in our own legal system, and that the trustee (who had been replaced in the meantime) could not claim any right to the shares. The judge instead ruled in favour of the plaintiff, without however discussing as to the nature of "trusts" and their compatibility with the Italian legal system (which, according to the majority of authors, in the case at hand should have been ruled out, as the trustee was Italian); the judge based his ruling on the provisions relating to actions for recovery, which are regardless of the title to the property, but are based on the factual relationship with the property, such as possession.[20]

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[18] Tribunale di Oristano, 15.3.1956, ibi, 1956, I, 1020

[19] Tribunale di Casale Monferrato, 13.4.1984 (decree), in Giurisprudenza italiana, 1984, I, 2, 754

[20] Pretura di Roma, 8.7.1999 (order), unpublished.

3. Use of *Anstalt* from Lichtenstein

For the purpose of tax savings, to invest capital abroad and for reasons of confidentiality, wide use has been made of the institute of *Anstalt*, a typical device of the law of Lichtenstein. It is similar to a foundation set up by a sole subject; it has legal personality and is considered by the Italian judges as a legal person existing under foreign law, recognised in Italy in the same way as our legal system recognises other foreign legal entities. Under the laws of Liechtenstein, the necessary officers of the company are the founder and the administrator, while a General Assembly and Statutory Auditors are not strictly required. The administrator may dispose of the estate and may promote actions to safeguard the same. The general provisions of law (art 16) and the Bruxelles Convention of 28th.02. 1968 (art. 1) are applied. The first doubts that had been expressed by the Italian judges (in particular the Tribunal of Milan,[21] have been settled, and the Court of Cassation has upheld the legitimacy of *Anstalts* even if set up by founders who remain secret.[22]

4. The foreign models utilised in Italian contractual practice

In Italian contractual practice it is rare for the parties, if they are both Italian, to choose a foreign law to govern the contract. On the other hand there are numerous institutes, types of contracts, negotiating practices, remedies which have been imported from foreign experiences, especially from English or U.S. common law, to govern economic relations. Here are a few examples.

Many types of contract have been accepted in our legal system, by virtue of the principle of freedom of contract. These – as opposed to what occurred in other countries, such as France – have retained their original names: for instance, leasing contracts, factoring, franchising, merchandising, project financing, joint ventures, contracts regarding the use of information and data transmission

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[21] Tribunale di Milano, 11.1.1979, in Rivista di diritto internazionale, 1980, 523.
[22] Corte di Cassazione, 21.1.1985, n. 198.

technologies, and so forth. As with all contracts defined as "atypical", because they are not comprised among the types regulated by the Civil Code or by statutes, they are governed by the contractual clauses negotiated between the parties. The judge's control is two-fold: on the one hand he verifies if they are worthy of protection under the Italian legal system, that is if the interests and the objectives they pursue are lawful and economically useful; on the other hand, in the event that a contract should fail to make adequate provisions for all the eventualities that may come about, the judge proceeds to qualify the same, taking into account the nominate legal types. For instance, in the case of a leasing contract, reference is made either to the conditional sale agreements (with retention of title), or to rental contracts; for joint ventures, reference is made to association *en participation*, etc.

As for negotiating practices, the use of side-letters is frequent, and so is the use of letters of intent, letters of guarantee. Above all, for certain complex economic transactions, such as the sale of share holdings, the technique adopted in the United States is followed: a due diligence research is made, a first agreement is reached (closing) and then the parties proceed to the definitive contract. Even as regards remedies, reference has been made to the experiences of common law, to better attain the interests of the parties: after some hesitation, the so-called "autonomous contract of guarantee" has been accepted (configured at common law as bid bonds, etc.). But it should be specified that often even among Italian parties, the use of US Standard Contract forms, drafted in English, is preferred. Even if the contracts are complex, and therefore more articulate than the average contract utilised in Italy, we never arrive at the detailed regulation of US Contracts, consisting often of weighty files, in which every conceivable event is taken into account and provided for.

5. *Lex Mercatoria* and Principles of International Commercial Contracts evolved by Unidroit

In international commercial contracts the Italian parties, when together with their foreign counterparts they do not choose a foreign law, normally refer to the principles of *Lex Mercatoria*, or to the principles developed by the Institute for the Unification of Law (Unidroit), with its Head Office in Rome.

5.1 Lex Mercatoria

Even for the *lex mercatoria* – to the development of which the Italian merchants of medieval times gave a great contribution[23] – we can make the same observations as were made in relation to Roman law. It was not considered as a sort of foreign law, as in the history of our experience (not national but cultural) it is considered part of the history of Italian law. In any event, whilst the Italian judges have no difficulty in acknowledging it as "a body of rules of conduct appraisable as widely used in the mercantile *societas*, the problems that may arise regard the possibility of making arbitration awards based on the same. The question is intertwined with the issue of international arbitration, which is not the subject of this paper.

It is worth recalling one of the few instances in which Italian judges have dealt with the matter. The case regarded a contract entered into between an Italian company and a German one, containing an arbitration clause, which referred the settlement of disputes to the Refined Sugar Association of London, which applies the principles of the *lex mercatoria*. The award was not motivated, in accordance with the practices of the Association. As the parties were citizens of two countries (Germany and Italy) which had signed the Geneva Convention of 21.04.1961 on International Commercial Arbitration, the Italian party (non-prevailing) claimed that the award was null and void, on the basis of the fact that the Convention envisages that where either party requests that the award be motivated, prior to the rendering of the decision, the award must be so motivated (art. 8). The German company had defended itself claiming that the Association belonged to a country (the United Kingdom), which had not signed the Convention, and therefore the award was valid.

The Court of Cassation issued a very elaborate ruling in which it upheld the claim of the Italian party. The motivation for this sets off from the notion of *lex mercatoria* previously mentioned; it went on to specify that *lex mercatoria* lacks sovereignty, because the mercantile *societas* has no boundaries, but it does not have the

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[23] P.GROSSI, L'ordine giuridico medievale, supra at n. 3.

enforceability of sovereign systems. Having therefore to refer to a legal system in order to render the arbitrators' decisions enforceable, the Court of Cassation deemed it appropriate to apply the Geneva Convention, claiming that the same has a more modern approach than that of New York. The choice is motivated in the sense that since the parties are citizens of countries that are signatories of this Convention, this Convention: "must be considered as recalled by implied reference in the contractual stipulations between entrepreneurs belonging to ratifying States of the same.[24]

5.2 The Unidroit Principles

The principles of Unidroit represent a veritable melting pot of models from the most varied experiences, but above all represent a fortunate attempt to merge the principles of civil law, of common law and of the *lex mercatoria*.[25] They start by upholding of freedom of contract and they propose clear and simple rules which regard the binding force of contracts, the principle of good faith and reasonableness, the formation, interpretation and execution of the contract, in addition to rules on non-performance and damages. From the viewpoint of the Italian experience, of particular relevance is the envisaging of rules relating to situations of hardship.

In all systems, rules are established, expressly or construed from judicial or theoretical interpretation, regarding the eventuality that performance may become frustrated. In the Italian experience we can point out two occurrences: that in which frustration was extraordinary and unforeseeable, which bears with it the consequence of termination of the contract (art. 1467); and that in which the frustrating circumstances were foreseeable, but not actually envisaged by the parties. In this case, one has to ascertain the possibility of applying the theory of so-called "pre-supposition" which, connected with the bona fide clause, with "Causa" of the contract and with the negotiating basis (that is with the assignment of advantages and risks) may entail the termination of the contract.

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[24] Corte di Cassazione, 8.2.1982,n. 722, in Foro italiano, 1982,I, 2285

[25] J.BONELL, An International Restatemene of Contract Law. The Unidroit Principles of International Commercial Contracts, Irvington, N.Y., 1994

In international trade there is a trend, as underlined many times, toward keeping the contract alive. Therefore the general rule according to which the parties are compelled to carry out their respective obligations, even if their performance has become more onerous (art. 6.2.1.), is tempered by the institute of "hardship". The features of this institute are outlined in article 6.2, where they are indicated as follows: frustration must be dependent on a risk not accepted in the contract, on external circumstances, which must not be ascribable to the party which invokes the same, and must have supervened or, if precedent, must not have been known or recognisable by the party who invokes them. The effect of "hardship" clauses is directed at maintaining the relationship alive. Therefore, the possibility is given to the party invoking the same to re-open negotiations without hindrance and without suspension of the performance due under the agreement. Should negotiations fail, the interested party may apply to the judge (in our case to the arbitrator).

Here lies another scope for intervention, which in countries of codified law is totally ignored, indeed it is strenuously opposed: the judge, in fact, may – beyond the ruling of termination of the contract, which is the customary conclusion – "adapt the contract with the aim of re-establishing the balance between performances" (art. 6.2.3). What is really extraordinary for civil lawyers is to admit the power of the judge to "re-write the contract" on behalf of the parties, in contrast with the principle of "sanctity of contract". But the aim of the Principles is precisely to save the economic transaction and to render it feasible in accordance with the supervening risks.

6. The European Union rules

Community law cannot be considered a "foreign law", because it is one of the sources of the legal systems of the Member States. However, both Regulations and Directives tend to create uniform rules for the internal market. These rules are created originally by the organs of the Community, but can be traced back to the models coming from the individual countries of the Community; these rules are effective in the "strong" models (the French, German and English models) which are often adapted to the new exigencies; to those stronger models the weaker models (from a political,

numerical, economic viewpoint) adapt.[26] (26). Thus it was, for instance, for the directive on "unfair clauses in consumer contracts", for the directive on consumer credit, for the directives on banks and insurance companies and, above all, for the rules on competition. It is important to underline that from the complex of directives on the subject matter of contracts, special rules can be singled out which tend to become general: let us think of the use of the form of contract to protect the weaker party, to the ban on the abuse of bargaining (contracting) power; to the rules on prior and subsequent information in the stipulation of contracts, to the principle of good faith which is now at the basis of any type of contract.

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[26] See B. MARKESINIS, "Learning from Europe and Learning in Europe", in ID., Foreign Law & Comparative Methodology.A Subject and a Thesis, Oxford, 1997, p. 163 ff. and ID., "Our Debt to Europe: Past, Present and Future", in The Clifford chance Millennium Lectures. The Coming Together of the Common Law and the Civil Law, Oxford-Portland, 2000, p. 37 ff.

THE USE OF CHILDREN IN WAR: THE INTERNATIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS

JONATHAN BLACK-BRANCH

Few people would dispute that children are amongst the most vulnerable during times of war or armed conflict. They are often recruited into some of the toughest of military operations by mandatory conscription or drawn into it by the seemingly glamorous appeal of being part of a macho operation. Often times parental figures are absent or incapable of providing appropriate guidance on such matters. Alone, children are not sufficiently capable of understanding the issues at stake; they may be easily led astray making decisions which invariably cost them dearly. Children need protection under international law. They need legal guarantees that protect them from mandatory or voluntary recruitment. In response to reported increases in the numbers of children participating in war and armed conflicts, the United Nations Commission on Human Rights has agreed an Optional Protocol On the Involvement of Children in Armed Conflicts, The Protocol seeks to protect children who are recruited in situations of armed conflict, by legally raising the age of compulsory recruitment of persons into armed forces and by seeking to limit their participation in direct hostilities. Although a necessary first step in protecting children, the Protocol itself falls short of an out right ban of child participation in hostilities, *per se*. This article critically assess the new Protocol, examining its strengths and deficiencies.

1. Introduction

The dawn of the Third Millennium marks an important point in history for children around the world. On 21st January 2000, 70 nations agreed a United Nations treaty to ban the direct use of children in war. Known as the Child Soldiers Protocol, it prohibits the deployment of children under the age of 18 in armed conflict, and their recruitment, compulsory or voluntary, to "armed groups". The Protocol, which will accompany the 1989 Convention on the Rights of the Child, marks six years of international negotiations.

Although heralded as a triumph by advocates of childrens' rights, the Protocol itself is limited in its legal protections of children. Concessions insisted upon by the United States in particular, and backed by the United Kingdom, leave open voluntary recruitment of 16 and 17 year olds into non-combatant services. Moreover, the Protocol seeks to address the issue of direct usage of children, providing little protection for children in relation to indirect involvement in war and armed conflicts.

The purpose of this article is to examine the main provisions of the new Protocol. Discussion focuses on the substance of the articles themselves, highlighting some of their strengths and weaknesses. The article concludes by highlighting issues left un-addressed regarding the indirect use of children in war.

2. The Optional Protocol: Background and Deliberations

In response to mounting pressure to address the concern of the use of children in war around the world, in 1994 the United Nations Commission on Human Rights[1] established a working group to draft a protocol to the Convention on the Rights of the Child relating to the involvement of children in armed conflicts.[2] This mission was considered to be a matter of priority, and was hoped to be concluded to coincide with the 10th anniversary of the Convention on the Rights of the Child. Representatives and observers attended from a broad scope of nation states, international bodies and non-Governmental organizations. Participation was open to all members of the UN Commission, of which some 33 appointed representatives to the deliberations.[3] In addition, observers of some 20 non-member States of the

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[1] Authorized by the Economic and Social Council (Resolution 1994/10, UN Economic and Social Council), the first session of the working group opened its 1st meeting, 31 October 1994.

[2] (E/CN.4/1994/91) submitted by the Committee on the Rights of the Child.

[3] Participating member States were: Angola, Austria, Australia, Brazil, Bulgaria, Canada, Chile, China, Côte d'Ivoire, Cuba, Cyprus, Ecuador, Finland, France, Germany, India, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Pakistan, Peru, Poland, Republic of Korea, Romania, Russian Federation, Sri Lanka, Syrian Arab Republic, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America.

Commission attended[4] as well as two non-member States of the United Nations, namely the Holy See and Switzerland. Observers were present from the United Nations Children's Fund, the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and from the following non-governmental organizations: African Commission for Health and Human Rights Promoters (CAPSDH), Baha'i International Community, Defence for Children International, Friends World Committee for Consultation (Quaker), International Federation Terre des Hommes, International Fellowship of Reconciliation, International Save the Children Alliance.

At its sixth session held from 10 to 21 January 2000, the working group of the Commission on Human Rights agreed a draft optional protocol to the Convention on the Rights of the Child. The protocol was submitted to the Commission on Human Rights for consideration and approval at its fifty-sixth session (20 March-28 April 2000) and then, through the Economic and Social Council, to the General Assembly for final adoption. It will come into effect once ratified by ten countries.

3. The Aim of the Protocol

The principal aim of the Protocol is to protect children who are recruited in situations of armed conflict under international law. In particular, it seeks to raise the age of compulsory recruitment of persons into armed forces and to limit their participation in hostilities.

4. The Child Soldiers Protocol[5]

The Protocol itself seeks to address a number of concerns regarding the use of children in war. It aims to protect them from

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[4] The following non-member States of the Commission, were represented by observers: Algeria, Argentina, Croatia, Czech Republic, Denmark, Egypt, El Salvador, Greece, Iraq, New Zealand, Morocco, Nicaragua, Norway, Philippines, Senegal, South Africa, Slovakia, Sudan, Sweden, Thailand.

[5] Draft optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. See Appendix 1 for the complete wording of the Protocol.

a number of concerns that have surfaced in recent years and to promote their general welfare relating to their involvement in war and armed conflict. To begin with the Optional Protocol endeavours to ban the use of children under the age of 18 from direct involvement in armed forces hostilities.[6] It calls for a ban on the compulsory recruitment of children under 18 into the armed forces in the first place.[7] It raises the minimum age for voluntary recruitment[8] and calls for the adoption of safeguards to ensure voluntary recruitment is not forced or coerced[9] The Protocol prohibits armed groups, which are distinct from the armed forces of a State, from recruiting or using children under the age of 18 in hostilities.[10] It reiterates the continuance of State obligations regarding existing international humanitarian law.[11] And, States that are party to the Protocol must implement effective means of enforcing the provisions thereof.[12] Moreover, States agree to provide rehabilitation and social reintegration of persons who are victims of acts which are deemed contrary to the Protocol.[13]

5. Use of Children in Direct Hostilities

Delegates of the working group readily agreed that setting an age limit for child participation in hostilities was "the key" issue of the new protocol. Reaching consensus on this point, however, proved to be more contentious. The Convention on the Rights of the Child (1989) initially set a minimal age of 15 years for children participating in war and armed conflicts.[14] Human rights groups, assisted by some UN Member States, argued 15 was too young an age for children to participate in war. They argued 18 was a more suitable minimum age.

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[6] Article 1.
[7] Article 2.
[8] Article 3, which means an amendment of Article 38(3) of the 1989 Convention on the Rights of the Child.
[9] Article 3.
[10] Article 4.
[11] Article 5.
[12] Article 6.
[13] Article 7.
[14] Article 38(2).

Mr. Olara Otunnu, Special Representative of the Secretary-General for children in armed conflict strongly supported the proposal to raise the minimum age to 18 for recruitment into armed forces or armed groups, and participation in combat. He urged all participants to adopt this measure stating that it would send a "very important and much needed message concerning the protection of the rights and welfare of children in situations of armed conflict".[15] Similarly, the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, addressed the working group expressing the hope that those Governments which were reluctant to accept a minimum age of 18 would "reconsider" their position.[16]

Although the vast majority of the delegates supported a limit of 18 years, there was strong opposition to this measure by those countries favouring a lower minimal age, remaining adamant throughout the six years of deliberations, only acquiescing at the last round of discussions in January 2000. The final draft of the optional Protocol bans children under the age of 18 from taking "direct part in hostilities".[17] Indeed, countries are to "take all feasible measures" to ensure this end.[18] Advocates of childrens' rights are particularly pleased with this outcome of a minimal age of 18 relating to direct participation, citing it as a triumph for children. But, amid their success, they recognize the shortcomings of this same provision.

6. Voluntary versus Compulsory Recruitment to the Armed Forces

The ban does not prohibit children under 18 from joining the armed forces in the first instance, it simply distinguishes between voluntary and compulsory recruitment. Many of the delegates favoured an "outright" ban on children joining the armed forces.

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[15] Statement by Mr. Olara Otunnu, Special Representative of the Secretary-General, read by the Chairman of the working group at the 4th meeting, on 5 February 1998.

[16] Speech by the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, at the 5th meeting, on 9 February 1998.

[17] Article 1.

[18] Article 1.

They wanted the participation of "no" child under the age of 18 years in any form of military training, exercise, or indeed hostility. Since consensus could not be reached in that regard, discussion turned to the nature of recruiting children under the age of 18. Distinction was made between voluntary recruitment, where children freely offer to join the armed forces and compulsory recruitment, where they are compelled to do so by state authorities.

Voicing the stand of many states, the representative from Ethiopia issued strong support for a "straight 18" ban, stating that, "compulsory recruitment should be totally abolished,[and] the age limit for voluntary recruitment into the armed forces should be set at 18". Although many states were willing to accept banning child recruitment as a "compulsory measure, they were less enthusiastic about the abolishing voluntary recruitment drives.

Ultimately, a "straight 18" ban of both types of recruitment could not be reached, a compromise was struck whereby delegates agreed to ban compulsory recruitment practices of children under 18. Voluntary recruitment, however, remains open to children freely electing to join the services. States are to raise the minimum age in years for the voluntary recruitment of individuals into their national armed forces from that set out in Article 38(3) the Convention on the Rights of the Child, from 15 years to 18.[19]

7. Criticisms of Voluntary Recruitment to the Armed Forces

Many activists criticise the compromise to allow voluntary recruitment. Delegates point to a certain illogic to the approach of

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[19] Article 38 states: 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

some Governments in that they recruit and deploy children under 18 years of age as soldiers, but ban the sale of alcohol and tobacco to these same children. Other Governments prohibit children from employment in some industrial spheres, which are deemed likely to jeopardise the childs' health or safety, but these same children can participate in armed conflict and war.

Beyond these illogical stands, many delegates argued that most children of that age are not sufficiently aware of the consequences of their actions in joining military offences. They contend the "straight 18" ban serves to protect children from taking such serious decisions. There is often a fine line between a childs' exercising his or her free and untethered desire to become part of a military organization and being indoctrinated into believing it is in his or her best interest to do so. In that regard, many NGO participants, highlighted the vulnerability of children who had been displaced from their families during actual internal conflicts. They point out that refugee camps, in particular, are ripe grounds for the recruitment of child soldiers. While some children voluntarily sign-up, others are forced to do so. Many children are told they have to participate in the hostilities and are treated in a master-servant relationship.

Although others do volunteer, there remains some ambivalence as to how voluntary their choices actually are, in that respect. Feeling unsafe and left to their own devices, some refugee children volunteer to join armed groups hoping to find physical protection and economic security. They are lulled into a false sense of security and worth. Many children are allured into a "romantic notion" of becoming a soldier. One who is tough and in control, when they as children feel weak and out of control during their displaced period, all during the midst of adolescent angst.

It seems, the issue of child soldiers is not a merely military or patriotic one, but more a matter relating to exploitation and poverty. NGOs made reference to reports which demonstrate that, irrespective of the method of recruitment, child soldiers very often come from poor and disadvantaged groups of society with lower educational prospects or from groups with disrupted or non-existent family backgrounds. Moreover, child soldiers are not all boys; many girls are recruited as well, many of who are at risk of sexual exploitation, sexual violence, contracting the AIDS virus and un-planned pregnancy.

Whilst recognizing these concerns, some countries point to the military as a source of livelihood for many young people citing what they perceived as the benefits of early recruitment. Reiterating this point, Pakistan, for example, argued voluntary recruitment to be kept at 16 because many children at that age entered the armed forces in Pakistan for job stability, training and educational opportunities, providing in some cases a livelihood for both themselves and their families. The representative from Pakistan thus argued that lowering the age could cause "severe social dislocation" for individuals and families.

