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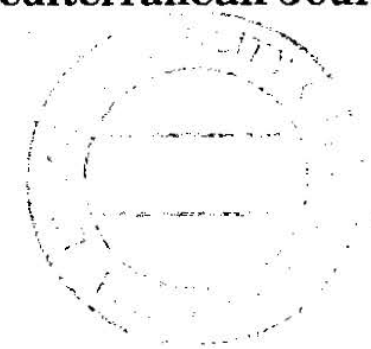

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FOREWORD

This issue would not have been possible without the input of various law students at the University of Malta, who dedicated part of their summer to assist in the editing. We would therefore like to thank the following students for their assistance: Theresienne Bezzina B.A., Christine Bondin B.A., Usneus Bonnici, Mireille Caruana B.A., David Friggieri B.A., Alexia Galea, Lisa Lombardi B.A. and Francesca Scerri.

As this issue goes to print, we on the editorial team wish to express our solidarity with a regular contributor to our journal: Professor Saad Eddin Ibrahim, who heads the Ibn Khaldoun Center for Development Studies (ICDS) in Egypt. Professor Ibrahim was arrested for a period of 45 days this summer and we understand that his Center has had to suspend its operations and is currently under investigation by state authorities. We hope that the Center will soon be in a position to resume its operations and we look forward to collaborating once more in the future to ensure respect for human rights in the Mediterranean.

Finally, a special word of thanks must go to Paula Muscat, our Journal Secretary, for her hard and patient work in connection with this issue.

EDITORIAL

POLITICS, SOVEREIGNTY AND GLOBALISATION

GIORGIO REBUFFA

This editorial deals with the impact an increased level of globalisation may have upon state sovereignty and politics. In the era of globalisation the political leaders of a Nation State could make choices which might affect people they are not accountable to and the converse is also true: a national government can be called before some international organisation because of situations originating within the national jurisdiction. Therefore issues of justice no longer arise solely within the context of the relationship between a state and its nationals. The author focuses his attention upon his country, Italy. He observes that Italian politics is based upon the concept of the Nation State. Only the technological and economic consequences of globalisation are noticed, without grasping its fundamental political essence. Yet the Pinochet saga highlights the crisis of the model of national sovereignty and our new responsibilities. Thus, the European Union is a political reality which is not simply given by the sum of the wills of its individual member states. It is argued that flexibility and ductility in international relations can coexist with national sovereignty, provided that this be supported by active political subjects, parties, movements, and currents of thought. Italy is deprived of such strong references rooted in its national history. This is why, in the age of globalisation, Italy as a nation runs the risk of evaporating. The strength of Europe lies in its strong political identities, its heritage of experiences and capacities, values and memories, and also of myths and symbols.

Do we still need the concept of "sovereignty"? The language of Italian politics – and of Political Sciences – as well as its practice seems to be moving within the boundaries of the concept of sovereignty. A perfect coincidence and symmetry between decision takers and recipients is still taken for granted and national and international politics are exclusively carried out bearing in mind the paradigm of the Nation-State. The universe in which the political class takes its decisions is extremely limited when compared to the universe of the Country-system. This might eventually result in a perception of politics as totally divorced from society, to the point

where reforms are no longer seen as necessary albeit impossible to be carried out, but simply as useless. The country will have found its own way forward, maybe guided by technocrats or else relying on a kind of social Darwinism.

Let us ask ourselves what a policy based upon the concept of the "Nation-State" is. Policy-making with the concept of national sovereignty taken for granted means to assume that the fate of the Nation-State is totally in the hands of those political subjects who are born within the legal and political horizon traced by the Nation-State itself. Therefore the only recognised "Outside Subjects" are other "Nation-States". All political and institutional changes are seen as variations within the "Nation-State", which remains the framework for all political projects: in short, a kind of "monad". No attention is given to the changes taking place in international law, in the economy or in the technology of globalisation. Or, to put it better, only the technological and economic consequences of globalisation are noticed, without grasping its fundamental political essence.

In Italy, for example, the Pinochet story caused great sensation in the public opinion. Nevertheless, the political debate, which followed those events, was predominantly ideological. On the contrary, that story should have made us think about the changes in international law, the crisis of the model of national sovereignty, and our new responsibilities. Another example: how can our Constitution still contain a provision forbidding the entry into Italy of the male members of the former Italian royal family, the Savoia, given that they already live in France; on the territory of a state which falls, as Italy does, within the jurisdiction of the European Union, which prevails over the national jurisdictions of individual member States. Anyone wishing to do so may appeal to Sections 2 and 10 of the Italian Constitution, as well as to the Schengen Treaty, in order to declare that provision inapplicable. This is just a minor example.

Sometimes there are some conditioned responses, which give rise to funny situations. In the debate on TV electoral commercials, it has been suggested to introduce a rule envisaging a limitation to campaigning on the Internet, as if it were just a different form of television broadcasting, instead of being a totally independent form of communication, which ignores what we define as the "Nation State". The consequences of globalisation are subject to a "domestic-oriented" interpretation; as if the world was all contained within the Italian Nation-State. But this world, where policy-making

reigned and everything was in the hands of the sovereign state, no longer exists; as does the entire public life developed within the boundaries of the sovereignty paradigm. Politicians still relying on such assumptions would be like the blind man of Bruegel's painting, who drags all his fellows with him down in the abyss, feigning himself capable of seeing what he could not see.