8. Protecting Children who Join Voluntarily

In view of the above issues and concerns, certain measures were introduced to try to curtail abusive voluntary recruitment. Under Article 38 of the Convention on the Rights of the Child, states are to "recognize" that children under 18 are "entitled to special protection". To that end, upon ratification of the Protocol, each member state is to deposit a binding declaration which sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces as well as a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

Those states which permit voluntary recruitment into their national armed forces under the age of 18 will agree to endeavour to maintain safeguards to ensure, as a minimum, that: (1) such recruitment is genuinely voluntary; (2) such recruitment is done with the informed consent of the person's parents or legal guardians; (3) such persons are fully informed of the duties involved in such military service, and such persons provide reliable proof of age prior to acceptance into national military service.[20]

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[20] Under Article 3, each State is permitted to strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations who shall inform all States Parties. Such notification shall take effect on the date which it is received by the Secretary-General.

9. Military Education and Training Exempt

Many of the states opposing the minimum age for voluntary recruitment argued that a "straight 18" ban might undermine branches of their educational system. It was noted that in many countries the function of military service is not limited to defence alone. The military sector provides an important educational service for many young people as it relates to instructional and vocational training schools. It often provides young people an opportunity to acquire transferable knowledge and skills that they can use as the basis of career advancement generally. These states felt that too high an age limit for recruitment would limit access to education for some young people, particularly those who lack financial means to otherwise continue their schooling.

Given this position, it was accepted in the final version of the Protocol that the requirement to raise the age to 18[21] would not apply to schools operated by, or under the control of, the armed forces. The requirement to raise the age to 18, as set out in paragraph 1 of Article 3 "does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child". [22]

10. Indirect versus Direct Hostilities

As mentioned above, one of the main criticism of the provision is that it serves to qualify the ban. It does not prohibit children from taking part in hostilities, *per se*, it merely precludes them from "direct" involvement, thus weakening the childs' protection. Children may participate in other capacities of war and serve to facilitate troops on the front lines. Many delegates favoured an "outright" ban to be applied to "all forms of participation", whether it be "direct or indirect". The bans as it stands is therefore limited to "direct" participation in hostilities, it does not eliminate it altogether. While limiting their involvement is admittedly a step forward, many strong proponents of childrens' rights involved in the delegation

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[21] Pursuant to Article 3 of the Protocol.

[22] Article 3.

would have liked to seen an outright ban of the use of children in any form, whether it be in the direct hostilities or as ancillary support to facilitate front line battle.

In relation to this, it was pointed out during the discussions that the optional nature of the protocol means that *too* strict a margin would deter some states from ratifying the treaty. And, it was imperative to have as many nations adopt the Protocol as possible. Some stressed the importance of banning child involvement with armed groups.

11. Armed Groups

Most delegations agreed that the realty in the world today is that most under-aged combatants participating in armed conflicts serve in non-governmental armed groups. They therefore felt the Protocol should reflect this reality by specifically addressing the issue of child soldiers recruited by non-governmental entities. Notably, the Protocol distinguishes between the use of children by "state-run armed forces" and "armed groups" which act as splinter guerrilla forces not under state control. Article 4(1) states that, "Armed groups ... should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years", be it compulsorily or voluntary. To this end, state parties to the Protocol are to take "all feasible measures to prevent such recruitment and use" of children. Specifically, they are to adopt "legal measures" to prohibit and indeed to criminalize such practices.

12. Implementation, Enforcement and Monitoring

The Protocol will enter into force three months following ratification by ten countries. It will come into effect in subsequent countries one month after their respective ratification or accession.[23] States party to the Protocol are to co-operate with its implementation, including the prevention of any activity contrary to it.[24] It is incumbent on each member state to take "all necessary

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[23] In accordance with Article 10 of the Protocol.

[24] Article 7(1).

legal, administrative and other measures to ensure the effective implementation and enforcement" of the provisions therein.[25]

Within two years following the entry into force of the Protocol, each respective state must "submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment".[26]

In addition, states are to ensure children who are recruited or used in hostilities are demobilized or otherwise released from service within their respective jurisdiction.[27] Moreover, states are to offer children adversely affected in this manner "appropriate assistance for their physical and psychological recovery, and their social reintegration" into society.[28]

13. Denunciation and Amendments

Any State party to the Protocol may denounce it at any time by written notification to the Secretary-General of the United Nations.[29] "Denunciation will take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations".[30] "If, however on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict."[31] A denunciation will not have the effect of releasing the said member State from its obligations in regard to any act which occurred prior to the denunciation coming into effective.[32] In addition, such a denunciation will not prejudice in any way the continued consideration of any matter which is already under consideration

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[25] Article 6.
[26] Article 8(1).
[27] Article 6.
[28] Article 6.
[29] Article 11(1).
[30] Article 11(1).
[31] Article 11(1).
[32] Article 11(2).

by the Committee prior to the date at which the denunciation becomes effective.[33]

Any State Party may propose an amendment and file it with the Secretary-General of the United Nations.[34] The Secretary-General will communicate the proposed amendment to States Parties requesting whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal.[35] If within four months from the date of the communication at least one third of the States Parties favour such a conference, the Secretary-General will convene the conference under the auspices of the United Nations.[36] Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.[37]

14. Protocol Negotiations: A Balancing Act

The measure of success of this Protocol is arguable. While some feel it is a progressive step forward for humanity in general and children in particular, others highlight its deficiencies and shortcomings. At the risk of stating the obvious, negotiating a protocol of this nature is a delicate process. Parties are faced with the dilemma that too narrow a margin of protection enshrined in the various provisions render it weak and insignificant, whilst too strict a margin would ultimately deter some states from ratifying the treaty (many of whom the international community want to ratify it). The working group was thus faced with the task of balancing the interest of children on the one hand, i.e., setting acceptable standards relating to their participation in war and armed conflict, and on the other hand agreeing a treaty that would be ratified and indeed, complied with, by the vast majority of nations throughout the world.[38] Theirs was a delicate balancing act. One on which many would congratulate the drafters.

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[33] Article 11(2).
[34] Article 12(1).
[35] Article 12(1).
[36] Article 12(1).
[37] Article 12(1).

15. Protocol Weakness: The Indirect Use of Children in War

The greatest strength of the Protocol appears to be in its coming to fruition in the first place, amid much adversity and varying opinions on a delicate matter. Its greatest weakness, however, is its failing to address a number of questions relating to the "indirect" use of children in war. The indirect use of children can manifest itself in a number of ways, depending on the country in question, the circumstances of the war in question and the nature of the troops involved in the fighting.

One indirect use of children is to strategically position them so as to act as deterrents from air raids. Many countries limit bombing campaigns levelled against them by placing important military points in areas where children frequent. They purposely place munitions factories, military barracks and intelligence headquarters in areas where civilian populations, generally, and children in particular are likely to live, study and play, including near schools, playgrounds and places of worship. This strategy is an effective means of deterring bombing campaigns, particularly from international forces who wish to avoid child and civilian casualties.[39] While children are not used a soldiers as such, they are used indirectly as part of the larger machinery of war.

Others are used in the war itself. Specifically, children are often used for landmine detection and clearance. They are asked to walk before the troops with the strategic effect of identifying anti-personal mines. It is considered a more efficient use of resources to lose or maim a child than to injure or lose trained soldiers. To that effect, children are not technically used directly in hostilities, but they are used all the same, and in a most brutal fashion. Another area which is not sufficiently covered in the Protocol is the issue of exploitation as it relates to rape, sexual abuse and sex slavery. Many children, particularly young girls are physical exploited by some soldiers of war both in indiscriminate *ad hoc* manners and via systematic forced slavery and servitude. Such

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[38] See discussion notes of Commission on Human Rights Fifty-fourth Session (E/CN.4/1998/102 of 23 March 1998).

[39] A case in point is the 1999 NATO air campaign against the Federal Republic of Yugoslavia.

treatment has led to many unfavourable outcomes, including unwanted pregnancies, the spread of the AIDS virus and psychological trauma, generally. Finally, another indirect use of children relates to medical usage. Many children are used to facilitate war by supplying blood to soldiers wounded in action. Some are used as human blood banks to injured soldiers. Many children are literally bleed to death in this fashion, or at best suffer adversely therefrom.

As discussed, although the Protocol is am important step forward in regulating the direct use of children in military services and armed conflict, there remains a number of pressing issues left to be addressed by the international community as it relates to the broader participation of children in war generally.

16. Conclusions

There is little doubt that the Protocol is a progressive step towards protecting childrens' rights. For the first time in history there seems to be a collective political will to improve the quality of life of children generally and to safeguard their early life experiences relating to their participation in military duty, armed conflict and hostilities in particular. The Protocol is no doubt an important turning point. But, amid its success, it has many shortcomings. The ban does not prohibit children under the age of 18 from joining the armed forces in the first instance, it simply distinguishes between voluntary and compulsory recruitment. Moreover, it does not prohibit children from actually participating in hostilities, *per se*, it merely limits their involvement in hostilities, falling short of prohibiting participation altogether. It would seem that this is an appropriate point from which to develop further international law as it relates to the place of children in war and armed conflict, be it directly or indirectly.

APPENDIX 1

Draft optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts

At its sixth session held from 10 to 21 January 2000, the open-ended working group of the Commission on Human Rights entrusted with the elaboration of a draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts has completed its mandate by adopting by consensus, on 21 January, the text of the draft optional protocol. The draft optional protocol will now be submitted to the Commission on Human Rights at its fifty-sixth session (20 March-28 April 2000) for consideration and approval and then, through the Economic and Social Council, to the General Assembly for final adoption.

The unedited English version of the text of the draft optional protocol is reproduced below.

PP1: Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child.

PP2: Reaffirming that the rights of children require special protection and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security.

PP3: Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development.

PP4: Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals.

PP5: Noting the adoption of the Statute of the International Criminal Court, in particular the inclusion of conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities as a war crime in both international and non-international armed conflicts.

PP6: Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child, there is a need to increase the protection of children from involvement in armed conflict.

PP7: Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

PP8: Convinced that an Optional Protocol to the Convention, raising the age of possible recruitment of persons into armed forces and their participation in hostilities, will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.

PP9: Noting that the twenty-sixth international Conference of the Red Cross and Red Crescent in December 1995 recommended inter alia that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities.

PP10: Welcoming also the unanimous adoption in June 1999, of the ILO Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits inter alia forced or compulsory recruitment of children for use in armed conflict.

PP11: Condemning with gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit,train and use children in this regard.

PP12: Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law.

PP13: Stressing that this Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including article 51 and relevant norms of humanitarian law.

PP14: Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter of the United Nations and observance of applicable human

rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation.

PP15: Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to this Protocol due to their economic or social status or gender.

PP16: Mindful also of the necessity to take into consideration the economic, social and political root causes of the involvement of children in armed conflicts.

PP17: Convinced of the need to strengthen international cooperation in implementation of this protocol, as well as physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict.

PP18: Encouraging the participation of the community and, in particular, children and child victims in the dissemination of information and education programmes concerning the implementation of the Protocol.

Article 1

State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

State Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

States Parties shall raise the minimum age in years for the voluntary recruitment of persons into their national armed forces from that set out in Article 38(3) the Convention on the Rights of the Child, taking account of the principles contained in that article and recognize that under the Convention persons under 18 are entitled to special protection.

Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol which sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

States Parties which permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that: such recruitment is genuinely voluntary; such recruitment is done with the informed consent of the person's parents or legal guardians; such persons are fully informed of the duties involved in such military service, and such persons provide reliable proof of age prior to acceptance into national military service.

Each State Party may strenghten its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations who shall inform all States Parties. Such notification shall take effect on the date which it is received by the Secretary-General.

The requirement to raise the age in paragraph 1 does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

1. Armed groups, distinct from the armed forces of a State, should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed to preclude provisions in the law of a State Party or in international instruments and international humanitarian law which are more conducive to the realisation of the rights of the child.

Article 6

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery, and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present protocol, including in the prevention of any activity contrary to the protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation among concerned States parties and other relevant international organisations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral, or other programmes, or inter alia, through a voluntary fund established in accordance with the General Assembly rules.

Article 8

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other State Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from State Parties further information relevant to the implementation of this Protocol.

Article 9

1. The present Protocol is open for signature by any State which is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification or open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General of the United Nations in his capacity as depositary of the Convention and the Protocol shall inform all States Parties to the Convention and all States which have signed the Convention of each instrument of declaration pursuant to article 3, ratification or accession to the Protocol.

Article 10

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 11

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States which have signed the Convention. Denunciation shall take effect one year after the date of receipt

of the notification by the Secretary-General of the United Nations. If, however on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act which occurs prior to the date at which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

Article 12

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

   When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments which they have accepted.

Article 13

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States which have signed the Convention.

ACADEMIC FREEDOM AT PALESTINIAN UNIVERSITIES: A HUMAN RIGHTS REPORT

BASSEM EID

Bassem Eid traces the history of Palestinian Universities over three periods – the Israeli occupation early 1970s until the Intifada, the Intifada and its aftermath and the current era. The author examines the serious problems and restrictions faced by University students and intellectuals. He denounces a series of human rights violations particularly the rights of freedom of expression and association. Such violations include deportations, violence against students, arrests and detentions without formal charges and unfair dismissal of professors who spoke their minds. These human rights violations are not solely a result of Israeli oppression but also a result of the interference of the Palestinian Authority. The author probes into the University Security Administration and the presence of undercover agents within the universities, who monitor and report the activities of individuals, are associated with the Islamic bloc or who criticise the Palestinian Authority.

1. Introduction

University campuses distinguished by high levels of academic freedom are characterised by open environments in which students and professors exchange their ideas freely, openly, and without fear or risk. They are institutions where critical thinking is developed and valued. This applies to academic writing, campus activities about internal university matters, as well as to those political issues that concern the wider society. Furthermore, such universities require an environment in which all students have an opportunity for equal education and one in which students and professors are judged on the merits of their scholarship.

Five years after the advent of the Palestinian Authority (PA), Palestinian universities continue as they have always, to reflect trends of the general society. Today human rights at risk on a societal level are similarly at peril on campus. The Palestinian Human Rights Monitoring Group recognises the vital importance

of academic freedom for the support and preservation of human rights in the wider Palestinian population. Palestinian universities form the most significant force for long term national reconstruction and democratisation. No other Palestinian institution can have as dramatic an impact on the intellectual and technical development of future generations. When academic freedom is in jeopardy, the development of critical thinking is threatened at its very foundation. Furthermore, the respect and demand for human rights are deadened.

There is a common assumption that the West Bank is freer than Gaza. It is obvious that the problems of academic freedom are quantitatively and qualitatively worse in Gaza. The universities in Gaza are government controlled which means they are de facto PA institutions. Furthermore, Gaza universities exist in closer proximity to the Palestinian Authority and therefore many more people affiliated with the university are connected to the PA. The existence of an Islamic University in Gaza has led to greater suspicion on the part of the Authority, with internal and external pressure exerted to squelch Islamic opposition. We have chosen not to emphasise the differences between the two areas in order not to create a hierarchy that could lead to the acceptance of lesser abuses.

The lack of published information on this issue stems in great part from the fear of negative repercussions such as the loss of livelihood or professional ostracism perceived by Palestinian intellectuals. Students are equally concerned about risking current and prospective jobs and therefore are hesitant to speak openly about their experiences on campus. Despite these obstacles, it is extremely important to address this issue. We firmly believe that an improved human rights environment at the universities will have an impact on the development of democracy and the strengthening of civil society.

Universities are microcosms of society and as such encompass many activities. Since the establishment of the Palestinian Authority, employment has been a major source of tension for the Palestinian People. In June 1999, a strike broke out at many of the universities. The strike resulted because of the PA's failure to transfer to the universities in order to pay workers' salaries. As a result of the failure in transferring these funds, professors and other staff members had not been paid in over four months.

I strongly recommend that the Palestinian Authority recommit itself to higher education and, in so doing, pledge sufficient financial and human resources in order to advance the research and teaching at Palestinian universities. We also propose that the PA rescind all security measures implemented solely for the purpose of controlling the academic community.

2. Background

The Palestinian people are undergoing a critical transitional phase of nation building. Simultaneously they are pursuing ongoing peace negotiations with Israel. These two complex realities create constraints on society, which have often resulted in the violation of fundamental freedoms. There is a notion among many Palestinians that the PA is learning from its mistakes and that the abuse of freedoms should be tolerated as part of the difficult process of state building. In the past, Palestinian Universities have been centres of the Palestinian struggle against the Israeli occupation. Today, they should be able to develop the capacity to balance the social, cultural and political activities necessary for comprehensive social development. Only in a system that values academic freedom can universities engage in an honest struggle with the complexities of building a Palestinian state. This balance can be built organically over time, but Palestinians cannot do this in a vacuum. Borrowing from international models is critical. Despite the economic and political constraints placed upon political leaders and university administrators alike, the authorities and the general society need to be cognisant of international norms.

3. Israeli Occupation and the Intifada

Palestinian universities in their current form came into existence in the early years of the Israeli occupation. The modern Palestinian universities have seen three distinct periods. The Israeli occupation from the early 1970's until the Intifada characterises the first period. The Intifada and its aftermath are the second period. The current era, the third period, encompasses the years since the establishment of the Palestinian Authority to the present, and it constitutes our major concern.

The first institution to expand from a junior college is Palestine's

leading university, Birzeit University. In 1972, Birzeit's junior college status, which it held in the 1950's and 60's, was upgraded to that of a four-year college. Today there are 3863 students. The first Bachelor's degree was awarded in 1976. Bethlehem University followed Birzeit in 1973. Four years later less than 100 students graduated from this university. Today there is a total of 1929 students. Until 1987 Israel treated Bethlehem University better than the others. However in October of 1987, a few months before the start of the Intifada, the campus was ordered closed for a week by military order.

In 1977, al-Najah National University became the next four-year Liberal Arts College to be established. Today it is the largest university in the West Bank with 8442 students. Because of the Islamic ambience in the very nationalist city of Nablus, al-Najah University was always subject to more pressure from the Israeli military. Nonetheless, faculty on several occasions attempted to help students jailed by Israel and smuggle exams into prison. Army raids, checkpoints, and brief closures were the norm through the 1970's and 80's.

The Gaza Islamic University was established later. After Camp David, travel to Egypt became increasingly difficult and, as a result, a university in Gaza was set up with the support of al-Azhar University in Cairo. The university also received funding from the Arab Gulf states. From the outset the institution was opposed by Israelis and by Palestinian secular nationalists. One of the ways in which Israel showed its opposition was through the refusal to renew work permits for many professors from the West Bank who taught in Gaza. Currently there are close to 8000 students. In 1992, the university was split in half, and a new institution called al-Azhar was created with direct backing from the PLO. Today there are 1 1,671 students.

All universities were subject to Israeli hurdles with respect to their development. Licensing was not granted on a long term basis and required annual approval. Each new faculty also needed approval. Palestinian universities were subject to other violations such as the censorship of books and periodicals. In addition, a ban on materials considered threatening to Israel was also instituted, despite the fact that they could be found and accessed at Israel universities. Student arrests were common, and their number increased during the Intifada. For example throughout the 1970's

and the early 1980's, the number of students arrested at Birzeit University totalled in the tens, although in 1985-86, the number reached 115 at Birzeit University alone. Students were often detained without charge. Ten professors were also detained often for materials they possessed or for books they authored. In addition, Israel also withheld work permits for international faculty, particularly Palestinians living in Jordan and in other parts of the Arab world. Other human rights violations included closures, imprisonment of students, exile, and compulsory residency. Administrative detention increased steadily in the 1980's. Some students were arrested without charge. Others were arrested for security offences, such as throwing rocks or being a member in an illegal organisation.

The Intifada was the turning point in Palestinian University life. Violations increased so much that academics that lived through both periods now look at the earlier period as comparatively benign. During the Intifada, the universities were considered the centre of the nationalist struggle by Israel and were subject to more severe restrictions. Preventive closures were initiated shortly before the Intifada. Universities were constantly visited and monitored by Israeli military personnel. Movement was restricted by the establishment of checkpoints on the way to the universities. Administrative detentions and deportations increased for students and for professors, as did violence against students, including the killings of student protestors. At the start of the Intifada, detainees were rounded up; former, present, or current candidates for student council were the most common targets. Sometimes they were detained for possessing illegal literature, which may have included posters about students who had been killed on campus. Many students were subject to arrest if they left their campus. Some universities were closed for up to 4 years. The massive shutdowns motivated Palestinians to develop alternative education, which included holding classes in private homes. Despite these efforts, most students continued to take more than the normal four years to complete their studies. This prolonged period of undergraduate education caused severe economic hardship for students and for their families. The human rights violations by the Israeli occupation, which still have not disappeared, left a legacy of politicisation at the Palestinian universities. Israel's effect on Palestinian University life, while critical, is only one of the outside

influences that have affected Palestinian institutions of higher education.

4. Learning from the Arab World

The phenomenon of securitization of West Bank and Gaza universities has a correlative in the early stages of Egyptian independence. Anecdotal information shows that there are also similarities to the Jordanian system, although much more work must be done to document academic freedom at Jordanian universities.

In Egypt there was a systematic policy to centralise and control university life. The guards were answerable to the Ministry of the Interior, through which the government was able to manage University affairs. (In Palestine, President Arafat is the Minister of Interior. To the extent to which he is kept abreast of university affairs and to the extent that he is associated with all the important cases in the West Bank and Gaza, there is a parallel).

In the West Bank and Gaza, the PA has not sought to control the universities but rather to restrain and contain intellectual opposition. There is, however, a Congress of Presidents of Universities which is a consultative group that convenes at the Ministry of Higher Education. This group has been formed to include University leaders in the process of centralisation of higher education.

In Egypt, military figures were appointed general secretary of university administration. Elected faculty deans were replaced by appointed ones. The President of Al-Azhar University, who is also on the executive committee of the PLO, has a double position. Elsewhere, at al-Najah University, where a new president was recently appointed, President Yasser Arafat had a role in the choice. In Palestine, the most over-arching standardisation is the development of a national human rights course, which is to be implemented at all universities. However, there is an effort to change the status of universities from public to governmental. Because funds are very limited, universities have an incentive to consent. Government universities receive all their funding from the government whereas public institutions are not guaranteed any money from the central authority. However, the move to make the

Authority responsible for higher education simultaneously allows it more control.

What is similar to the Egyptian case is the contracting of undercover agents to report on university activities. In Egypt, these agents were resented but were recruited from students and teachers. In the West Bank and Gaza, our research has only found students who report on other students and to a lesser extent on lecturers. In Jordan, students and professors similarly work for the security services, and professors are frightened to speak openly in class.

5. Securitization of the Academy

There is a long-standing procedure at Palestinian Universities, as well as at many urban universities around the world, to employ security guards to patrol the university gates. However, in European and North American universities, these security officers have no connection to the state; they are university employees hired to safeguard the students and faculty from theft and violence. On Palestinian campuses there is little consensus regarding to whom these guards report as well as what exactly their job entails.

In May of 1995, the University Security Administration was established by Presidential Decree. Concerned with keeping order on campus and protecting students from threats of violence, sexual-misconduct and external political intruders, President Arafat created a national office to prevent discord. The Administration was placed under the control of Colonel Khalil Arafat who was given the title of General Director. His office is located in the Palestinian General Security. The Colonel is also a relative of President Arafat. Despite the fact that the University Security Administration was created in 1995, it was only in 1996 that the Officials at the Ministry of Education in the West Bank had a concrete explanation for its creation in the West Bank. Rather than being established for the sake of conceptual principles of protection, the University Security on the West Bank was created in response to a concrete event. Responding to events at al-Najah University in March 1996, President Yasser Arafat justified the expansion of the University Security Administration, although officially the office was to have encompassed both Gaza and the West Bank from the outset.

There are pronounced distinctions between the West Bank and the

Gaza Strip in terms of the presence of security on campus. In the West Bank, few people know that such an office exists; few people, however, would deny that undercover agents are present on the campuses. In Gaza, students, lecturers, and administrators alike have no doubt about the existence of the University Security Administration. Furthermore, the universities in the West Bank have historically been independent private universities. Despite the fact that support for Fatah among students and faculty has always been strong, no West Bank universities maintain direct links to the PLO.

The issue of the role of security services on campus is sensitive. Strictly speaking there is nothing inherently against human rights principles for a university student to work for the security or intelligence services. However, it is problematic for these same students to be in the active employ of their supervisors while they are attending classes. The official use of undercover agents on campus is an infringement on a student's freedom to express one's opinion either in class or in student pamphlets, and it constitutes a violation of international norms regarding academic freedom.

These persons have other functions besides that of monitoring. The University Security Administration in Gaza, where it is functioning, is officially responsible for checking students' identification cards, protecting the building from visitors and preventing students or visitors from entering the campus with weapons, and preventing students from wearing security or police uniforms. The University Security Administration was created because the guards that are hired privately by the universities are not considered adequate. According to the Police, the regular guards are incapable of stopping people who enter the university because they do not have the training and jurisdiction of the police. The current guards in Gaza are hired by the administration of the universities, but they are people who work for or have been trained by the Palestinian Authority. However, they are not direct employees of the University Security Administration because their people are monitors. Nonetheless, many people confirmed that guards hired privately by the university administrations also work for the PA.

The other police and security forces are not supposed to interfere on the campus. However, many students, from other forces, who work simultaneously as security and police officers are on duty when they are at school. Both students who work under cover for

the security branches and full-time civilian students assert that there are security activities taking place on campuses in the West Bank and Gaza. The University Security force denies this assertion. They maintain that other security departments do not have specialised university offices. As in other areas of the PA, the department in charge of University Security does not have full jurisdiction. The various security services extend their control over segments of society and individuals over which they can.

The Palestinian Authority's involvement of students and others in university surveillance serves as a form of political patronage. Students work for the security services because it is a good job. The money available from the PA is not only used to pay salaries. It is also instrumental in mobilising students to cease their opposition activities. Some students in Gaza even receive money from the PA even though they are not performing security services. They are registered and receive money; such contracts are secret. A law student who works for Preventative Security Service (PSS) says he can promise financial support of up to 200 shekels a month (50 dollars) to convince a particularly popular student to join Fatah. He may also offer protection and other services that someone might need, depending on the budget of the department. Since it is easier to say yes than no, especially in today's dire economic situation, the security service and Shabibeh's promised resources are a way of persuading people not to oppose the PA. By contracting young people to work for the authority against their colleagues, the PA provides employment for an underemployed population and in this way, it ensures support for Fatah.

In addition to President Arafat's sanctioned University Security Administration there are many undercover agents working on the University campuses on the West Bank and Gaza. These individuals keep tabs on campus organisations, threaten people to vote for Fatah in elections, write reports, and collect the names of students involved in the Islamic Bloc and in the left wing opposition. They also go after people who criticise the PA of corruption or expose its human rights abuses. The vast majority of undercover security agents are male, although there are also some female students who write reports for the security services. Without the freedom to speak in class, to participate in campus activities without fear of reprisal, the development of critical thinking and free exchange of ideas is severely curtailed.

We urge the PA to close down the University Security Administration or, at the very least, to restructure the office so that it genuinely protects students. The PA should not monitor the behaviour of university students and faculty members committed to honest and valuable critique of those governing their society.

6. Disruptions of Student Life: Arrests, Censure and Censorship

Palestinian universities are characterised by a high level of national political activity when compared to their counterparts in Europe, North America, and other parts of the Arab world. The activities of the students unions centre around the Palestinian political situation rather than the concerns of students regarding tuition or student clubs. Student life on Palestinian campuses consists mainly, though not exclusively, of political activities, and it is precisely these activities which sometimes aim to undermine support for the Palestinian Authority that the security seeks to monitor and suppress. Furthermore, students' lives are affected by the system's inequitable distribution of grades, scholarships, and even travel permits.

7. Electoral Abuses

Student Council Elections at Palestinian Universities are basically democratic and proceed without much interference from the University Administration or from the PA. However, there is a trend at some of the universities to work on behalf of the Fatah groups either by directly supporting them or by employing measures to block the success of the Islamic groups. One mechanism used by security officers is to arrest students who run for office. Students are aware that security officers are present at the elections and that these officers take note of the activists. The employees of the University Security Administration monitor elections on the campuses in the Gaza Strip. They only monitor the male student elections, since there is no risk of violence among the female students. Also, female students are not arrested due to social and societal constraints. The University Security Administration does not send people to monitor elections in the West Bank, but it receives reports from police in the West Bank.

Student elections at al-Quds Open University in Gaza in June 1998 were postponed by the Administration. In the absence of new elections, students requested the dissolution of the student council whose term had expired. This resulted in disorder on campus among students affiliated with the different student blocs. This in turn led to the intervention of the Preventive Security to intervene and the arrest of a student. After a series of meetings with University Administrators, students distributed press releases. This was followed by a meeting between students. Similarly, at a peaceful gathering organised to protest the undermined the date of student elections, violence broke out once more between rival student groups. As a result, on 27 June 1998, the university administrative board issued an administrative order, which prevented the distribution of all press releases and publications from any bloc, if such distribution took place without permission. The order also included a prohibition of the distribution of information by alternative means. Two days later, the PSS summoned some of the leading members of the student blocs, including one student leader of the Popular Front bloc and two Islamic Bloc student activists. Two of the three were arrested and later released. According to the student press release, warnings had been sent by the Administration without forming an investigation committee to determine the reason for the events and to identify the participants. Some of the names which were mentioned in the warning were not present at the university when the events happened. All the students belonged to different student blocs, and no warning was sent to any student from the Fatah Youth Movement, which according to the students, is the group responsible for the postponement of elections. Elections were held finally on November 2nd, 1998.

8. Student Arrests

The first students to be arrested by the Security Forces did not set the tone for those who followed them. Arrested by the security forces in March of 1996, the seven Birzeit students were imprisoned in Rainallah, accused of engaging in illegal activity on behalf of Hamas. No formal charge was filed, and they were never questioned. A suit was filed in the High Court of Justice against the Attorney General and Yasser Arafat, in his capacity as Minister of the Interior. The High Court ordered the defendants to formally

issue the reasons for the students' incarceration. The PA then challenged the court's jurisdiction and called for the order to be repealed. In response the High Court issued a final order in August 1996, ordering the immediate release of the students. The court's final decision stated that the incarceration of the students was an abuse of power. The court order was ignored, and the students were not released until President Arafat issued a decree on 7 October 1996, ordering release of 25 detainees including the seven Birzeit students. Following the Court's decision, the Chief Justice, Amin Abdul Salain was fired.

The difficulty of Palestinian state building undoubtedly is increased by internal opposition and by Israeli pressure to show quantitative results from Palestinian security efforts. The Wye Memorandum calls for the Palestinians to eliminate the entire infrastructure of the groups that incite violence or terror. This international commitment and obligation does not, however, mean that the PA can arrest students without any evidence of their involvement in supporting, planning, or carrying out violent acts. The International Covenant on Civil and Political Rights severely limits the range of permissible interference with these rights. We agree that individuals that incite violence should be arrested and punished according to the law. However, under the PA, many students particularly those affiliated with the Islamic Bloc, are arrested and detained with no charge and with no court proceedings. The vast majority of them are arrested outside of the campus in their student houses, at their parents homes, or elsewhere. While these arrests do not necessarily come under the guise of the abuse of academic freedom, many are subsequently interrogated about their activities and about their peers in the Islamic bloc or other student opposition blocs.

Sometimes students are arrested in connection with a particular event, often in conjunction with Israeli security needs. Prior to the May 1999 Israeli elections, the Palestinian Intelligence raided a house in Nablus where students from al-Najah university live. The force of 9-1 0 men searched the house for over 90 minutes, during which they confiscated a large amount of books and papers. They arrested two men for whom arrest warrants had been issued as well as six other men. The eight students were interrogated about their relation with "al- Jihad" Islamic Movement and about their academic and social activities inside and outside university. Two

students were kept in custody, while the others were released. The two students remained in custody for five days. Their families were allowed to visit on Friday, 14 May 1999.

When students are arrested and put in prison, their studies are interrupted. They are hindered from completing their degrees as scheduled, which is costly both in terms of money and time. It also causes them an unfair disadvantage vis-a-vis their classmates. In most instances the University Administrations have done close to nothing to help the arrested students. Many administrators prefer to view the arrest of campus students as matters outside their purview. The Lima Declaration maintains that "states are under an obligation not to interfere with the autonomy of institutions of higher education as well as to prevent interference by other forces of society" (Article 18). In the West Bank and Gaza, the organs responsible for Higher Education have not aided in blocking state interference. Despite the Ministry of Higher Education's role in serving as the central address for matters concerning Palestinian Universities, it has not played an active role in defending students.

We call on the PA to end the arbitrary disruption of student life and to bolster democracy on campus by allowing fair elections of student councils. Furthermore, the PA and its security branches should not play a role in supporting one student group over another and should, in no way, interfere with student publications intended to promote dialogue and discussion about critical national issues.

9. Faculty Fears

The ability of students to acquire skills of critical thinking is highly dependent on the academic freedom of their professors. Similarly, the professional life of academics and their maximum contribution to society are threatened when academics are unable to express their opinions. While it seems as though instructors have had fewer problems with the security forces, there are a number of cases, particularly in Gaza, of violations of academic freedom. The general view is that these professors are used as example for others.

9.1 Dr. Fathi Subuh

Dr. Fathi Subuh's case is the foremost case with respect to violations of academic freedom. However, this example encompasses

a number of human rights violations and is therefore a good starting point for examining the ways in which academics have suffered from the PA's non-compliance with international legal standards.

On 2nd July 1997, the Preventative Security Service arrested Dr. Fathi Subuh, a professor at Al-Azhar University in Gaza. Dr. Subuh prepared a final examination with two questions about corruption. The questions were:

1) Discuss administrative corruption in the PA agencies;
2) Discuss administrative corruption at al-Azhar University.

These two questions were generated from student presentations from previous years. While PA spokesmen asserted that the arrest was the result of security charges, the Director General of the President's Office, Tayyeb Abdul-Rahim, stated that it was the result of the questions he asked in the final examination. He had taught the same course while under Israeli occupation, with the same critical view of the Israeli regime and its corruption, and he was not once questioned about the course. Later that month, a squad of civil police officers searched Dr. Subuh's home and confiscated the students' answers to the aforementioned test questions.

His arrest, like so many others related to academic freedom, was arbitrary and illegal. He was arrested without a properly authorised arrest warrant, and he was held in arbitrary detention for four months without being charged or presented to a civil court. He was arraigned by the State Security Courts rather than by the civil courts. Finally, he was released on strict conditions. Dr. Subuh was arrested at his home and brought to interrogation after being presented with a detention order by the PSS. Despite the request of the Palestinian Independent Commission for Citizens' Rights (PICCR), he was not presented to a judge in order to legitimate his detention, as required by Article 10 of the Law of Arrest and Interrogations Number 4 of 1924. He was held for seven days at which point the High Court of Justice granted the Preventive Security Service eight days to respond to a motion to declare Dr. Subuh's arrest illegal. Several days later on 31st July, Dr. Subuh had still not been allowed to meet with his lawyer. By mid-August the reasons for his arrest were still not clear, although the Legal Advisor to the PSS had asserted in a letter to the PICCR (the human rights body handling Dr. Subuh's defence) that he had not

been detained for disloyalty to the PA and that his arrest had been legal. It was not until 6 September that Dr. Subuh was able to meet with legal representation. Three days later, on the 9th September, the High Court of Justice in Gaza announced that Dr. Subuh's case was a "security file." It issued no further explanations. On the 6th October, the High Court rejected the petition presented by Dr. Subuh's attorney, claiming that the "High Court does not have jurisdiction to rule on cases falling under the jurisdiction of the High Court for State Security." At the end of November, Dr. Subuh was released on bail, with the condition that he reports daily to the police station. He was also forbidden from leaving the country without special permission from the attorney general, despite the fact that no charge had been made against him.

9.2 Dr. Ayyub Othman

Dr. Ayyub Othman was dismissed from his position as a professor of English at al-Azhar University in Gaza because he made public information about incidents of forgery within the university. For three years, Dr. Othman has been writing newspaper articles outlining corruption within the university, and criticising the performance of the PA. Dr. Othman discovered information that was held as "secret" and was released from his position for obtaining it. He was then dismissed. As a result of an article, in which he reported on the misbehaviour of the dean and of the president of the university, Dr. Othman was summoned to the attorney general for defamation and for publishing illegal material. Dr. Othman successfully defended himself using the Palestinian Press Law.

On 29 May 1997, Dr. Othman was arrested for 25 hours, after he published an article on a report released by the General Security Service, addressing corruption within the country. While there was nothing previously unknown in the article, Dr. Othman was the first person to open the al-Azhar University files in the High Court. Since then, eight cases for academics and administrators were brought before the High Court. Dr. Othman succeeded in subpoenaing the university president to the Court, as well.

9.3 Dr. Ahmed Sa'id Dahlan

In 1994, Dr. Dahlan was eligible to receive a promotion. However, in 1993, he and a colleague, Dr. Sa'id Abdul Wahed, placed a

congratulatory advertisement in a newspaper upon fellow professor Ayyub Othman's return to the university. Consequently, Dr. Dahlan fell into disfavour with the university president. In 1994, when he became head of the academics union in the university, Dr. Ayyub Othman asked him to bring his case to the university, as part of his position as head of the union. The administration attempted to make a bargain with Dr. Dahlan: in order to receive his lawful promotion, Dr. Dahlan had to ignore Dr. Othman and Dr. Abdul Wahed's cases. Dr. Dahlan did not ignore their cases, and in July 1994, after organising a teacher's strike, and after receiving a decree from President Arafat, the two professors were allowed to return to the university.

As a result, however, Dr. Dahlan's promotion request was delayed. In December 1994, Dr. Dahlan, representing himself, appeared before the High Court regarding the delay in receiving the promotion he had earned. After twelve months, the High Court reached a decision. In September 1995, the court granted his promotion, which he had qualified for a full year earlier.

9.4 Dr. Salid Abdul Wahed

When Dr. Ayyub Othman was allowed to return to his post at the university, several other teachers, including Dr. Sa'id Abdul Wahed, published a congratulatory message in a newspaper, thanking President Arafat for the decree which allowed for his return, as well as congratulating Dr. Othman for regaining his position. Dr. Abdul Wahed was then accused of misleading the people by what was written in that congratulatory note. Dr. Abdul Wahed reported the accusations to various NGOs concerned with human rights, which in turn asked the university president exactly how one could mislead the public with such a message. Dr. Abdul Wahed has received no answer thus far.

Dr. Sa'id Abdul Wahed has also been waiting for his promotion from Assistant Professor to Associate Professor, according to the rules of the university. In May 1998, he requested his promotion, "according to the law and not according to the president's mood." He was promoted academically from that day, but financially the promotion will not be in effect for one year.

Dr. Abdul Wahed has also experienced the consequences of speaking his mind within the university. For example, he will not

change a student's grades if the president asks him to do so. Because of this, he has been harassed. The same dean who had previously nominated him for a scholarship, two weeks later accused Dr. Abdul Wahed of being an "unintelligent professor" and a "bad researcher." The dean, who had sent him a letter of thanks and appreciation for his academic performance and for following the guidelines of the university for the 1997-98 academic year, five days later asked for answers to a list of questions about a problem that occurred four months earlier. Again, members of the administration held on to problems and accusations and raised them when they found it useful to do so.

9.5 Dr. Abdul Sattar Kassem

Professor Abdul Sattar Kassem of al-Najah and Birzeit Universities is known for his criticism and reproof of the PA and administrative corruption in universities. He was dismissed from the Jordan University in Amman for his candour. Subsequently, his promotion was blocked for several years at al-Najah University because he criticised the University administration. He has also recently written a book that is very critical of the PA. The book is not allowed to be sold in the University bookstore. He and his colleagues sell it to students privately.

Dr. Kassem wrote an article in which he said that Arafat was not democratic. Shortly following the publication of his article, he was shot with four bullets 200 meters outside the al-Najah University by the PA.

While most professors agree that book censorship is not a problem, the aforementioned book, by Dr. Abdul Sattar Kassem, was not available in his university bookstore because the staff refused to carry it. In addition, the book was published in Israel because no publishing house in the West Bank was willing to print it.

There is, however, a degree of control whether direct or indirect over freedom of speech. On 4 December 1998 a general decree to all the employees at al-Azhar University was issued by the president, which prohibited employees from talking to the press without consulting the president. His memo to the staff stated that anyone who sends a press release needs specified permission from the president directly.

We recommend that professors not be arrested without charge

and that the PA ends its policy of singling out professors as an example. Permitting professors to criticise and to educate democratically is the best method for building a tolerant Palestinian civil-society.

10. Conclusion

At this critical juncture in Palestinian nation building, when President Arafat has acknowledged the importance of international human rights standards, the PA has responded to its commitment to higher education by creating a University Security Administration and by generally restricting academic freedom. This body, as well as other security services, are supposed to protect students but have instead created an atmosphere of fear. Students are aware that their classmates are monitoring them. Many have been arrested and, even after their release, have been repeatedly visited by the security forces. Campus publications and activities have been censored or hindered.

Professors have been reprimanded, arrested, and have suffered significant setbacks to their professional careers. Furthermore, their families have suffered from the deprivation from their livelihoods. As noted throughout the report, the situation in Gaza is worse than that on the West Bank, but abuses of academic freedom exist at all the campuses.

When freedom of expression, association, and movement are restricted, human rights are violated. One of the ways in which freedom at Palestinian universities continues to be limited is through Israeli impositions on freedom of movement between Gaza and the West Bank as well as within the West Bank itself. Furthermore, Israeli pressure on the PA to be "tough on security" results in the arbitrary arrest of students who in many cases fill a quota and are released within a few days.

The lack of an open and free university life is an indicator of the direction the country may take. Several people have told us that the situation at universities is improving; several others have stated just the opposite. Since the establishment of the Palestinian National Authority five years ago, much has been written about national reconstruction and democratisation in the West Bank and in the Gaza Strip. Palestinian universities have the opportunity to lead these national processes. The nature and extent of academic

freedom will determine how much they will do so. We join other voices in asking the PA to take the following measures to strengthen academic freedom.

(1) End the expansion of the University Security Administration to the West Bank and abolish this bureau in the Gaza Strip.
(2) Require Palestinian security organs to end the practice of student monitoring of classmates and of arbitrary arrests of student political activists.
(3) Enshrine academic freedom in any future legislation protecting the human and civil rights of Palestinians. Such an act will acknowledge the significance of, and the PA's commitment to, strengthening academic freedom.

For its part the Palestinian academic community can improve the level of academic freedom as follows:

(1) Encourage professors to speak out in the face of violations against their colleagues
(2) Establish and implement a system at universities that practice fair promotions.
(3) Review teaching standards and call on other PA institutions to respect faculty professionalism and not to interrupt efforts to teach critical thinking.
(4) Students should be encouraged to express their points of view and not be singled out and punished for membership and participation in activities of legal political organisations.

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FUNDAMENTAL RIGHTS OF MIGRANTS AND THE ITALIAN IMMIGRATION POLICY

STEFANO LESZCZYNSKI

On March 6, 1998, a new law on immigration, entitled *"Disciplina dell'immigrazione e norme sulla condizione dello straniero"*, otherwise known as law 40/98, came into effect. The new law completely substituted the previous *"Martelli Law"*, which was introduced during a period of great emergency, due to the intense migratory flows coming from Eastern Europe. The law 40/98 attempts to discipline all areas relative to immigration with a certain degree of elasticity. In fact, for the first time, it represents a serious attempt not to leave to chance such a socially relevant issue as immigration. Italy finds itself in a very complex situation, divided between European and Mediterranean aspirations. In short, it is experiencing an identity crisis, battling between the demands and advantages that go along with being one of the founding members of European Union, and those that go along with being one of the preferential partners of the extra-European Mediterranean countries. That is why any attempt made by the Italian 'Governments' to give an answer to the migration issue in the country has to be made in the frame of the objectives set forth by the Barcelona Declaration.

1. Introduction

News of the arrival of Northern African immigrants to the coasts of Sicily and its islands dominated the majority of Italian newspapers in the summer of 1998.

The discussions on the permeability of Italy's borders and their low military control, the renewed requests for penalizing the entrance of illegal immigrants, and the reclusion of illegal immigrants in 'special detention centers' – which were set up following the new law on immigration (L.40/98)[1] and that prompted

[1] In Italian: "Centri di assistenza e permanenza temporanea per immigrati in attesa di rimpatrio". Decreto legislativo 25.07.1998, n.286 (Consolidation Act), art. 14 *Expulsion enforcement* (art. 12 law n.40/98 of 06.03.1998).

many undocumented migrants' riots – created a siege atmosphere in public opinion that has gone unchanged in subsequent years.

This 'invasion syndrome', however, is new neither in Italy, nor in Europe. At the end of the 1980s, the 'invasion' started with Eastern Europeans, after the fall of Communist regimes in Poland, the Czech Republic, Hungary and Romania, and the consequent freedom of movement their citizens finally enjoyed. The long war following the break-up of the former Yugoslavia, which still persists in many ways, led to the sad period of the 'invasion' from the Balkans. Most recently there have been the great flows of immigrants from Albania and Kosovo, and from Kurdish regions in Iraq and Turkey.

The media often presents the problem of immigration, particularly illegal immigration, with excessive alarmism. It often invoked emergency solutions that were not to prove long term answers or would not solve the problem with equity.[2]

According to the new legislation no distinction seems to be made between types of 'invaders'. The category indiscriminately includes people fleeing poverty, criminals, victims of political persecution, and refugees for humanitarian reasons, the latter, potentially entitled to the right of asylum. The title of non-EU immigrant (*extra-comunitario*) is by now an all-encompassing qualification.

This article provides a series of reference points for beginning an analysis of the complicated and confusing legislative, statistical, and sociological aspects of immigration in Italy. To this end, we have decided to examine some of the most relevant aspects of the

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[2] A complete analysis on the titles of agencies and newspapers in the period of July-September 1998 (defined in the media as «*the long summer of the illegal immigrants*») and December-January 1999 (characterized in the news by the term «immigration emergency») can be found in: «Stranieri e Mass Media: Noi e gli Altri. Come la stampa italiana tratta il fenomeno immigrazione.- Tesi di Lurea di Maurizio Corte A.A. 1997/98 Facoltà di Magistero, University of Verona. Re: Chiarenza F., Corasaniti G. and Mancini P. (1992), «Il giornalismo e le sue regole. Un' etica da trovare», EtasLibri, Milano; also Viglongo E. (1995), «Temi e modelli interpretativi della ricerca su media e razzismo» in Grossi G., Belluati M. and Voglongo E. (1995), «Mass media e società multietnica,» Anabasi, Milano; Mansoubi M. (1990), «Noi stranieri in Italia. Immigrazione e mass media», Maria Pacini Fazzi, Lucca.

immigration phenomenon in Italy as well as some legislative developments in the past two years. In conclusion, we synthesize Italy's main international engagement in controlling immigration, with particular reference to two demands: the harmonization of European policies, and the interest of maintaining an independent political strategy for the Mediterranean.

2. Migration flow towards Italy

The official numbers and analysis on immigration vary between sources, but always contrast with the unofficial data collected by NGOs that deal with immigration issues.[3] However, official and unofficial statistics coincide in regards to 'expulsion injunctions' (*espulsioni intimate*) and expulsions that are effectively carried out (*espulsioni eseguite*): they total in average 4,000 monthly, a figure which increases slightly during the summer. The number of expulsions that are carried out is reportedly much lower than those that are intimated: in 1998, only 18% of the intimated expulsions were successfully completed. The fact that the majority of this expulsions (82%) were realized only on paper, results in the unique and dramatic situation of condemning the 'expelled' to live in Italy as illegal immigrants, thus depriving them of rights, protection or assistance.

According to the annual Caritas Dossier on immigration, the number of migrants arriving in Italy is not particularly alarming. However, the data source is the Ministry of the Interior, and therefore, only regards documented immigration. At the beginning of 1998, the total number of regular foreigners in Italy was about 1,240,000, of which about 168,000 from EU countries and little more than 260,000 from other developed nations. At the same time, there were an estimated 200,000 illegal immigrants from various countries. According to the latest statistics reported by the

[3] For sake of clarity, we refer to official data from the Documentation Center of the Interior Ministry http://mininterno.it; Sistema Statistico Nazionale: http://pers.mininterno.it/sistan/; Dossier Statistico immigrazione (1997-99), Caritas Diocesana of Rome, Anterem edizioni Roma; http://www.chiesacattolica.it/caritasroma.

Documentation Department of the Interior Ministry, at the end of 1999, the number of regular immigrants in Italy reached 1,252,000. The NGOs estimate a figure of 1,500,000, which includes those minors who have legal recognition only on their parents' residence permit (*permesso di soggiorno*), as well as the new residents that have still not been registered because of bureaucratic procedures. According to data noted at the beginning of 1999, it is estimated that the immigrant population grows 20% every year in average. The level of migration flows from Northern Africa remains stable, while that from Eastern European countries, particularly Albania, the former Yugoslavia and Romania, is on the increase by 30%[4]. Generally, we can affirm that the immigrant population in Italy is growing by 19% with respect to last year. If we compare these numbers to the 12 million non-EU immigrants that reside in the European Union, Italy's situation does not seem to justify the public fear of a very unlikely 'invasion'.

3. Why immigrants choose Italy

The majority of immigrants in Italy look for opportunities to build a more dignified life for themselves and their families. Most of them know quite well that Italy is not the utopian country that they see on the television, and they also know that the realization of their dreams will be very difficult.

Italian public opinion is increasingly founded on the belief that «more immigration means more criminality.»[5] This pervades other EU nations as well, even if in a less pronounced manner. Such a belief originates from the existence of increasingly reinforced links

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[4] 28.8% of the immigrants come from Africa (in total, about 297,600 people), of which: 145,840 from Morocco, and 47,300 from Tunisia; 2.4% from the Middle East and surrounding areas and 16.5% from the Far East and Indian Sub Continent. (Source: Caritas Roma Dossier Statistico Immigrazione, using statistics from the Internal Ministry).

[5] Ref.: Maurizio Corte, op.cit; Barbagli M. (1998), Immigrazione e criminalita in Italia, Il Mulino, Bologna. Belotti V. (1997), Indagine sulle opinioni nei confronti dell' immigrazione straniera in Veneto: dalla compiacenza alla diffidenza, in Quaderni di Ricerca 1, Venezia 1998, published by Osservatorio regionale immigrazione Veneto and Fondazione Guiseppe Corazzin.

between Italian and foreign criminal organizations, particularly those operating in the Balkans. Although much research has been produced on this subject, it seems to emphasize one point: that it is not the quantity of immigrants that favor the growth of organized delinquency, inasmuch as the difficult conditions within the country of immigration, particularly regarding its legal capacity to regulate undocumented immigration.

It is possible to identify specific factors about immigration in Italy: the prevalence of immigrants from non-European nations over those from European ones (ratio of 9 to 10), and the increasing stable character that immigration has assumed in the past several years. For example, 89% of the residence permits are given for the purposes of family reunification or for work, the latter of which remains the principal reason that brings immigrants to Italy in a permanent way. Indeed, official statistics report immigrants' increasing integration in the national labor market. An estimated 60,000 foreigners are self-employed.

What's most alarming is that immigration for humanitarian reasons is relatively very high in the percentage list: approximately 41,000 people fled their country of origin because their lives were in danger. A great number of them come from Southern and Eastern Mediterranean countries. Their nationality is difficult to determine. Almost all of them destroy their documents out of fear that Italian authorities will discover their nationality and repatriate them. In Italy few possibilities for obtaining asylum exist, but the process is very long. The confusion surrounding the asylum law (a draft of a law has been sitting in Parliament since 1996)[6] is in itself a deterrent to those who intend to save their lives relying on the Italian Constitution.[7] Not surprisingly, there were less than 2,000

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[6] Bill (203-554-2425) on humanitarian protection and asylum. Approved by the Senate of the Republic November 5, 1998; currently under examination of the Commission for Constitutional Affairs in the Chamber.

[7] Constitution of the Italian Republic, approved by the Constituent Assembly on 22/12/1947, published on 27/12/1947 (Gazzetta Ufficiale no. 298, edizione straordinaria), and implemented on 01/01/1948, art. 10: «*L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute. La condizione giuridica dello straniero è regolata dalla legge in conformità delle norme e dei trattati internazionali. Lo straniero, al quale sia*

asylum applicants in 1997. A sharp increase in asylum applications occurred in 1998, almost exclusively attributable to the events in the former Yugoslavia and in the Kurdish territories of Iraq and Turkey. Although the official figures for 1999 are still unavailable, they are generally estimated to be similar to those from the previous year. In fact, despite the recent conflict in Kosovo, many refugees did not apply for political asylum because the Italian legislation provided them with temporary residence permits for humanitarian reasons.[8]

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impedito nel suo Paese l'effettivo esercizio delle libertà democratiche garantite dalla Costituzione italiana, ha diritto d'asilo nel territorio della Repubblica, secondo le condizioni stabilite dalla legge. Non è ammessa l'estradizione dello straniero per reati politici.»

[8] With the legislative decree of May 12, 1998, entitled «*Misure di protezione temporanea, a fini umanitari, da assicurarsi nel territorio dello Stato a favore delle persone provenienti dalle zone di guerra dell'area balcanica*», the Italian Government provided for the refugees coming from 'the Balkan area' (sic) the possibility to apply for a temporary residence permit for humanitarian reasons, which would expire on December 31, 1999. These particular residence permit allowed the refugees to work in Italy, which is not possible for an asylum seeker, at least until the asylum procedure is successfully completed. The legislative decree provided the possibility for the asylum seekers coming from the Balkan war areas to interrupt the asylum procedure and opt instead for the temporary residence permit. This provision persuaded many asylum seekers to interrupt the asylum procedure immediately after having drawn the funds provided for them by the Interior Ministry. Funds, which were not provided for the refugees who opted *ab initio* for the temporary residence permit.

Some of the main legislative rules with reference to the emergency on the refugee flows from the Balkan war areas follows: 26.03.1999 Decreto del Presidente del Consiglio dei Ministri "Dichiarazione dello stato di emergenza per fronteggiare un eventuale eccezionale esodo delle popolazioni provenienti dalle zone di guerra dell'area balcanica"; 26.03.1999 Ordinanza n.2967 della Presidenza del Consiglio dei Ministri "Disposizioni urgenti per fronteggiare un eventuale eccezionale esodo delle popolazioni provenienti dalle zone di guerra dell'area balcanica"; 01.04.1999 Ordinanza n. 2968 della Presidenza del Consiglio dei Ministri "Ulteriori disposizioni urgenti per assicurare l'assistenza alle popolazioni coinvolte nella crisi in atto nelle zone di guerra dell'area balcanica"; 07.04.1999 Circolare di attuazione del Ministero dell'Interno, Dipartimento della Pubblica Sicurezza "Emergenza Kosovo – Disposizioni concernenti i cittadini appartenenti alla Repubblica Federale di Jugoslavia già presenti sul territorio nazionale"; 20.04.1999 Circolare del Ministero degli Affari Esteri "Rilascio visti ai cittadini kosovari carenti di documentazione"; 12.05.1999 Decreto del Presidente del

Although refugees leave their country for various reasons such as the attempt to escape poverty and the need to support their families in the country of origin, other, much more tragic reasons exist: the lack of fundamental freedoms, the desire to live under the rule of law, the horror of armed conflicts (internal or international), as well as the existence of widespread human rights abuses.

For those who flee only from misery, the hope of improving their condition - legally or illegally -exists abroad. But those who flee human rights abuses are less likely to be easily satisfied elsewhere if they are not given refugee status, and thus are consigned to the effective existence of an illegal immigrant.

4. The Italian Immigration policy

On March 6, 1998, after almost eight years of waiting, the new law on immigration, entitled «*Disciplina dell'immigrazione e norme sulla condizione dello straniero*», otherwise known as law 40/98, came into effect. The new law completely substituted the previous «*Martelli Law*» (n. 30/1990), which was introduced during a period of great emergency, due to the intense migratory flows coming from Eastern Europe. Consequently, the law inadequately addressed the complexity of immigration in a definitive manner.[9] The new law, 40/98, on the contrary attempts to discipline all areas relative to immigration with a certain degree of elasticity.[10] In fact, for the

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Consiglio dei Ministri "Misure di protezione temporanea, a fini umanitari, da assicurarsi nel territorio dello Stato a favore delle persone provenienti dalle zone di guerra dell'area balcanica"; 27.05.1999 Circolare di attuazione del Ministero dell'Interno, Dipartimento della Pubblica Sicurezza "Emergenza Kosovo – Decreto del Presidente del Consiglio dei Ministri concernente l'adozione di misure di protezione temporanea"; 05.08.1999 Telex ministeriale n.300/c/226995/9/28 sott.28/1 Adiv. "Emergenza Kosovo. Disposizioni concernenti i cittadini appartenenti alla Repubblica Federale di Yugoslavia. Revoca delle disposizioni impartite con la circolare del 7 aprile 1999. Applicazione del D.P.C.M. del 12 maggio 1999.

[9] The law 30/1990, known as the 'Martelli Law,' was completely repealed by the new law on immigration (40/98), with the exception of the first article about asylum.

[10] Title I-General Principles; Title II-Norms on entrance, residence, and expulsion from state territory: Paragraph I-Norms on entrance and residence, Paragraph

first time, it represents a serious attempt to not leave to chance such a socially relevant issue as immigration. Nevertheless, this new law on immigration was stalled for over a year because of the lack of enforcement rules (*regolamento di attuazione*), which conditioned many of its essential aspects. This impasse had a very negative effect at the political and social levels. The chaotic Italian political context did not allow adequate attention for the objectives of integration and inter-ethnic cohesion, leaving open those questions regarding citizenship and voting rights for foreign immigrants. These conditions, along with the lack of a law on the right of asylum, and the risk of expulsion, could eventually harm those immigrants who are refugees and therefore could potentially apply for asylum.

Along with the practice of ***rejection*** (*respingimento*)for those who do not satisfy the demands for entering Italy (*art. 10, paragraph 1*), there is the «expulsion with accompaniment to the border», that various Police Offices use when dealing with foreigners who attempt to enter national territory illegally, or who have been rescued and therefore are temporarily hosted (*art. 10, paragraph 2*). Regarding the expulsion procedures, the new law foresees a forced expulsion with accompaniment to the border when: a) the foreigner has stayed in national territory notwithstanding the injunction to leave the country within 15 days (*decreto di espulsione*); b) is expelled for reasons of public order or state security; c) he is without documentation that testifies his identity or nationality and there are good reasons to assume that the person will try to escape expulsion; d) the person seems dangerous and able to escape expulsion.

The procedure ultimately foresees expulsion as a security measure and an alternative to detention (*art. 15 and 16*).

II-Borders control, rejection and expulsion, Paragraph III-Norms on humanitarian issues; Title III-Rules and regulations on work; Title IV-Norms on family reunification and protection of minors; Title V-Norms on health assistance, education, housing, social integration: Paragraph I national health System, Paragraph II-Norms on education and higher studies, Paragraph III-Norms on housing and social services, Article IV-Provisions on social integration, discrimination, and institution of funds for migratory politics; Title VI-Provisions concerning citizens of EU member states; Title VII-Final norms.

The increased severity of the new law with reference to expulsion procedures risks provoking many serious consequences, especially to those migrants who could be entitled to apply for asylum. This part of the law, in fact, does not seem to sufficiently recognize the fact that potential refugees and asylum seekers (if such a distinction is indeed admissible) enter the country in exactly the same way as do the 'illegal' immigrants. And this becomes even more obvious if we consider that: neither those fleeing from internal or international conflicts, nor victims of persecution in their own countries, can tread the official path to enter Italy legally. Consequently, potential refugees, at the moment of their arrival in Italy, often follow the same *iter* as those illegal immigrants who are simply fleeing poverty or other such reasons. Lack of knowledge regarding the immigration law and of how to apply for asylum, together with obvious communication problems, often prompts the immigrants to try to meet up with relatives and acquaintances in other European countries, particularly France and Germany, where their status of undocumented migrants will not change. In the worst case scenario, *de facto* refugees risk placement in one of the ill-famed Italian 'detention centers', where they will await repatriation or expulsion to the country from which they arrived (*art. 14 T.U. art 12 L. 40/98*).[11]

5. Problems related to documented flow of migrants

The unexpected government crisis on October 9, 1998, aroused fear that proceedings concerning the enforcement rules of the law 40/98, the legislative decree fixing the ceiling of legal immigration and the act of indemnity (*'sanatoria' or regolarizzazione*) for undocumented immigrants who could prove they entered the country before March 27, 1998, could stall for a long period. Fortunately, the resigning government of Mr. Romano Prodi

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[11] Repatriation follows from specific readmission agreements that Italy has with various countries (currently, with Albania, Bulgaria, Yugoslavia, Latvia, Morocco, Romania, Slovakia, Slovenia, Tunisia. They have also signed agreements that have not gone into effect with: Croatia, Estonia, Lithuania, Poland, Switzerland, Hungary. They are in the process of developing agreements with: Algeria, Belorus, Egypt, Greece, Malta, Moldavia, Russia, Spain, Ukraine).

responded to the appeals and pressures of NGOs dealing with immigration, and passed the decree regulating the legal entrances of migrants for 1999. The process for approving the enforcement rules of the law 40/98, strongly affected by the political events in Italy, was completed only at the end of October 1999. At the moment, the legislative *corpus* on immigration is basically complete and composed as follows:

1) Consolidation act on immigration.[12]
2) Enforcement rules of the Consolidation Act on immigration.[13]
3) Law 40/98.[14]
4) Article 1 of the law 39/90 (The "Martelli law", which remains in force only with reference to the norms concerning the asylum procedure).
5) Law on citizenship acquisition and its enforcement clauses (Law 91/1992).
6) Norms on EU citizens.[15]
7) Annual governmental plan on the immigration policy.

The decree for determining the ceiling of immigrants who could be admitted into Italian territory, signed by the government of Mr. Prodi as an ordinary administrative act, in execution of the dictate of article 3, paragraph 4 of the Consolidation Act no. 286, has often been considered imperfect and excessively restrictive.

In its substance, the decree consented to the release *«of residence*

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[12] The legislative decree 25 July, 1998, n. 286 *«Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero»*-, (Consolidation Act on the disposals concerning the discipline of immigration and norms on the condition of the foreigner, as modified by the legislative decrees no. 380/98 and no. 133/99).

[13] The Presidential decree 31 August 1999, n. 394, *«Regolamento recante norme di attuazione del Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero»*, (Rules for the enforcement of the Consolidation Act on immigration accordingly to article 1, paragraph 6, of the legislative decree of 25 July, 1998, n. 286)

[14] The law on immigration of March 6, 1998, n. 40, *«Disciplina dell'immigrazione e norme sulla condizione dello straniero»*. (Law on immigration and norms on the condition of the foreigner,» in its original text).

[15] The norms concerning EU citizens: decree of the President of the Republic on December 30, 1965. N. 1656 and successive modification norms.

permits for work purposes, also of seasonal or atypical character, and of autonomous work, to non-EU citizens who are residents abroad (...) and to those already present in Italy, within a maximum total of 38,000.» Of these, 3,000 permits were reserved for Albanian citizens (*«of whom up to 1,500 accepted repatriation after having been in Italy, on the basis of the bilateral agreements between Italy and Albania»*), 1,500 for Tunisians and 1,500 for Moroccans (on the basis of bilateral agreements between Italy and Tunisia and Italy and Morocco signed in the summer of 1998). In practice, such a decree has had little effect on the current opening of the regularizing process to illegal immigrants with the Indemnity Act[16]. Those who had illegally entered the country before March 27 could ask for regularization until 15 December 1998, according to the new Indemnity Act.[17] The applicants, as predicted, had far surpassed the ceiling fixed by the decree for regulating the legal entrances.

In the year 2000, the Italian Prime Minister, Massimo D'Alema, signed a decree that was more detailed and attentive to the demands of immigration and Italy's economy. Moreover, much of the merit for the new decree, that allows the entrance of 63,000 immigrants, and that may be expanded with further decrees in the course of the year, must be attributed to the intense lobbying by NGOs.[18]

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[16] The legislative decree of April 9, 1999, was added to the law 40/98 as a provisional norm to the article 49bis to regularize immigrants (who had entered Italy before March 27, 1998) under certain conditions: proof of employment, housing, and a clear police record.

[17] On 25/01/2000, of the 250,272 applications that had been presented by 27/03/1998, 91,000 applications were still undecided, 145,759 were accepted, and 13,931 were rejected.

[18] Decree of the Council of Ministers published in the Gazzetta Ufficiale of March 15, 2000: «...Considering that the annual programming of migratory flows must take into account labor needs, provided by the Ministry of work and social security program for the three-year period from 1998-2000 and of work at national and regional levels, as well as the number of non-EU citizens on lists of employment, according to article 21, paragraph 4, of the Consolidation Act; Taking into account that some national sectors, such as tourism, agriculture, construction and services demand foreign labor for specific times, often of a seasonal nature; also taking into account that other national sectors, such as the iron and steel industry, mechanics and crafts demand foreign work for temporary work; etc; art. 1 declared that: «for the year 2000, 63,000 foreigners will be admitted for both subordinate and autonomous work. Of these 63,000,

The law 40/98, furthermore, delegates to local institutions and voluntary associations the task of providing for the needs of those desperate immigrants who still disembark illegally on the Southern and Eastern coasts of Italy, (*art. 38 ss. Cap.III*).

To such an end, the government should have allocated the necessary funds (art. 45 of the Consolidation Act n.286 «National fund for migration issues»), but the lack of such funds, along with the bureaucracy, resulted in the impossibility of such provisions being realized. Immigrants, both documented and undocumented, continue to live in poor conditions for a long time after their arrival in Italy.

For many years, Italy has been a country of transit; for many immigrants it still is, especially when they realize what awaits them if they try to remain in the country. Another problem is the lack of preparation or simply, the incompetence of some voluntary associations, particularly with regard to legal assistance for refugees, a situation which leaves the asylum-seekers with little point of reference.

Some of the main problems regarding asylum are as follows:

1. Confused and non-functioning procedures of assistance for asylum seekers; it takes between five and six months for the Central Commission to examine asylum applications, but the applicant receives financial assistance from the State for just 45 days. What makes this situation even more dramatic is the extreme bureaucratic slowness asylum seekers have to face in order to draw this financial aid: in many cases it exceeds 9-12 months.
2. Many Police officers, unaccustomed to dealing with asylum applications, or unaware of the importance of the asylum procedure, illegitimately refuse to deal with the applications, and they interpret the existing law only with an eye towards maintaining public order.
3. The organization of temporary detention centers for immigrants (*centri di assistenza temporanea per imigrati in*

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article 3 of the decree reserves the entrance of 6,000 Albanians, 3,000 Tunisians, 3,000 Moroccans, and 6,000 to citizens of other non-EU countries that have signed specific cooperation agreements on migration matters».

attesa di rimpatrio) makes it difficult to distinguish between asylum-seekers and other 'illegal' immigrants. Consequently, the risk of violating the principle of '*non refoulement*' (art. 32 Geneva Convention) is high, as the peril of not respecting the provisions of art. 17 of the immigration law, «*Divieti di espulsione e di respingimento*»(Prohibitions for expulsion and rejection) is always present.

The lack of provisions concerning the so-called «humanitarian asylum,» which is currently being discussed in Parliament, makes it impossible to uniformly extend humanitarian protection. There are many situations in which the asylum seeker is simply tolerated without having any concrete protection from the State, in which case he has the status of an illegal immigrant who must be expelled.

On the basis of what we have discussed so far, we can conclude that the issue of immigration corresponds to a situation of extreme confusion and grave emergency, attributable to the scarce regularization of particular situations and confusion over legislative mechanisms.

In such a situation, the work of most voluntary associations becomes even more meritorious: with very little means, they attempt to realize the objectives of the new immigration law – integration, planning and transparency.

The strategy that the Italian government has recently adopted with regard to immigration, particularly illegal immigration, is not based so much on humanitarian issues as on issues of politics, international economic cooperation, and institutionalized cultural relations.

6. Italy's international obligations with reference to immigration

Italy finds itself in a difficult situation, divided between European and Mediterranean aspirations. In short, it is experiencing an identity crisis, battling between the demands and advantages that go along with being one of the founding members of European Union, and those that go along with being one of the preferential partners of the extra-European Mediterranean countries. Italy actually failed in its aspiration to become a stepping-stone for the expansion of European Union policies toward the

Eastern and Southern Mediterranean countries, and transformed itself inevitably into a solid bridge, more useful as an outlet for problems affecting Mediterranean developing countries rather than for helping the Mediterranean economy to develop. The Italian authorities are less worried with internal problems than with their international commitments, that is: a) the creation of the Schengen area (that is currently under scrutiny in the attempt to re-dimension it by adopting so-called 'compensatory measures' of free circulation in order to mitigate the growth of illegal immigration and criminality) b) the application of the Amsterdam Treaty, c) the Euro-Mediterranean Agreements d) the Barcelona Declaration of 1995, instituted by the Euro-Mediterranean Partnership.[19]

In the Preamble of the Barcelona Declaration, the sixth paragraph clearly affirms that: «*the general objective of turning the Mediterranean basin into an area of dialogue, exchange and cooperation guaranteeing peace, stability and prosperity, requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development, measures to combat poverty and promotion of greater understanding between cultures, which are all essential aspects of partnership.*» When the signatory nations will be able to pursue such an objective, most problems tied to migration phenomenon will almost certainly be resolved. The first chapter of the Declaration, entitled «*Political and Security Partnership: establishing a common area of peace and stability*», urges the member states to conform to the principles established by the United Nations Universal Human Rights Declaration and to develop the principles of legality and democracy in their political systems, obviously under the banner of the domestic jurisdiction principle.

Until the signing of the Barcelona Declaration, human rights in the Mediterranean have not really improved: in some countries, for example, governments limit the freedom of the press, and in others,

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[19] Considering the particular Mediterranean dimension in the course of the last fifteen years and the impossibility of treating all of the aspects relative to the harmonization of Italian politics according to the dictates of the EU, we limit ourselves to briefly analyzing and drawing some conclusions only with regard to Euro-Mediterranean aspects.

torture and extra-judiciary executions are systematically practiced. In some countries, fundamental freedoms are gravely threatened, defenders of human rights persecuted, corruption of government functionaries is widespread, and judicial power often suffers a pathological lack of independence. This situation shows a profound lack of democracy and respect for human rights in the entire region, causing the most recent migration flows from the Mediterranean to EU countries. We know well that the situation regarding the respect of fundamental rights in the Southern Mediterranean area, is strictly connected to the human rights situation in Northern Mediterranean countries, and is particularly highlighted in the treatment of refugees and migrants.

In order to fulfill inter-European obligations, the Mediterranean EU states have adopted severe and restrictive laws regarding immigration policies, not realizing that the closure of external borders encourages immigrants, who, once inside the Schengen area, prefer a stable and permanent solution rather than a temporary or seasonal one. It is easy to hypothesize that with the guarantee of a greater number of brief visas, many immigrants would choose to move more frequently from their country of origin to the country of immigration, favoring an expansion of business trade in the Mediterranean area, in the true spirit of the «Barcelona process.»

The recent readmission agreements between Italy and Tunisia and Italy and Morocco,[20] have had embarrassing consequences on a humanitarian level. Tunisian legislation, for example, foresees very severe sanctions against its citizens who are guilty of unauthorized expatriation. In many Mediterranean countries, a number of representatives from the political world and of the 'civil society' have criticized these agreements. Nevertheless, in certain circles many support the contents of the readmission agreements.[21]

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[20] This last one was implemented in October of 1999. The complete document was published in «La Nuova Frontiera-International Human Rights and Security Review» n. 12/13, Antonio Stango Editore, Roma, 1998.

[21] M. Augusto Sinagra, L'accord de Réadmission Italie-Maroc du 27 Juillet 1998 et les Droits del l'Homme, intervention at the international conference: Droits del l'homme et communaute marocaine a l'etranger; organized by the Ministry for human rights of the Kingdom of Morocco, Tangier, 23-36 November 1998.

The main objective of the «Barcelona process» is to guarantee stability in the Mediterranean basin. However, this stability is not founded upon the solution of regional conflicts or on the broader and more complex Middle-East conflict, as much as on the intensification of the Euro-Mediterranean trade and financial co-operation, and on closer bilateral relations among the 27 partners of the Barcelona Declaration. The readmission agreements signed by the Italian Government with the Kingdom of Morocco and with Tunisia are to be viewed from this point of view. At stake are not just the future relationships between countries on the Southern edge of the Mediterranean and the European Union, but also, and in a much more relevant measure, the enormous economic profits that the Southern and Eastern Mediterranean countries gain from the emigrants' remittances (this is, for example, the main economic resource of Morocco). In conclusion, it is therefore possible to note how governments treat the issue of migration in relation more to economic, trade and financial co-operation matters, rather than to the enormous problems of democratic and social development which affect almost the entire Euro-Mediterranean region. With the readmission agreements, Italy, under the umbrella of EU institutions, has initiated an embarrassing and unworthy barter, which will soon become common practice among the rich and developed countries.[22]

Among the countries of the Euro-Mediterranean Partnership economic issues are still considered more important than those relative to the protection of human rights, more incisive than the rule of law, more remunerative than democracy. We thus stand as impotent witnesses before one of the greatest paradoxes of the Barcelona process: the attempt to build an area of peace and stability in the Mediterranean region through the violation of fundamental human rights, through the weakening of democracy, and renouncing the rule of law.

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[22] During the sessions of the summit at Stuttgart between the Foreign Ministers of 27 countries of the Euro-Mediterranean Partnership April 15-16, 1999, one of the few points of agreement resulted in the greater diffusion at the Euro-Mediterranean level of bilateral readmission agreements between the partner states.

THE *MISKIN* AND THE BIG-MAN: SURVIVING AS A REFUGEE IN MALTA

MARCIA YOUNG

Malta passed the Refugees Act in July 2000. Refugees and aid agencies alike had long awaited this law in the hope that it would enable refugees in this country to take more responsibility for their own lives. This paper will make an ethnographic investigation of the situation prevailing in Malta prior to the enactment of this law, discussing some of the issues it was meant to address. We will examine the categories and assumptions of the institutional framework that lay behind the distribution of charity to refugees. The paper will outline the paths and strategies that made particular resources available to refugees. Without legal structures to guarantee refugees their livelihood, they were pushed into relations more akin to traditional networks of patronage. The Government's decision to permit refugees access to particular resources, such as work, has important implications for the ability of refugees to engage with Maltese society as complete social beings.

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 22, Universal Declaration of Human Rights

1. Introduction

In international law 'Refugee' refers exclusively to 'a status accorded to an individual who has crossed an international border and been granted the right to asylum on the grounds of persecution and the loss of protection of his or her state' (Harrell-Bond & Voutira 1996a: 1076). It is the nation-state that is the presumed

guarantor of their citizens' rights. Refugees are a product of the failure of this assumption. Certain groups of people do not have the protection of their own state. UNHCR figures for the end of 1999 estimated 11,675,660 people as refugees around the world.[1] Just as worrying is the fact that in the present day asylum seekers are finding it increasingly difficult to find protection elsewhere. Lanphier describes the beginning of the new millennium as marked by large numbers of people on the move with no place to go (1997: 118).

Malta's location in the Mediterranean makes it physically an ideal stepping stone between parts of the Southern and Easter coasts of the Mediterranean and the coasts of Italy, to the North. A significant proportion of asylum seekers in Malta arrive through illegal channels to our islands. Others outstay their visas. UNHCR figures for the end of 1999 showed the number of refugees in Malta to be 270.[2] The Government of Malta admits all refugee applications, however, it does not permit resettlement in Malta. Despite this criterion, refugees' sojourn in Malta often stretches to several years before they are resettled.

Till July, 2000, there was no Refugee Law in Malta. Before the implementation of this law, refugees were permitted free education and medicine, refugees were not permitted to work. As a result they had to rely on aid from humanitarian agencies. Often this aid took the shape of helping the refugees to find work so that they could become self-sufficient. This paper will look at the reasons why this policy failed. Rather than becoming self-sufficient, refugees became increasingly dependent on what they could attain from the main aid agency on the island, the Emigrants' Commission. It has been shown in studies of other refugee and aid worker relationships, especially within camps, that 'the one fundamental problem: the reason why it is so difficult to assist refugees, is that they are not recognized as having any responsibility for their affairs at the beginning – and this affects the whole subsequent programme...' (Appe 1984, cited in Harrell-Bond 1986: 300). Categorising persons as refugees involves aid workers establishing what they should do

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1 Source: http://www.unhcr.ch/pubs/rm101/10101.htm

2 Source: http://www.unhcr.ch/refworld/refbib/refstat

for them (Zetter 1991). Below, we will consider how refugees in Malta could rarely get by without some form of help from aid agencies. By observing how aid was distributed, we can deduce the 'networks of power' (Harrell-Bond and Voutira 1996b: 211) by which aid workers could make decisions over the refugees' lives.

It is important not to erase the refugees as actors in this process. Refugees became aware on what basis aid would be distributed to them. Thereby, they could develop strategies so as to fit the expectations of aid agencies so that they would be given provisions. It is central to developing theory on refugee behaviour that the 'refugees are present but are neither glorified nor explained away' (Harrell-Bond and Voutira: 1996b: 209). The conclusions that will be drawn here will be based on observations drawn from anthropological fieldwork carried out by the present writer between January and May 1999, amongst male refugees hosted in a Home in Malta.

The objective of this critique is to establish the scenario that the new Refugee Law is being introduced to. By recognising and addressing the weaknesses of the previous system, the Refugee Law may be implemented in a more effective way, thus granting refugees their rights as individuals.

2. The situation in Malta before the Refugee Law, July 2000

Malta signed the 1951 Convention Relating to the Status of Refugees in 1971. Malta limited its official commitments to refugees coming from Europe. However, Malta has not abided by its self-imposed criteria and has given asylum to any eligible applicant from any nation. It also made a number of reservations 'in the light of Malta's own special problems and its peculiar circumstances and characteristics' (Buttigieg 1997; 67) which mainly referred to Malta's size, its high population density, and its 'very limited resources' (Buttigieg 1997; 77). The two reservations made in 1971 were that:

(i) Refugees were not allowed to settle permanently. Therefore, Malta could only serve as a transit point to a third country of resettlement.
(ii) Refugees were not permitted to work in Malta.

Malta offered refugees free medical attention and free education, including university education. Other than these, refugees were

entitled to no other social benefits. Finally, refugees in Malta could not be issued with a refugees' passport to enable them to travel.

Although not allowed to remain in Malta, many refugees' sojourn in Malta stretches to several years. Not being given a legal right to work under the previous system, refugees were placed under the responsibility of the Emigrants' Commission.

The Emigrants' Commission was originally set up to help Maltese emigrants abroad. The Maltese Government referred sporadic cases of asylum seekers arriving in Malta from Europe in the seventies and eighties to the Emigrants' Commission. During that time, a rapport developed between the Commission and the United Nations High Commission for Refugees (UNHCR) until, in 1987, the Emigrants' Commission became an Operational Partner for the UNHCR, via UNHCR's Branch Office in Rome (Buttigieg 1997; 67). Between 1992 and 1998, the Commission dealt with over 2,000 refugees, of which 1,500 were resettled, mainly in Australia and Canada. Malta has a relatively high success rate of resettlement for its refugees. This is mainly thanks to *Monsignor* Bugeja, the Director of the Emigrants' Commission. Mgr Bugeja has drawn on contacts from over forty years experience of dealing with authorities abroad in caring for the well being of Maltese emigrants.[3]

Without any legislation catering for refugees' subsistence in Malta, Mgr Bugeja decided to commit himself and the organisation he heads to ensuring that refugees got by on the island. From the Commission's Offices refugees with no means to support themselves received funds and goods. Families and individuals were provided with free accommodation, or paid a nominal rent. In 1995, the Emigrants' Commission was providing shelter to 185 persons in church homes and private accommodation (Calleja 1995). UNHCR funds to mandate refugees were distributed through the Commission too, beginning at LM90[4]/month for the first six months, then reduced to half the sum, and for the following year to a quarter of the original sum, until stopped completely. After this,

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[3] Until the 1960s large numbers of Maltese migrated in order to find work many of whom went to Australia and Canada.

[4] LM1 is equivalent to $2.50.

refugees with no other source of income received LM1/day from the Commission as well as accommodation.

Although not permitted to work, the refugees were encouraged to become self-sufficient by the Emigrants' Commission. Employers would get in touch with Mgr Bugeja offering work to the refugees. Much of the employment came from construction and agriculture, where employers were seeking cheap manual labour. Refugees were not protected by the Social Services Act in case of injury, they received no sick pay, they were not paid during shut down or on weekends, and were not entitled to bonuses and other allowances (Calleja 1995). This situation put refugees in a very vulnerable position. Most of the refugees I met had experienced not getting paid for their work by one employer or other. In all cases where this happened, the refugee had found the work on his own, not through the Commission. Refugees could go to Mgr Bugeja in such cases, and occasionally he would be able to sort something out with the employer.

Even work could not grant refugees total independence. Without a Law to protect them they were liable to exploitation and abuse, and their only source of support in such cases was the Emigrants' Commission. All major decisions in the refugees' lives seized to be in their hands. Work, their whereabouts, and ultimately whether and where and when they would be resettled, became subject for others to decide.

The following case study of one of the Homes provided by the Emigrants' Commission will illustrate how decisions were taken for the refugees, and how refugees' needs became institutionalised. Following Mauss (1990), we examine the relationships tied to the procedures by which refugees received charity and the systems of control made applicable through the manner in which charity was distributed.

3. Case-study: St James' Home[5]

I carried out research at St James' Home between January-May 1999. St James' Home hosted only male refugees, mostly under

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[5] All names used in this text are fictitious so as to protect the identities of the people concerned.

thirty years old. There were normally around 25 refugees there at a time. All refugees had to have written permission from Mgr Bugeja to live at the Home. St James' is an old building and most of the refugees shared rooms because of the lack of space. It was expected to be a temporary refuge, until the refugee could get a job and rent his own accommodation. However, as can be seen from Appendix 1, a good number of refugees who arrived there remained for over a year. Most of those who left while I was carrying out my research did so because they were resettled in, or escaped to, another country. Only two managed to pull together enough resources to be able to afford to pay rent for their own flat. Refugees at St James' were mainly in and out of different labour jobs so money was always sparse. At least 2 refugees had not worked in the previous 3 months. For basic necessities they came to rely on what they received from the Home and from the Emigrants' Commission.

Sister Rose, a small lady in her seventies, was responsible for the Home. Sr Rose came from the convent next door several times a day in order to cook for the refugees and distribute various foodstuffs to them. There was a small kitchen at the front of the residence where a number of refugees gathered at different times of the day to ask the Sister for food or money or to wait for her to feed them. The refugees would also ask her if anyone had phoned to offer work. There was no phone at the residence, so it was through Sr Rose that employers got to the refugees. Often Mgr Bugeja gave employers her phone number at the convent in order to employ refugees.

Sr Rose relied solely on the money, food and clothes donated to the home. She often did not have enough food to go around in terms of tins of tuna, packets of rice and tins of milk, so she cooked at least one meal a day to ensure the refugees who did not cook got one proper meal. Sugar and clothes detergent were divided into small jars and distributed all around. When not in the kitchen, she always kept it locked. Otherwise, the refugees would "take all the food I have stocked. Oh how much they eat! They always want rice and milk, but I have to make sure that I give to everyone!" Thus she had difficulty making ends meet. She often exclaimed how her heart goes out to every one of the refugees at the Home, but she often got angry at them for not taking some responsibility for themselves, and not giving her a hand in taking care of the Home.

Furthermore, she could not trust the refugees to make good use of the goods she gave them. For example, occasionally food was thrown away because one of the refugees had cooked more than he needed. Sr Rose kept a tight hold over the small amounts of money she received in the form of donations. She insisted donors give the money to her, to ensure that all the money reached all those who were in need. Otherwise, she said, the refugees would spend all the money on *kapricci* (trivial luxuries), such as cigarettes and alcohol. It was up to her to ensure that the money would go where it was needed most.

4. How refugees became objects of charity

The charity that went to the refugees at St James' was channelled through the Emigrants' Commission or Sr Rose, who could then see that the charity went to meet the refugees' needs. There were specific purposes that charity was supposed to go towards, such as food, clothing and shelter; while it was clear what charity was not supposed to go towards, such as items classified as *kapricci*. Refugees' needs were specified by those who were distributing the charity, not the refugees themselves.

Carrying out policy agendas involves defining the categories one is dealing with so as to meet specific objectives (Zetter 1991). As soon as individuals come under care and are labelled refugees, specific sets of assumptions are built around them. Labelling is a process 'by which policy agendas are established and more particularly the way in which people, conceived as objects of policy are defined in convenient images' (Wood 1985, cited in Zetter 1991, 44). In Malta, the aid agencies saw themselves as reacting to a refugee situation where refugees were not permitted to work, and when they did, work did not offer them any long-term financial security. Thus the institutional objective was to provide aid in the form of charity. In the process, the refugee was constructed and presented to the public as *miskin* (this Maltese adjective is broadly translatable as 'poor and pitiable').

Mauss remarked that 'charity is wounding for him who accepted it' (Mauss 1990: 65). This is because charity goes against the spirit of the gift, since it does nothing to create or solidify human relationships. Gifts are not just about receiving, but also about reciprocating, in the process signifying the relationship between the

persons involved whether between parent and child, husband and wife or between friends. No such relationship could be created between the anonymous donors and the refugees. Refugees dealt mainly with the aid agencies. According to some refugees, even wages from work carried out by the refugees would occasionally be transmitted through the Commission. This procedure protected refugees from not getting paid, but also protected employers from the authorities for employing illegal workers. This process, however, also denied refugees an identity separate from that of refugee, as the transaction between employer and refugee contained a different set of rights and obligations to that of normal work.

The image of the refugee as *miskin* was prevalent in the national media as well as within the institutional framework which catered for refugees in Malta. There have been several occasions in recent years where Malta has had to cope with a boatload of destitute migrants arriving at its shores. Many of these ask for asylum, although it is often the case that most of them will not have come from a refugee-producing country therefore their claim for refugee status is invalidated. Not all refugees, however, arrive at Malta's shores destitute and in such severe need of emergency assistance.

Refugees come from a variety of backgrounds. At the Home, I came across former mechanics, university students, a cook, a theatre director, electricians and even one who claimed to have had experience in providing aid in refugee camps in his own country. Some had arrived with money and had managed to work illegally for some time with no help from the Emigrants' Commission. However, either because of not gettng paid, losing their jobs or similar circumstances, as soon as they hit on hard times they would need help from the Commission.

The category of the poor refugee is not a fixed identity but is a process whereby a person comes to fit that label (see Zetter 1991; Harrell-Bond 1986; Harrell-Bond and Voutira 1996b). Refugees may have arrived in Malta with their own resources, or else as capable young persons, yet in the course of their stay they became the *miskin* who needed the help of Maltese generosity to get by while on the island. Furthermore, the aid provided to refugees could offer no alternative identity to refugees other than that of *miskin*.

5. Refugees behaving badly?

We have explained how by accepting charity one takes on other persons' assumptions of oneself, in this case, that of a poor refugee. However, was this an identity a refugee assumed uncritically? Looking at the aid agencies' assumptions in giving charity is only one side of the equation. In order to answer this question we need to see how refugees put charity, and their other sources of income, to use. This way we can recognise refugees as actors in their life histories.

It was observed that the refugees were often scolded by Sr Rose for spending what income they had, including money from charitable sources, on *kapricci*. Such spending drew disapproval, as it denied the whole ethos of charity where persons who are better off give to the needy. By going out, drinking and socialising, the refugees attempted to keep apace with Maltese people, thus hazing the boundary between the needy and the average person. Sr Rose would occasionally exclaim, "they are still young", in excuse for their behaviour, which after all was normal to their age group, except for the fact that they were refugees.

The refugees at the Home rarely looked after the little funds they had. At best they would save for a specific object such as a second-hand car or something as simple as a new pair of shoes. Being able to purchase something themselves rather than relying solely on what was given gave the refugees a sense of independence, and they displayed pride in such objects. Charity and work were therefore maximised by successfully converting them into objects which granted the refugees the *appearance* of normal persons. Harrell-Bond and Voutira note that in camps in Africa, from the refugees' standpoint, 'they have legitimate claims as regards the promotion of their interests, which include becoming sufficiently independent so as not to need the camp' (1996b: 216). We have seen that the refugees who came to the Home rarely managed to become totally independent, but they could buy goods to at least appear independent. However, drawing further on Harrell-Bond and Voutira's observations, 'such realisations are seldom articulated because they would threaten the fragile (paternalistic) relationship on which the refugees are forced to depend' (1996: 216b). The refugees at the Home would draw on images of the refugee as *miskin* in order to attract more charity, but they felt little

responsibility towards Mgr Bugeja or Sr Rose on how they put it to use.

6. Resource networks

In the foregoing discussion, it has been observed how survival as a refugee in Malta depended on two networks for the provision of resources. On the one hand, their status as refugees created expectations of certain guarantees and civil rights from the international community, while on the other, their day-to-day existence depended heavily on the charity that reached them through the Church and their identity as *miskin*.

Appadurai (1986) has demonstrated the value of examining the different pathways that resources may follow in order to understand the social relations that are at work. Here it is argued that much of the refugees' frustration may be traced to the ambiguities that arise from the different values and strategies that are at work in these two networks, which shall be examined more closely in turn.

In a liberal democracy, there are civil agencies that distribute civil justice equally among its members. We have already noted how, by definition, a refugee is a person whose civil rights are not being protected by the country of origin. In fact, the refugee's only hope of protection by a civil society depends on being a formally recognized refugee. In Malta, the rights that this entailed were that they would be resettled by the UNHCR, and until resettlement would be able to remain in Malta. The UNHCR provided some financial assistance for a limited period. Meanwhile, refugees were denied the right to work to sustain their livelihoods.

The denial of this right pushed them into a different network from that of the formal procedures which accompany civil rights. They found themselves depending on this alternative network in order to get access to clandestine employment and charity. As noted above, the Emigrants Commission tried to ease their plight by facilitating contact with potential employers. When unable to find clandestine work, they relied on the providence of the Emigrants' Commission in the form of charity. The channels to gaining access to resources for their livelihood were therefore not through legal structures but rather took the form of traditional networks of patronage.

In this scenario, the only person of any authority that the refugees had access to was Mgr Bugeja. In their eyes, he was the

figure that could distribute work or charity to them. So many resources were dependent on him, that it was felt among refugees that one had to ingratiate oneself with him in order to access any sort of resources. Any friction with Mgr Bugeja was blown-up into a personal vengeance from the Monsignor in their minds. Several refugees accused Mgr Bugeja of withholding funds which they received from the UNHCR. They could not understand why the UNHCR stopped funds after a certain amount of time. They often spoke as if all power over their lives was in the Monsignor's hands, even arguing that the ultimate question of their resettlement depended on him.

Against this background, it is particularly significant that one Sudanese refugee described the Monsignor as the "big man" for refugees on the island. This observation succinctly summarised the way that Monsignor was perceived by the refugees at St. James'. The role of the "big man" in many traditional agricultural societies is to further the interests of members of his own group, through skilful negotiation with leaders of other groups (Sahlins 1963). The network which refugees depended found themselves engaging with for their survival was very similar, in that they were often totally dependent on the contacts, skill and experience of the Monsignor to further their interests.

However, having invested all one's hopes in the Monsignor, any failure on his part to achieve anything for anyone of the refugees was taken as a failure in his role as one's provider. Having become the principal provider for refugees on the island, the Monsignor was in the thankless position of also having to bear responsibility for their grievances.

In this section, we have considered two networks through which refugees had access to resources. We have seen how the formal structures of UNHCR recognition and the state failed to guarantee the livelihood and daily bread of the refugee. As a result, refugees came to depend for their survival on a very different network of patronage, which was inseparable from their identity as objects of charity. This ambiguity resulted in their constant frustration. Their expectations as formally recognized refugees with a right to participation in a civil society were met instead by charity and segregation.

The refugees regarded the right to work or resettlement as the only avenue to re-claiming control over their lives. Recognising this

we may better appreciate the wider implication of the new Law on refugees' lives on the island. What remains to be explored is the earlier reluctance to grant refugees the right to work.

7. Admitting refugees into civil society: What cost?

At the time of my research in 1999, the Emigrants' Commission was spending between LM3,000 and LM4,000 every month on refugees, much of which was derived from charity (Young 1999: 17). The situation at St James' Home was not unique. No matter how much refugees received through charity and work few were able to achieve financial independence.

This system gave aid on the presumption that the refugee would need to come back for more sooner or later, rather than establishing the refugee as a fully functioning individual in society. One key to understanding this is by looking at what was given to the refugee, and what was not. The type of goods that were given to the refugees were often durable items like food and clothes; or money that was expected to be spent on these items. They were not expected to go beyond the refugees, who used them up then returned for more.

Charity is derived from donors' surpluses. It gives the giver a good feeling, but does not necessarily improve the quality of life of the recipient. The alternative to charity would have been granting refugees work. Yet work is a resource which the authorities were wary of sharing with refugees, even if it could make them more responsible for themselves, rather than a drain on charity. Here we may draw on Weiner's work showing that 'reciprocity as a principle of exchange is not only "giving while receiving" but a series of disguised strategies of power relations that she describes as "keeping while giving"' (Weiner 1992, cited in Harrell-Bond et al 1996: 211). In the case of Malta's policy with refugees, it was a matter of keeping Malta's resources for Maltese while giving from a surplus which could be absorbed by the refugees without actually sharing in the resources that really are considered to matter, such as a 'good' job.

This process is also evident in the type of work refugees carried out. It was shown above that the type of jobs that normally went to refugees were low-paid, labour-intensive jobs. This time surplus was not in the form of charity but in the form of work most citizens were unwilling to do. Refugees were given work because they were a source of cheap labour.

Finally, we need to question whether the refugees were welcome by the authorities to integrate among the Maltese during their sojourn here. It has been noted that 'there has risen since the seventies a rhetoric of inclusion and exclusion that emphasises the distinctiveness of cultural identity, traditions, and heritage among groups and assumes the closure of culture by territory' (Soysal 1993, cited in Stolke 1995: 2). Thus insiders should stay in, while outsiders stay out. The Government policy among refugees in Malta at the time ensured that even if refugees were in the country, they still could not partake in Maltese society as full social beings. This is the crucial issue that the implementation of the new law will have to address.

8. The Refugees Act, 2000

The Refugees Act was enacted on the 25th July, 2000. The Act regulated procedures for the granting of refugee status, establishing a Refugee Commissioner and a Refugee Appeals Board. It is significant that refugees' rights are clearly stated, in terms of section 11 (1) of the Act:

a) to remain in Malta, and to be granted personal documents, including a residence permit; and if in custody in virtue only of a deportation or removal order, to be immediately released;
b) unless he is in custody awaiting judicial proceedings for the commission of a criminal offence, or is serving a term of imprisonment, to be given a Convention Travel Document entitling him to leave and return to Malta without the need of any visa;
c) to have access to state education and training in Malta and to receive state medical care and services.

Section 11(1) (b) is the most significant addition to refugees' rights in Malta. Rights are at the basis of being able to participate in society as a full social being. It is significant therefore that work is not included as a right of refugees in Malta. Instead, it is left to the discretion of the Minister, in terms of section 19 (1), to make provisions for:

d) extending, with the concurrence of the Minister responsible for social security, any of the provisions of the Social Security Act to person falling under this Act

e) regulating, with the concurrence of the Minister responsible for labour, the granting of work permits to recognised refugees

The Government, it would seem, does not want refugees to forget that they are Malta's guests, and that Malta should not become their permanent home.

Since September 2000, an increasing number of refugees have received their work permits. This offers the possibility that refugees may integrate into Maltese society and exercise the right to self-dignity,[6] which derives from the freedom to make one's own decisions over one's life. It is still too early for us to assess the impact of this Law over the refugees' lives. But in light of what has been discussed above, we may question whether the Law alone will be enough.

We have seen how a culture of dependency was integrated into the refugees' lives on the island. This was heavily due to the absence of any Law protecting their rights at the workplace. However, there were other important factors too. Only certain jobs were often open to most refugees, such as in construction. The main reason they were employed was because they were cheap to hire. This will predictably remain the main reason refugees get employed in such industries even with the Law in effect, although the refugee will now be entitled (at the discretion of the Minister) to protection and benefits other workers receive. Whether other jobs become open to refugees will depend much more on the culture of the country: will refugees be considered appropriate applicants for office jobs, for example?

Even with the permit to work, we cannot assume that refugees will be able to manage on their own all the time. Aid agencies need to be flexible enough to meet the different needs of different refugees (see Harrell-Bond 1986; Harrell-Bond and Voutira 1996) so as to enable refugees to have responsibility over their own lives. This requires a change in the culture of giving aid to refugees in Malta. Need should not be dictated or else we will remain with a system where refugees receive nothing until they become poor

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[6] See the Universal Declaration of Human Rights, Article 22.

refugees in need of food and shelter, or else where they learn how to live up to the preconceptions of need by which they can access aid. Refugees often need a helping hand not a handout.

9. Conclusion

A major source of refugees' frustration on the Island has been their inability to fulfil their potential, whether at a professional or social level. The two are interconnected. Failure to advance at a professional and economic level contributed to preventing the refugees from integrating socially. Ability to participate in social life was often at a superficial level, depending on one's success of accessing funds through work or charity.

The new Refugee Law needs to challenge preconceptions held about refugees in Malta. Being denied any control over their lives meant refugees in practice became dependent on the agencies which attempted to instil a sense of independence in them. The new Law could be a start to enabling refugees to re-acquire responsibility for themselves. Perhaps refugees, in turn, will return more than gratitude to Malta, but contribute to Malta's economic, social and cultural life.

APPENDIX 1

Refugees at St James' Home Jan – May 1999

	Origin of refugees at e the Home as at 15/1/99	Whereabouts as at 10/5/99	Time spent at St. James' Home as at 10/5/99
1	Algeria	St James' Home	3 years
2	Algeria	St James' Home	2 years
3	Algeria	St James' Home	1 year
4	Algeria	St James' Home	Unknown
5	Algeria	Moved out. Returned to the Home within a month	1 year
6	Algeria	Moved out. Returned to the Home within a month[7]	10 months
7	Iraq	St James' Home	14 months
8	Iraq	St James' Home	9 months
9	Iraq	St James' Home	1 year
10	Iraq	St James' Home	Unknown
11	Iraq	St James' Home	Unknown
12	Iraq	Moved to own apartment in February	Unknown
13	Iraq	Moved to own apartment in February[8]	Unknown
14	Iraq	Moved in with Maltese lady friend in March	18 months
15	Iraq	Escaped[9] in February	Unknown
16	Iraq	Escaped in May	6 months
17	Lebanon	St James' Home	2 years
18	Palestinian (from Iraq)	St James' Home	10 months

[7] 5 & 6 moved out and rented a flat together. They returned after having difficulty paying the rent.

[8] 12 & 13 moved out together. I never met either of them.

[9] That is, clandestinely by boat to Sicily.

	Origin	Whereabouts	Time spent at the Home
19	Palestinian	St James' Home	2 years
20	Guinea	St James' Home	9 months
21	Somalia	Resettled in USA[10] in March	2 years
22	Somalia	St James' Home	4 years
23	Sudan	St James' Home	Unknown
24	Sudan	St James' Home	Unknown
25	Sudan	Moved in with Sudanese friend in April	6 months
26	Sudan	Resettled in USA in March	2 months
27	Sudan	Resettled in USA in March	3 years
28	Sudan	Resettled in USA	2 years
29	Senegal	Escaped	Unknown
30	Angola	Moved out and married	7 months

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JERUSALEM : UNE CONTRIBUTION A LA SPECIFICITE INTERNATIONALE DE LA VILLE

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After having focused on Jerusalem's legal status during different periods and after having followed the different historical phases of the protection granted to the Sacred Places that belong to the three monotheist religions, together with the ensuing internationalization of the city accompanied by the numerous treaties and statutes issued from the times of the Ottoman Empire till today, it would be desirable to put forth some ideas that could give a contribution towards finding a fair solution. Given the impossibility of finding a unifying solution, which on the other hand would work against the interests of the three religions because a Jewish or Palestinian sovereignty would inevitably place the other religions in a sort of ghetto, it is believed that an effort of good will could be made by using an existing international convention. Reference is here being made to the UNESCO Convention of 23 November 1972 on the world's cultural heritage; since if there is a place that really belongs to a great part of humanity, that is to say to Christianity, to Islam and Judaism, it is really the city of Jerusalem.

Sur le conflit arabo-israélien il y a une très vaste littérature qui, d'ailleurs, ne peut pas suivre la succession rapide des événements à laquelle on a procédé, en particulier dans les deux dernières années, dans le but de parvenir à une conclusion. Le problème de la ville de Jérusalem, par contre, n'est plus sur la scène comme il était auparavant. On en parle, bien sur, dans les disputes territoriales, mais on a mis de coté l'accent sur la spécificité de la ville.

Je voudrais revenir sur cet aspect et parcourir les différentes étapes dans le but d'ajouter d'autres idées qui pourraient contribuer à une solution équitable.

S'agissant de réfléchir pour un statut particulier de la ville de Jérusalem, il faut tout d'abord partir de l'histoire de la ville et des différentes situations qui ont été proposés à fin de protéger le caractère religieux de la ville qui intéresse les trois religions

monothéiste qui se retrouvent autour de la Méditerranée. En effet, déjà à l'époque de l'Empire ottoman, et en particulier lors de la dissolution de celui-ci, un statut particulier pour les Lieux saints a été envisagé et, à l'époque, la France s'était proposé comme puissance protectrice des catholiques, tandis que le Tzar de la Russie se proposait, lui même, comme protecteur des orthodoxes. Le Traité de Partis de 1856 et celui de Berlin de 1878 reconnaissent, encore une fois, l'intangibilité des Lieux saints et en particulier de la ville de Jérusalem en garantissant le *status quo ante* et, en conséquence, les droits des différentes religions qui étaient déjà fixés à l'époque de l'Empire ottoman.

Au le siècle dernier, à l'époque de la Société des Nations, comme on le sait, la Palestine est confié en administration à la Grande Bretagne (mandat du 23 juillet 1922) sans toutefois que des obligations spécifiques, relatives aux Lieux saints, ait été fixées. Après la deuxième guerre mondiale et avec la constitution des l'Organisation des Nations Unies, une commission *ad hoc* fut constitué pour étudier le problème et formuler des proposition en particulier pour la Palestine.

Par un rapport adoptée à la majorité on propose la constitution d'un Etat arabe, d'un Etat juif ainsi que un statut international pour la ville de Jérusalem. L'Assemblée générale des Nations Unies, le 29 novembre 1947, avec 33 votes en faveurs 13 contraires, exprimés en large partie par les Etats arabes, et 10 abstentions, parmi les quelles le Royaume Uni, adopta la Résolution 181 dans la quelle on propose la constitution des deux Etats mentionnés, ainsi que la constitution de la ville de Jérusalem sous forme d'entité séparé, à confier au Conseil de Tutelle des Nations Unies qui aurait du élaborer un plan spécifique pour un régime international de la ville. Une hypothèse analogue avait été exploité, sans succès, sous le gouvernement britannique en 1937.

Dans la Résolution 181 on ne trouve pas en conséquence la soi disant internationalisation de la ville de Jérusalem mais on la prévoit simplement comme hypothèse de solution et on confie la formulation du contenu spécifique de ce régime au Conseil de Tutelle, charge que, en réalité, fut réalisé par le Conseil moyennant un projet déposé le 4 août 1950.

Que est que signifie, en langage juridique, cette hypothèse d'internationaliser un territoire, ou une ville, comme dans le cas d'espèce? Il s'agit généralement d'une solution de caractère

temporaire tendant à congeler une situation de différend sur la souveraineté existante dans le territoire mis en cause, dans l'attente qu'on puisse trouver une solution durable. Les exemples qu'on connaît parmi, les quels les plus cités sont la ville de Danzica ainsi que la ville de Trieste, n'ont connus, en réalité, aucun succès.[1]

La Résolution 181 de l'Assemblée générale est accepté par la population juive de Palestine même avec certaines réserves à propos de la ville de Jérusalem mais elle est rejeté par la population arabe.

Quelque mois après, le 14 mais 1948, l'Etat d'Israël est proclamé et le jour après, le 15 mai, cesse le mandat d'administration confié au Royaume Uni. On sait bien que cette situation provoque immédiatement l'intervention militaire de l'Egypte, de l'Iraq, de la Jordanie, de la Syrie et du Liban et que, en conséquence de cette intervention, la Jordanie occupe, parmi d'autres territoires, la partie ancienne de la ville. La situation se termine avec l'armistice signé à Rode le 13 avril 1949.Le 19 mai 1949, par la Résolution 273, l'Etat d'Israël est admis comme Etat membre des Nations Unies.

Le projet d'un statut international de la ville est évoqué encore dans la Résolution 194 du 11 décembre 1948 et dans la Résolution 333 du 9 décembre 1949. Quelque jours après cette Résolution, le 13 décembre 1949, l'Assemblée nationale de l'Etat d'Israël, la Knesset, décide que la ville de Jérusalem soit la capitale de l'Etat. Quelque mois après la Jordanie, par résolution de l'Assemblé nationale du 24 avril 1950, procède à l'annexion de la Cisjordanie et de la partie est de Jérusalem dans le territoire de l'Etat.

A ce moment donc, au dépit de tout projet d'internationalisation, la ville de Jérusalem est divisée en deux parties : la partie ouest appartenant à l'Etat d'Israël et considérée même capitale de l'Etat, la partie est englobée dans le territoire de la Jordanie. Dans les faits, donc, une situation contraire à toute hypothèse de internationalisation.

Le problème est présenté de nouveau aux Nations Unies, en 1952, mais sans aucune suite favorable car, entre temps, l'Union soviétique, qui dans le passé avait appuyé l'hypothèse d'un statut international, abandonne cette position. Cette situation reste inchangé jusqu'à la guerre des six jours, en 1967.

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[1] Voir: . MARAZZI, I territori internazionalizzati, Torino 1959

Quelles sont les considérations juridique relatives à cette période qu'on peut avancer. A la base, comme on le sait, il y a la Résolution 181; même si cette Résolution a été accepté par le peuple juif mais rejeté par la population arabe, il est claire que les Nations Unies on donné confiance à cette acceptation juive qui est évoqué également dans la Résolution par la quelle l'Etat d'Israël a été admis aux Nations Unies. D'ailleurs, la souveraineté territoriale de l'Etat d'Israël sur la partie ouest de la ville repose sur la Résolution des Nations des Nations Unies, sur l'effectivité de la souveraineté territoriale exercé par l'Etat et sur la volonté, bien claire, manifesté par l'Etat lui même. Les dites conditions, toutes valables pour le droits international, n'ont pas été mises en doute dans aucune occasion successive et chaque fois que les Nations Unies, par différentes résolutions, ont invité l'Etat d'Israël à abandonner les territoires occupés, il se sont référé toujours aux territoires occupés après 1967 mais jamais aux situations précédentes. Les éléments juridiques en faveur de la souveraineté territoriale de l'Etat d'Israël sont ainsi confirmé par la volonté de la communauté internationale exprimé à travers les Nations Unies[2].

Quel est, par contre, la situation de la partie est de la ville, à savoir la ville ancienne occupé par la Jordanie suite à l'intervention militaire de 1948 ? La situation est bien différente car il n'y a, à la base, aucune résolution ou acte des Nations Unies en faveur de cette occupation. En plus, il faut rappeler que, lors de l'intervention militaire de cinq Etats arabes, ils avaient précisé que leur intervention tendait à rétablir la paix mais sans aucune prétention territoriale. L'occupation militaire de la Jordanie ainsi que, à plus fort raison, l'annexion déclaré par l'Assemblée national, étaient dénoués de tout fondement juridique. Et on peut donc estimer que, à cette époque, n'ayant pas été réalisé l'Etat arabe, dont il était question dans la Résolution 181, ni un statut international de la ville de Jérusalem, on se trouvait nécessairement face à une contestation sur la souveraineté territoriale de la partie est de la ville.

Cette situation, par ailleurs, à été confirmé quelques ans après, par la déclaration du Roi Hussein de Jordanie du 31 juillet 1988,

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[2] Voir: LAUTERPACHT, Jerusalem and the Holy Places, London 1968

par laquelle la Jordanie renonce à toute prétention territoriale et souligne l'importance d'appliquer le principe de l'autodétermination.

Le deuxième période juridiquement important a, à la base, la guerre des six jours en 1967 par laquelle la partie est de la ville, ainsi que d'autres territoires, sont occupés par l'armée israélienne.

En dépit de toute condamnation de cet acte d'occupation militaire (on rappelle, entre autres, la Résolution 22/53 du 4 juillet 1967 de l'Assemblée générale, ainsi que la Résolution 252 du 21 mai 1968 du Conseil de Sécurité), l'Etat d'Israël établit une véritable souveraineté territoriale sur toute la région et en particulier sur le coté est de la ville de Jérusalem et manifeste une volonté très précise de garder cette souveraineté sur l'ensemble de la ville considéré la capitale historique de l'Etat.

On peut rappeler que, suite à la victoire de la guerre, le premier Ministre d'Israël, Levi Eshkol, déclara la ville de Jérusalem «*la capital éternelle d'Israël*»; et son successeur, Moshe Dayan, à un'autre occasion disait «*...on est revenu dans nos Lieux les plus sacrés ; on est revenu et on ne les quittera plus!*»

On sait bien que, depuis lors, la communauté internationale, le Conseil de Sécurité des Nations Unies, l'Assemblée générale et même d'autres organisation internationales y compris le Conseil européen, ont toujours condamné cette occupation israélienne qui est considéré comme une véritable occupation militaire illégitime en l'absence de toute situation de guerre ou d'agression préexistante.

A partir de ce période les considérations juridiques à formuler doivent tenir compte de cette division de la ville établit par les faits. La partie ouest de la ville appartenant à l'Etat d'Israël depuis la constitution et qui ne pose aucun problème juridique car elle est légitime vues les argumentations déjà évoqués et, de l'autre coté, la partie est de la ville dans laquelle, même en oubliant toute volonté et déclaration politique de l'Etat d'Israël, selon l'interprétation courant de droit international, on se trouve dans une situation d'occupation illégitime par l'Etat d'Israël.

Mais si l'occupation de l'Etat d'Israël est illégitime et si la Jordanie, ancien Etat occupant de la même partie de la ville, a abandonné toute revendication territoriale entre qui se joue actuellement cette souveraineté contestée? D'un coté, il est claire, il y a l'Etat d'Israël qui la revendique, mais de l'autre, la Jordanie, il y a renoncé et aucun autre Etat limitrophe a jamais posé la question. L'Etat arabe de Palestine, dont il était question dans la

Résolution 181, n'a pas était créé et donc il n'est peut pas revendiquer aucune souveraineté territoriale, mais il y a le peuple palestinien qui, dans le temps s'exprimait par l'Organisation pour la libération de la Palestine (OLP), et récemment, après les différentes tentatives de solution du problème, par l'Autorité palestinienne. A défaut d'un Etat on doit se demander si une organisation de libération nationale ou une autre autorité représentative d'un peuple peut revendiquer une souveraineté territoriale.

Sans entrer dans des débats strictement juridiques sur la personnalité internationale, je croie qu'il est de toute évidence que le peuple palestiniens cherche à rétablir les conditions nécessaires pour la constitution d'un Etat de Palestine[3]. Le peuple existe déjà, une forme de gouvernement embryonnaire également, mais, sans tenir compte de la situation temporaire actuellement existante sur la partie administré par l'autorité mentionnée, ce qui manque c'est une véritable souveraineté territoriale sur différentes zones de la région, ainsi que sur la partie est de la ville occupé par l'Etat d'Israël. Il en découle que, au point de vue juridique, on se trouve face à une contestation de souveraineté sur la dite partie est de la ville et on doit considérer que l'Etat d'Israël d'un coté, et le peuple palestinien de l'autre, sont les deux parties de cette contestation.

Ceci étant les choses après 1967, on sait que tous les efforts déployés par la communauté internationale, et en particulier avec l'intervention des Etats Unies, si ont permis d'avancer de solutions pour les revendications territoriales en dehors de la ville, n'ont permis en aucun manière d'avancer une solution quelconque pour la ville de Jérusalem car, à ce sujet, la position de deux parties en cause est radicalement opposée.

Les accords récentes de Wye Plantation du 23 octobre 1998, ainsi que dans les accords signés à Sharm el Sheik le 4 septembre 1999, se limitent à évoquer la spécificité, et parfois même l'unicité de la ville de Jérusalem, et même dans le traité de paix entre la Jordanie et Israël du 26 octobre 1994, on réitère l'appel au caractère religieux

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[3] Voir: LAPIDOTH et CALVO-GOLLER, *Les éléments constitutifs de l'Etat et la Déclaration du Conseil national palestinien di 15 novembre 1998,* dans Revue générale de droit international public 1992,p. 777

de la ville et récemment, enfin, la Résolution 1322 du 7 octobre 2000 du Conseil de sécurité se limite à demander le plein respect pour tous les Lieux saints et en particulier la ville de Jérusalem. En réalité on ne parle plus d'internationalisation; le mot a été définitivement abandonné et même le Saint Siège suive cette approche car, dans la lettre apostolique de Jean Paul II de 1984,[4] on se limite à demander un statut spéciale qui soit internationalement protégé ou garanti.

Apres avoir mis au point la situation juridique dans l'histoire de Jérusalem jusqu'à nos jours et face à une situation pénible qui dure depuis presque quarante ans, on se demande comment peut on contribuer à trouver une solution équitable.

La dispute sur la souveraineté territoriale à exercer sur la partie est de la ville est un problème hautement politique qui ne pourra pas être résolu qu'à travers un accord entre les deux parties – l'Etat d'Israël et l'Autorité pour la Palestine – agissant au nom du peuple palestinien, et qui, en tout état des choses, ne permettra jamais l'unification territoriale de la ville. Car ceci équivaudrait au *statu quo* actuel, cet à dire maintenir la souveraineté israélienne sur toute la ville de Jérusalem unifiée. Il n'est pas difficile à conclure que la partie palestinienne n'acceptera jamais une pareille solution. Un jour ou l'autre, et nous espérons dans les plus courts délais, on parviendra à un accord sur la souveraineté territoriale qui amènera, peut être, à la division de la ville, y comprise la partie dans la quelle se trouvent les principaux Lieux saints. L'entente sur la souveraineté, quelque soit la division à la quelle on arrivera, ne résoudre pas l'intérêt et les motivation qui étaient à la base de l'internationalisation proposé en 1947, ainsi que le statut particulier internationalement protégé, plusieurs fois repris dans les années successives.

L'unicité de Jérusalem réside, de toute évidence, dans les sites particuliers qui sont considérés fondamentaux pour les trois religions monothéiste présentes, le Christianisme, l'Islam et le Judaïsme. Jérusalem est la ville qui abrite le Temple par excellence, lieu sacré pour le Juif ; en même temps Jérusalem est le lieu ou se trouve le Tombeaux du Christ, devenu homme et sacrifié pour

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[4] Voir: "Redemptionis anno" du 20 avril 1984

la Rédemption de l'humanité et, en même temps encore, est le lieu où Mahomet ascendit au ciel. Ville privilégié d'expérience religieuse, de réflexion théologique, et historique, Jérusalem devrait être la ville de la paix, de la fraternité et de la solidarité.

Dans l'impossibilité d'une solution territoriale unitaire, et qui d'ailleurs serait contraire aux intérêt des trois religions qui trouvent dans la ville leur berceau, car la souveraineté juive ou la souveraineté palestinienne mènerait inévitablement à un sorte de ghettisation des autres religions, j'estime qu'une tentative de bonne volonté pourrait être trouvé en utilisant une convention internationale existante. Je me réfère à la Convention de l'UNESCO sur le patrimoine mondiale naturel et culturel du 23 novembre 1972.

Mise à part les centaines des lieux historiques et naturels qui ont été insérés dans la liste de biens appartenants au patrimoine mondiale, même s'ils se trouvent sur la souveraineté déterminé d'un Etat, Jérusalem s'impose de toute évidence. S'il y a un lieu qui appartient vraiment à une large partie de l'humanité à savoir le Christianisme, l'Islam, le Judaïsme, ceci est la ville de Jérusalem[5].

On sait bien que en application des dispositions contenues dan la Convention mentionnée il y a une procédure à suivre pour inscrire un lieu dans le patrimoine mondiale et il y a également un comité qui décide. Mais ce qu'il est plus important sont les obligations qui en découlent car, d'après la Convention, l'Etat dans le quel se trouve le bien tombé sur le patrimoine mondiale, s'engage à maintenir, protéger et mettre en valeur le bien, à fin d'en garantir la jouissance à l'humanité.

Rien empêche d'ailleurs que ces dispositions, insérées dans la Convention et donc obligatoires pour tous les Etats parties, soient complétés, le cas échéant, par des dispositions spécifiques adoptées sous forme d'engagement pris par les Etats en cause, au moment où le Comité devrait décider d'inclure la ville de Jérusalem dans le patrimoine mondiale. La situation ne serait pas difficile à imaginer

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[5] Déjà dans la Résolution 3.343 (octobre 19678), la Conférence générale de l'UNESCO a reconnu l'importance exceptionnelle que le patrimoine culturel de la ville ancienne de Jérusalem revêt non seulement pour les Pays directement intéressés mais également pour l'humanité toute entière en fonction de valeurs historiques, artistiques et religieux.

car l'épuisement des procédures prévues dans la Convention et au moment où le Comité décide d'inclure Jérusalem dans la liste, on demanderait aux Etats intéressés (aujourd'hui Israël et l'Autorité palestinienne, demain, peut être, l'Etat de Palestine), de signer l'accord spécifique pour élargir les obligations déjà existantes dans la Convention en considération de la spécificité de la ville et de l'intérêt fondamental des trois religions mentionnées.

La situation de la ville est bien différente de tout autre lieu ou bien inséré dans le patrimoine mondial. Si, lorsqu'il s'agit de prendre des engagements pour le Taj Mahal en Inde, pour la ville de Venise, les Pyramides du Caire, etc. il s'agit essentiellement de maintenir les lieux et d'en permettre la visite et en conséquence la jouissance à toute personne, pour la ville de Jérusalem il ne s'agit pas simplement d'un lieu historique, culturel ou autre à conserver et faire visiter, mais il s'agit d'un lieu religieux dans le quel on doit professer la religion et respecter le caractère religieux des différentes sites situés dans la ville. Ceci impose, à mon avis, des obligations particulières qui devraient s'ajouter à celles découlantes de la Convention de l'UNESCO et que, en conséquence, pourraient compléter un statut de Jérusalem, comme ville appartenant au patrimoine mondiale, mais accompagné de garanties particulières adoptées par les deux Etats territorialement intéressés en fonction de sa spécificité et unicité.

Enfin, considérant que la Convention mentionnée prévoit une sorte de contrôle de la part du Comité international sur la gestion des biens appartenants au patrimoine mondial, le contrôle sur le respect des garanties et des obligations particulières adoptées pour la ville de Jérusalem, en attendant une solution générale du problème, pourrait être confié au même Comité internationale. On aurait donc réalisé un statut particulier jouissant également d'une garantie internationale comme on a envisagé à plusieurs reprises dans les résolutions des Nation Unies et également dans les tentatives d'accords, les plus récents, entre les parties en cause.

Laissant de coté les points controversés de la souveraineté territoriale, cette hypothèse, limitée à la gestion de la ville, pourrait être engagé dès maintenant, avoir un caractère provisoire en attendant une solution qui engloberait l'ensemble des problèmes du conflit arabo- israélien, et pourrait, peut être, aider les deux parties à trouver un accord définitif entre eux tout en sachant à l'avance que la ville tomberait sous un régime particulier (patrimoine

mondial) et que les Etat qui exerceront la souveraineté sur les différentes parties de la ville, seront engagés à respecter les mêmes objectifs qui, au delà des règles générales du patrimoine mondiale, devront également porter sur le respect de la sainteté des Lieux et sur la liberté d'exercer les cultes et les offices religieux dans les différents Lieux.

CONFERENCE REPORT

THE CAIRO DECLARATION ON HUMAN RIGHTS EDUCATION AND DISSEMINATION[1]

BAHEY EL DIN HASSAN

At the invitation of the Cairo Institute for Human Rights Studies, in co-ordination with the Office of the United Nations High Commissioner for Human Rights and the Euro-Mediterranean Human Rights Network, with the participation of around one hundred human rights experts and defenders from forty human rights groups from 14 Arab states, as well as experts from Africa, Asia, Latin America and Europe, the **Conference on Human Rights Education and Dissemination: A 21st Century Agenda** was held in Cairo from the 13th to the 16th of October, 2000. At the close of this conference, the delegates adopted the following declaration:

The Conference

Having considered the international human rights instruments, as well as documents, declarations and reports adopted by relevant regional and international conferences, especially the UNESCO's International Congress on the Teaching of Human Rights – Vienna, 1978, International Congress on Human Rights Teaching, Information and Documentation – Malta, 1987, the International

[1] Adopted by the Conference on Human Rights Education and Dissemination: A 21st Century Agenda: The Second International Conference of Human Rights Movement in the Arab World (13-16 October 2000), Cairo.

Congress on Education for Human Rights and Democracy – Montreal, 1993, the UNESCO Regional Conference on Human Rights Education in Africa – Dakar, 1998, the UNESCO Regional Conference on Human Rights Education in Asia and the Pacific – Pune, 1999, the UNESCO Regional Conference on Human Rights Education in the Arab States – Rabat, 1999, and the First International Conference of the Arab Human Rights Movement – Casablanca, 1999,

Having reviewed the United Nations Plan of Action for the Decade for Human Rights Education (1995-2004), and the progress achieved halfway through the Decade,

Having held extensive deliberations throughout its sessions, taking into consideration the close link between the lack of respect for human rights and the prevalence of poverty and corruption as evidenced by the World Human Development Report and the Report on Corruption in the World, and also noting the increasing concern at the adverse effects of globalisation on the economic level, the abuse of human rights considerations in international relations, and the grave injustices they caused against peoples, especially in the Arab World,

Decides to adopt the following **Cairo Declaration on Human Rights Education and Dissemination.**

Participants reaffirm:

* Human rights principles are universal; civil, political, economic, social, cultural and collective rights are closely interconnected, interdependent and indivisible; women's rights are an integral part of the human rights system.
* Human rights values are the fruit of the interaction and communication between civilizations and cultures throughout history, the product of the struggle by all peoples against all forms of injustice and oppression internal and external. In this sense, such values belong to humanity as a whole.
* Commendable cultural specificity –as a human right- entrenches people's feeling of dignity and equality, promotes their participation in the conduct of public affairs in their countries, and promotes their consciousness and awareness of the common destiny of all humankind. It is not used to justify marginalizing or consolidating the inferior status of women, nor to justify

excluding the other on whatever religious, cultural or political grounds, or to waive commitment to international instruments.

* Respect for human rights is a prime interest for every person, group, people, and for humanity as a whole. This is considering that the enjoyment of dignity, freedom and equality by all is a crucial factor in the flourishing of the human person, in advancing nations and developing their material and human wealth, and in promoting the sense of citizenship.
* Human rights education and dissemination is a fundamental human right. This imposes on governments in particular great responsibilities to explicate, propagate and disseminate human rights principles and their protection mechanisms.

First: The Concept of Human Rights Education and Culture

Human rights education is, in essence, a public endeavour to enable people to learn the basic knowledge essential at once for their emancipation from all forms of oppression and suppression and the inculcation of feelings of responsibility and concern as regards the public good. Human rights culture comprises the host of values, mental and behavioural structures, cultural heritage, norms and traditions commensurate with human rights principles, along with methods of socialization that transmit such culture at home, school, intermediary agencies and the media.

Human rights education and dissemination is a continuous and comprehensive process that covers all the aspects of life, a process that should be brought into all kinds of practices whether personal, professional, cultural, social, political, or civic. It is necessary that all professions adhere to codes of practice committed to values that are inspired by the fundamental human rights.

The fundamental purpose of human rights education is to interweave knowledge and practice. Human rights education, inculcating dignity and responsibility along with social and moral responsibility, inevitably leads people to mutual respect, collective support and adaptation to their respective needs and rights. It leads people to accept working together to reach freely suitable and renewable formulas that would ensure the balance of interests and joint work towards the common good, without the need to resort to the sway violence, arbitrary or organized, which does away with the freedom of everybody.

Second: The Objectives of Human Rights Education and Dissemination

1. Developing and flourishing the human personality in its spiritual, intellectual and social dimensions, and entrenching people's sense of dignity, freedom, equality, social justice and democratic practice.
2. Enhancing men and women's awareness of their rights so as to help enable them to transform human rights principles into social, economic and political reality. It would also enhance their ability to defend, maintain and advance human rights on all levels.
3. Consolidating friendship and solidarity among peoples; promoting respect for the rights of others; cherishing cultural pluralism and diversity and encouraging the flourishing of the national cultures of all groups and peoples; enriching the culture of dialogue, mutual tolerance and renouncing violence; promoting non-violence, fighting bigotry, and immunizing the people against the discourse of hatred.
4. Promoting a culture of peace that is based on justice and respect of human rights, foremost of which are the rights to self-determination and to resist occupation; in addition to democratising international relations and institutions so as to reflect the common interests of humanity.

Third: Recommendations

Having studied the obstacles to human rights education and dissemination in the Arab World, the **Conference** makes the following recommendations:

1. Calling upon the Arab governments to:
   1.1 Ratify all the international human rights instruments; to drop reservations for those states that have ratified with reservations; to monitor their practical application; to respect all human rights indivisibly; and to not use the manipulation of human rights by some parties in the international community or cultural specificity as a pretext to justify waiving their commitments towards their peoples and citizens.

1.2 Eliminate all restrictions to the freedoms of opinion, expression and assembly, and academic freedoms, in conformity with the universally recognized human rights principles, and to the right to own and manage radio and TV stations and print media channels.

1.3 Draw up national plans for human rights education. This would be the greatest contribution to the promotion of the sense of belonging and citizenship, considering that raising people's and societies' awareness of human rights is the first line of defence of human rights and nations' rights.

In this regard, special attention should be given to:

i) Revising educational curricula and media materials to rid them of messages against human rights, and enriching educational curricula with human rights content.

ii) Including courses on human rights in higher and post-graduate education, and encouraging MA and PhD research in human rights.

iii) Including human rights in literacy and informal education programs.

iv) Including human rights courses in programs qualifying teachers, lawyers, judges, physicians, media personnel, religious scholars, police and army officers, civil servants, and those who work in the different fields of art.

v) Establishing national institutions for human rights education and dissemination; enhancing the role of those already existing in some Arab countries; and coordinating efforts to realize national plans in cooperation with local, regional and Arab human rights organizations.

vi) Consolidating cooperation with the relevant United Nations bodies and the international human rights education institutions.

vii) Paying special attention to the role the arts and letters may play in human rights education and dissemination, given their special capacity to address and inspire human consciousness. Special attention should also be given to knowledge of living reality as a starting point, in addition to developing non-traditional educational materials (such as films and plays).

2. Urging the League of Arab States to concern itself with the human rights issues of the Arab peoples and citizens. This requires revising the Arab Charter for Human Rights so as to bring it into conformity with human rights values and principles; establishing a special system for the Permanent Arab Committee on Human Rights in order to activate it; and opening channels of cooperation with Arab non-governmental organizations. Also, the League of Arab States is urged to contribute in activating the plans of the United Nations bodies concerned with human rights education and dissemination.
3. Establishing an Arab regional committee for human rights education and dissemination to include Arab governments that are active in this regard and the relevant Arab non-governmental organization, with a view to develop plans and programs in cooperation with the relevant United Nations bodies.
4. Urging education experts to develop human rights education curricula to address the heart and emotions as well as the mind. Such curricula should not be restricted to conveying information and knowledge; they should seek to develop critical thinking and attitudes. Thus they may help create a cultural environment that safeguards individual and collective rights and furthers the establishment of the state of law and right. It is necessary that such curricula be based on the universal human rights principles while drawing upon the respective people's specific culture and historical experience in resisting all forms of political, social, cultural and religious oppression and foreign occupation.
5. Calling upon the political parties in the Arab World to declare their full commitment to the international human rights instruments; to enhance the human rights content in their platforms and practices on the ground; to follow democratic practices internally; and to attach special importance to human rights culture in their cadre-training programs for the youth.
6. Urging the radio, TV and the print media to consider seriously promoting human rights values, pluralism and diversity, and to avoid all that may instigate racial or religious hatred, deride the opinions of the other, or degrade human dignity. Also, the Arab Press Union, the different press syndicates and civil society institutions are called upon to monitor the media's adherence to professional codes of ethics in this regard. Moreover, human rights institutions, both governmental and non-governmental,

are called upon to adopt special training programs for media personnel.

7. Urging human rights institutions, both governmental and non-governmental, to make the best use of media channels, especially the radio and TV, in disseminating the human rights culture. This may include establishing special platforms, designing special programmes, and making use of modern technology to this end. Human rights organizations are urged to study the components of popular culture that form the consciousness of individuals, with a view to reaching the discourse suitable for the dissemination of human rights.
8. Calling upon the Arab intellectuals, politicians and religious scholars to abstain from entangling religion in a confrontation with human rights, to consider those rights provided by the international human rights law as a minimum to build upon not to be reduced in the name of cultural specificity or any other pretext, and to work towards the entrenchment of human rights values in the Arab cultural traditions.
9. Calling upon academics, researchers and religious scholars to work for highlighting the roots of human rights in the Arab culture, to underscore the contribution of the Islamic and Christian civilizations in establishing human rights values, and to dismantle that artificial contradiction between a number of human rights principles and some obsolete fundamentalist interpretations.
10. Urging the non-governmental human rights institutions in the Arab World to promote local and regional coordination among them, as well as with the relevant local and regional governmental agencies, and with religious institutions concerned with human rights culture. They are also urged to carry out field research to assess the Arab experiences, both governmental and non-governmental, in human rights education, with a view to identifying the obstacles and making recommendations for improvement.
11. Urging the Secretary-General of the United Nations to take special notice of the issue of human rights education and dissemination, and to designate his yearly address on Human Rights Day, December 10th, this year for calling upon governments to enhance their efforts in this regard, particularly in activating the United Nations Decade for

Human Rights Education, including the mobilization of the necessary human and material resources.

12. Urging the United Nations High Commissioner for Human Rights to undertake the necessary doubling of efforts in order to activate the United Nations Decade for Human Rights Education in the best possible way, and to extend better support to the governments and non-governmental organizations active in this field.
13. Urging the United Nations High Commissioner for Human Rights and the UNESCO to consider the translation of all publications related to human rights issues into Arabic and making them widely available for the Arabic reader.

مدينة القدس: مساهمة للخصوصية الدولية لهذه المدينة.

كلاوديو زانكي

بعد التركيز على وضع القدس الشرعي أثناء الفترات التاريخية المختلفة وبعد تتّبع مختلف المراحل التاريخية للحماية الممنوحة للأماكن المقدسة والتابعة للديانات التوحيدية الثلاث وتدويل المدينة وما ساير ذلك من معاهدات وتشريعات منذ أيام الامبراطورية العثمانية الى يومنا هذا، تقدم الدراسة عدداً من الأفكار التي قد تساهم في ايجاد حل عادل لهذه المسألة.

ونظرا لإستحالة وجود حل موحد، ذلك الحل الذي قد يعمل ضد مصالح الديانات الثلاث لأن سيادة يهودية أو فلسطينية ستؤدي حتما الى وضع الديانات الأخرى في نوع من "الغَيْت" فمن المعتقد أنه يمكن بذل مجهود من النية الحسنة عبر اللجوء الى معاهدة دولية موجودة. وبهذا يُقصد المعاهدة التي صدرت عن منظمة الأمم المتحدة للتعليم والعلوم والثقافة ("يونسكو") في 23 نوفمبر\ تشرين الثاني 1972 حول التراث الثقافي العالمي. ذلك لأن اذا وُجد مكانٌ تابع، في حقيقة الأمر، لشقّ كبير من الانسانية يدين بالمسيحية وبالاسلام وباليهودية فذلك المكان يتمثل في مدينة القدس.

ونظرا لأحكام المعاهدة المشار اليها اعلاه، فإن الالتزامات الناتجة عنها تكتسب الأهمية لأن الدولة التي يوجد فيها المكان المتصف بالتراث العالمي عليها أن تتعهد بالمحافظة عليه وحمايته والاعتزاز به لتضمن بذلك تمتع الانسانية به. ويمكن لأحكام خاصة أن تلازم هذه المادة من المعاهدة ويكون هناك نوع من الالتزام من قبل الدول المعنية. ذلك لأن وضع مدينة القدس يختلف تماما عن سائر الأمكن المدرجة بقائمة الأماكن التراثية العالمية. وفحوى ذلك أنه يصبح من الممكن مباشرة طقوس كل من الديانات الثلاث مع احترام الطبيعة الدينية لمختلف الأماكن في المدينة. وهذا يضفي التزامات معينة يتحتم اضافتها الى الالتزامات المنصوص عليها في معاهدة "يونسكو" نتيجة لخصوصية هذه المدينة المنقطعة النظير. وهكذا يتم تنفيذ نظام أساسي قد يحظى بضمان دولي لإحترام قدسية الأماكن وحرية مباشرة الطقوس والمناسبات الدينية فيها.

أوروبا. ويحاول القانون 40\98 تنظيم كافة جوانب الهجرة بقدر من المرونة. وبالفعل، وللمـــرة الأولى، يمثل هذا القانون محاولة جدية للأعتناء بقضية الهجرة ذات الاهتمام الاجتماعي الكبـــير. وتجد ايطاليا نفسها في موقف معقد اذ أنها تتخلل تطلعات أوروبية ومتوسطية مختلفة. وباختصـلو، تمر ايطاليا بـــأزمة هوية وتصارع بين التزاماتها بصفتها عضو مؤسس للاتحاد الأوروبي من جهـــة وبين التزاماتها كإحدى الشركاء المفضلين للدول المتوسطية غير الأوروبية من جهة أخرى. ولـــذا فمن الضروري أن تدخل أيه محاولة من الحكومات الايطالية لمعالجة قضية الهجرة في اطار أهـداف اعلان برشلونه.

الـــ "مسكين" والرجل القوي: البقاء على قيد الحياة كلاجئ في مالطا

مـــارسيـــا يـــانغ

لقد سنـــت مالطا مرسوم اللاجئين شهر يوليو \ تموز من عام 2000. وانتظر اللاجئون ووكالات الاغاثة هذا القانون طويلا آملين أنه سيمكن اللاجئين في هذه البلد من تبني مسؤولية أكبر عـــن حياتهم. ويلقي هذا البحث نظرة على الوضع في مالطا قبل سن هذا القانون مع مناقشـــة بعـــض القضايا التي كان من المقرر أن تُعالج. كما نبحث الفئات والإفتراضات للهيكل التأسيسي التي على أساسها تم توزيع المساعدة الخيرية للاجئين. ويشير البحث الى السبل والاستراتيجيات التي سهلت توفير مصادر خاصة للاجئين. وفي غياب الأنظمة القانونية التي تضمن عيشة اللاجئين، فقد اضطر هؤلاء أن يتبنـــوا علاقات مبنية على النظام التقليدي المتمثل في التابع والراعي النصير. وفي الختـلم يُظهر البحث بوضوح أن قرار الحكومة أن تسمح للاجئين بالوصول الى مصادر معينة ، كالعمل، يعني الاكتراث لالتزامها فيما يخص السماح للاجئين أن يلعبوا دورهم في المجتمع المالطي كـــأفراد اجتماعية تامـــة.

الحرية الأكاديمية في الجامعات الفلسطينية: تقرير حول حقوق الانسان

بســـام عيد

يستعرض بسام عيد تاريخ الجامعات الفلسطينية عبر ثلاث مراحل تاريخية: من فـــترة الاحتـــلال الاسرائيلي في أوائل السبعينات حتى الانتفاضة، والفترة ما بعد الانتفاضة، وأخيرا المرحلة الحاليـــة. ويبحث الكاتب المشاكل الخطرة والتقييدات التي يواجهها الطلبة الجامعيون والمفكرون. ويشـــير الكاتب باستنكار الى عدد من الانتهاكات لحقوق الانسان ولاسيما حق حرية التعبـــير وحـــق المشاركة. كما تشمل هذه الانتهاكات الإبعاد واستخدام العنف ضد الطلبة والاعتقالات والقبض دون توجيه تـــهـــم رسمية واقصـــاء الأساتذة الذين عبروا عن أرائهم بصراحة. ولا تنحم هـــذه الانتهاكات لحقوق الانسان عن القمع الاسرائيلي فحسب ولكن تنحم كذلك عن تدخل السلطة الفلسطينية أيضا. ويحقق الكاتب في الادارة الأمنية للجامعات ويشير الى وجود وكـــلاء خفيـــين داخل الجامعات الذين يرصدون نشاطات العناصر المنتمين الى الكتلة الاسلامية أو أفراد ينتقـــدون السلطة الفلسطينية.

الحقوق الأساسية للمهاجرين وسياسة الهجرة في ايطاليا

ستيفانو ليسشينسكي

دخل في السادس من مارس \ أذار 1998 قانون جديد يتعلق بالهجرة حيز التنفيذ وعنوانه "نظـــام الهجرة وقواعد حول أوضاع الأجنبـــي" ويشار اليه: القانون 40\98. ويحل هذا القانون محـــل "قانون مارتيللي" الذي تم سنه في فترة طوارئ كبرى عقب التدفقات الهجرية المكثفة من شـــرق

استخدام الأطفال في الحروب:
الاتفاقية الدولية حول استخدام الأطفال في النزاعات المسلحة.

جوناثان ل. بلاك - برانتش

ان الأطفال من أكثر العناصر المعرضين للخطر أثناء النزاعات المسلحة وتلك حقيقة لا يجادلها سوى القليلون من الناس. وكثيرا ما يتم تجنيدهم للاشتراك في أشرس العمليات العسكرية عبر التجنيد الاجباري أو عبر إغرائهم بسحر الاشتراك فيما يبدو أنها عمليات تنمُّر. وفي كثير من الأحيان لا وجود للوالدين في كل هذا أو لا يكون بوسعهم تقديم الإرشاد الكافي في مثل هذه الظروف. وعندما يُتركون الأطفال لحالهم لا يمكن لهم أن يتفهموا كفايةً القضايا المطروحة أمامهم وقد يضلوا سبيلهم بكل سهولة نتيجة قرارات تكلّفهم كثيرا. والأطفال في حاجة الى حماية القانون الدولي وتعوزهم الضمانات القانونية التي تحميهم من التجنيد الإجباري أو التطوعي. واستجابة للقرارات التي تفيد بزيادة أعداد الأطفال المشتركين في الحروب والنزاعات المسلحة وافقت لجنة الأمم المتحدة لحقوق الانسان على اتفاقية اختيارية حول استخدام الأطفال في النزاعات المسلحة. وتهدف الاتفاقية الى حماية الأطفال المجندين في حالات النزاع المسلح وذلك عبر رفع عمر التجنيد الاجباري في القوات المسلحة قانونيا ومحاولة تحديد اشتراكهم في الاعتداءات المباشرة. ورغم أن هذه الاتفاقية تمثّل خطوة أولى ضرورية لحماية الأطفال، غير أنها لا تحرّم اشتراك الأطفال في الأعمال العدائية بشكل واضح وتام. وتقيّم الدراسة هذه الاتفاقية الجديدة وتبحث عن جوانبه القوية والضعيفة.

الفكرية هي حقوق مؤيدة ومحمية. هذا ولعولمة وسائل الاتصال أثر ايجابي في حقوق الانسان الى حد ما، غير أن استخدام شبكة "الانترنيت" من المجرمين الشواذ للأطفال ولأغراض نشر الدعارة ولتشجيع العنصرية والخوف من الاجانب وكرههم والعنف لا شك أن يثير عددا من التساؤلات الأخلاقية القانونية. فمن تأثيرات العولمة أن تجلب المجانسة الثقافية التي تعزز عالمية حقوق الانسان وتساعد في إنهاء بعض الممارسات التمييزية. أما البركات المتناقضة للعولمة الثقافية فتقترن بعواقبها السلبية فيما يتعلق بالحقوق الثقافية لمجموعات ضعيفة ومعرضة للخطر. كما يمكن لهذه العولمة أن تتجاهل هويات ثقافية موجودة حاليا وتضعف المبادئ الاخلاقية والتلاحم الاجتماعي.

القانون الأجنبي في الممارسة القانونية الدولية: وجهة نظر ايطالية

جويدو البا

يناقش البحث تأثير القانون الأجنبي في النظام القانوني الايطالي وفي مستهله يأخذ البحث بعين الاعتبار دور القانون الأجنبي في التنمية التاريخية العامة للقضاء الايطالي ابتداء من القرن التاسع عشر. ثم يركّز البحث على اللجوء الى القانون الأجنبي من طرف القضاة الايطاليين في القضايا غير التي تقتضي الرجوع الى القانون الأجنبي طبقا لأحكام القانون الدولي الخاص أو بناء على رغبة الأطراف المتعاقدة. ومن هذا المنطلق، فإن القانون الأجنبي عبارة عن مرجع للنماذج والأحكام والخبرة الأجنبية التي تساهم في ايجاد أحسن الحلول في قضايا قومية محلية. ويأخذ البحث بعين الاعتبار كذلك اللجوء الى نماذج تعاقدية أجنبية في الشراكات التجارية القومية والدولية وبخاصة استخدام الأسماء والصيغ والاشارة الى قانون التاجر والى مبادئ "أونيدروا" واستيراد المبادئ والأحكام من دول أكثر نموا اقتصاديا وتأثير النشاط التشريعي للإتحاد الأوروبي.

حرية الديانة والرِدة وحقوق الانسان: تقييم.

عبد السلام سيداحمد

ان قضية الرِدّة مرتبطة بشكل قريب بالنـــزاع حول الشريعة اذ أن الاسلاميين يؤكـــدون علـــى ضرورة قتل المرتدّ طبقا للشريعة. وبناء على ذلك ونظرا لكون عقاب المرتدين واجب ديني، فـــإن المادة 18 من الاعلان العالمي حول حقوق الانسان التي تنصّ على حق المسلمين أن يغيّروا دينـــهم، أي أن يرتـــدّوا، مادة غير منسجمة مع الاسلام. وأشير في البحث الى أن القواعد الدينية لهـــــذا الموقف ليست واضحة المعالم كما قد يعتقد البعض وأنه لا يوجد أساس منطقي محدد وراء عقاب الرِدّة. ولذلك ففي نـــهاية المطاف قد يكون في صالح المسلمين أن يوافقوا على مبدأ حرية الديانة كما تنصّ عليه المادة 18 من الاعلان العالمي حول حقوق الانسان.

العولمة وحقوق الانسان

يانوس سيمونيدس

للعولمة أبعاد مختلفة. وثلاثة من هذه الأبعاد ذات أهمية خاصة وهي العولمة الاقتصاديـــة وعولمـــة وسائل الاتصال والعولمة الثقافية. وتقدم العولمة الاقتصادية فرصا جديدة للنمو والتنمية الاقتصادية. غير أن ظاهرة العولمة الاقتصادية سايرت في نفس الوقت ظواهر الفقر والبطالة وعدم الاكـــتراث لحقوق الانسان في محيطات اقتصادية واجتماعية وثقافية معينة. ومع ذلك فليست كـــل حقـــوق الانسان معرضة للخطر. فتلك المتعلقة بالسوق، مثل حق الملكية الخاصة أو حق حمايـــة الملكيـــة

مواضيع حقوق الانسان: الأفراد الانسانية والمجموعة الانسانية

بيتر سراتشينو انغلوط

على الاعتراف بحقوق الانسان للفرد أن يكون مؤيدا باعتراف للحقوق التابعة للانسانية جمعاء. هذا ويجب ألا ينظر الى حقوق الانسان على أساس العلاقة الازدواجية بين الفرد والدولة، بل لا بد من النظر اليها على اساس العلاقة الثلاثية بين الفرد والدولة والانسانية ككل. والحاجة الى الاعتراف بالانسانية ككل بصفتها موضوع من مواضيع حقوق الانسان منبثقة عن مشاكل تتعلق بتنمية عملية فرض هذه الحقوق في اقليم البحر المتوسط وذلك ، الى حد ما، بسبب الاعتراضات العربية المسلمة التي ترى أن المعالجة القانونية الحالية لحقوق الانسان تتأسس على مبدأ الانسان كفرد متنافر الاجزاء. ويمكن للانسانية ككل أن يكون لها نوع خاص من الشخصية القانونية كالتي تتمتع بها الشراكة الانسانية في القانون الروماني (*universitas*). ويتضح مضمون هذه الفكرة عبر مثال الملكية حيث يشمل الحق الانساني للملكية الخاصة واجبا متلازما يتعلق بعدم الاساءة الى التراث المشترك للانسانية. ان هذا المفهوم الذى ينظر الى الانسانية جمعاء موضوعا من مواضيع حقوق الانسان قد يعمم ليصبح اساسا منطقيا لحقوق الأجيال المستقبلية والحقوق البيئية. هذا ولا بد من معالجة قضية التمثيل الرئيسية اذ أنه يتحتم الاعتراف بأي فرد أو جماعة (مثل الجمعية العامة للأمم المتحدة) كممثل للانسانية ككل. ان القواعد الفلسفية لهذه النظرية تكمن في الادعاء أن البشر جزء لا يتجزأ من وحدة كاملة تشمل السلفيين والأخلاف. وهذه حقيقة بيولوجية و ثقافية أدى تجاهلها الى عواقب سيئة مثل تلاشي قيم اساسية تابعة لثقافات غير غربية تحت وطأة الأفكار القانونية الغربية المفروضة عليها والتي تسرف في التأكيد على السعي وراء المصالح الشخصية. ويمكن لهذا الاطار الفكري أن يساعد في بناء أرضية للحوار بين دول البحر المتوسط والدول الأوروبية حول حقوق الانسان كما تصورته اتفاقية برشلونه.

لهذه الأمور لا يمكن فهمها بدون الاخذ بعين الاعتبار التفاعل القريب بين هيئة القضاة والمدعين العامة من جهة ووسائل الاعلام من جهة أخرى. وبعد النظر في التغييرات الكبيرة في الهيكل التنظيمي لهيئة القضاة الايطالية، تقدّم الدراسة بعض النتائج الأولية لبحث يتعلق بالتغطية الاعلامية لفضائح الفساد السياسي في الفترة ما بين 1992 – 1994. ويبدو أن تقارير الصحافة ساهمت في الحفاظ على جو مؤيد لمبادرات القضاة وكثيرا ما خرقت هذه التقارير الضمانات الواجبة لهذه العملية. وفي مناسبات كثيرة ساد حق اكتساب ونشر المعلومات على حساب حماية سمعة وسرية المدعى عليهم. ومع ذلك فإن المعلومات المتوفرة تشير الى أنه في السنوات التالية اتخذت الصحافة مواقفا أكثر انتقادا بالمقارنة مع السنوات السابقة وقد يكون أن ذلك أدى الى الانحطاط المستمر في ثقة الرأي العام بالنظام القضائي الذي برز في الفترة ما بين 1995 – 1998 .

تنمية حقوق الانسان في المغرب: بداية عصر جديد؟

توم بيار ناجم

منذ وفاة الملك الحسن الثاني وارتقاء ابنه محمد السادس العرش الملكي أصبحت حقوق الانسان قضية هامة وبارزة في المغرب. ويهدف البحث الى هدفين: أولا – أبحث بشكل وجيز الأحداث في المغرب خلال السنة الماضية فيما يخص تنمية حقوق الانسان، وثانيا – أحاول تحليل جدول أعمال الاصلاحات المطروح آخذا بعين الاعتبار إخلاص الحكومة لهذا المشروع وقدر إلتزامها به ونطاق قابليته للتطبيق عمليا وذلك عبر الاشارة الى التأثيرات التي ساهمت في هذه العملية الاصلاحية والنظر الى العواقب الكامنة في محاولة إدخال مجموعة حقوق انسانية ذات الاشتقاق الغربي في الواقع السياسي والاقتصادي والاجتماعي المغربي.

دور محكمة العدل في تحديد الدستور الأوروبي

سلفانو لابريولا

جدول المحتويات

الفساد السياسي: التفاعل بين العدل ووسائل الاعلام في ايطاليا

أنّـــا ميستيتز وباتريتسيا بيديرتسولي

إن إختلاط السياسة بالشؤون القضائية قد لعب دورا رئيسيا في تغيير المنظر السياسي الايطالي منذ عام 1992. ولا شك أن استقلالية القضاة والمدعين العامة كانت من بين العوامل التي فتحت الباب أمام تحريات عُرفت دوليا بألقاب "الأيدي النظيفة" و"مدينة الابتزاز". غير أن الصدمة السياســـية

الحماية القانونية للاجئين في مالطا

كاترين كاميلاري

تـــهدف هذه الدراسة الى بحث مجال الحماية التي ينص عليها المرسوم المالطي الجديـــــد المتعلـــق باللاجئين وذلك للتأكد من مدى مساهمة هذا المرسوم في تحسين حالة اللاجئين وطـــــالبي حـــق اللجوء السياسي في مالطا. وتستخلص الدراسة أن مرسوم اللاجئين هذا عبارة عن معلم هـــام في تاريخ حماية اللاجئين في مالطا، ذلك لأنه يمثل قفزة نوعية من نظام مؤسس على الإحسان طبقـــا للاستنساب الحكومي الى حالة تضمن الحماية القانونية للاجئين وطالبي اللجوء السياسي واحـــترام حقوقهم. غير أنه على السعيد العملي لن تنجم عن المرسوم سوى تحســـينات قليلـــة في وضـــع اللاجئين وأشخاص محمية أخرى في مالطا نظرا لأنـــهم سبق أن تمتعوا بما ينصّ عليها المرسوم من فوائد حتى قبل سنّـــه. وسيكون الفرق الرئيسي أنه عندما يصبح القانون ساري المفعول فتصبـــح تلك الفوائد بمثابة حقوق قانونية بدلا من مجرد فوائد. هذا والحقوق التي ينصّ عليها المرسوم مـــن النوع الأساسي جدا ولا تصل الى الحد الأدنى الذي أوصت به معاهدة 1951. كما أن المرسوم لا يعالج عددا من القضايا ذات الأهمية الأساسية. وأهم هذه القضايا هي تلك المتعلقة بحرية الحركـــة الداخلية لطالبي اللجوء السياسي وبحق العمل أو حق تلقي المساعدة حتى يتمكن اللاجئون مـــــن العيش بكرامة.

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