As a further example, we could consider the malfunctioning of the judicial system. The Italian political system has not yet "realised" that justice is no longer confined within the relationship between the Italian State and its nationals. Many years ago the civil liability of Magistrates was introduced in Italy by referendum. Soon afterwards the Parliament passed a law, which, *de facto,* nullified the results of the referendum. Policy makers preferred not to clash with a judiciary, which, at that time as it is today, was likely to argue with the Legislative and the Executive whenever its corporate interests were at stake. That position, which was shared by the magistrates and politicians alike, was based on the assumption that the repercussions of their decisions and the consequences thereof were to be perceived only within the national state. Italy has been proved guilty hundreds of time by the European Court of Human Rights for having violated the citizens' rights because of the extreme length of trials, for the unscrupulous use of preventive detention, or for the imbalance between prosecution and defence prerogatives. In most cases Italy has opted not to stand trial, preferring instead to comply with the Court's requests. In short, citizens got their compensation. After a while, the Italian *Corte di Cassazzione* came out asking for those repayments to be justified. It is most likely that the magistrates who were responsible for the violations of the citizens' rights will ultimately be the ones who are called to pay back to the Italian State the amounts due. What lesson can we draw from this example? International law, accompanied by a partial giving up of sovereignty due to our European membership, is, *de facto*, reintroducing the provision on civil liability, which Italian policy-makers had repealed for the sake of a "pragmatic" attitude vis-à-vis the Judiciary. This is a typical example of asymmetry and inconsistency between decision takers and recipients. We know that, in the era of globalisation, the political leaders of a Nation-State could make choices which might affect people they are not accountable to: i.e. the citizens of a neighbouring state (for example by adopting lighter measures in the field of drug addiction, or setting up new nuclear plants...) The

contrary is also true: a national government can be called before some international organisation because of situations originating within the national jurisdiction.

Generally speaking, today national governments are sometimes called to tackle situations, which cannot be ascribed to the traditional domain of their competence or to any "predictable" occurrences. The countries, which fail to keep the pace with, these changes risk losing their political autonomy. Indeed, large economic groups see policy-making as a hinder to human progress. In December 1999 the World Trade Organisation Summit took place in Seattle. The parties failed to reach the agreements they were seeking, and the summit had an unsuccessful outcome; nevertheless a clear-cut picture of today's situation emerged from that event. In the first place, Europe is trying to impose its "political management of globalisation", although a unanimous consensus is hardly reached on any of the issues on the table. The United Kingdom, for instance, has opted for a pro-American stance; when it declares itself favourable to an overall decrease of the safety and quality standards on the European market, so as to allow Asian goods to circulate in Europe. However, the European Union is a political reality which is not simply given by the sum of the wills of its individual member states. Hence the government of London itself acts along the lines of the European policy, even though with some reservations. The European policy is oriented to defend its independence within the process of globalisation. The point is not just to prevent "hormonised" beef and the like from being sold in Europe. France has insisted, for instance, that "culture" be deleted from the list of commodities, so as to curb the circulation of American audio-video products in Europe. Hegemony, in that case, would be inevitable, and a fully applied market law would lead to the dominance of American writers, directors, movie-makers and, eventually, to the lapsing into oblivion of the French language. Germany, on its side, emphasises the importance of social issues, demanding that the process of liberalisation take place in full respect of trade union freedom, the safeguard of the rights of children and women, and, generally speaking, of the weaker strata of society.

The U.S. Administration, on the contrary, is strongly urging for the fall of all European barriers to the process of globalisation. In this endeavour, the U.S. can rely on many like-minded Asian countries, where safety standards and the rights of the "weak people"

are totally neglected, thus keeping the cost of labour at the lowest levels imaginable, and making the goods manufactured extremely competitive. However this matter is controversial also in the U.S. In the American society there is a growing concern about the consequences of the process of globalisation on a system of civil rights, built during two centuries of democracy, and on the every-day life of citizens. So far, civil rights and consumer protection movements have played on their power to orient the vote of citizens. What if the elected representatives will no longer be able, for example, to prevent a multinational company, or simply a company without any national ties, from ignoring human rights, safety at work or the quality of commodities? There is a widespread concern regarding the harmful consequences on the environment and on health of a market, which has no relations with national governments. Bill Clinton was apparently well aware of these fears and risks when he tried, and partly succeeded, to start a dialogue with protesters in Seattle. Furthermore, a renewed growth of trade union activity is being recorded in the U.S. The American lay-man is trying to find the appropriate tools to counter the negative effects globalisation is likely to have on his life. The economic system is increasingly eluding the control of national governments and parliamentary assemblies.

Globalisation is not only evident at the international, but also at the local level. It is not just the development of the interaction between different political, social and economic realities above and beyond the Nation-State; it is also a growing interaction and interdependence between society, technology, government, policy, economy and culture. Globalisation, in other words, means the affirmation of a new model, in all social relations, - a model which ignores the concepts of "centre" and "periphery", the model of the "network". Does this mean that policy is doomed to loose its incisiveness on public life? No, but only if policy will be able to go beyond the horizon of the Nation-State. The problem is to understand how this new policy should be shaped.

Insofar as politics operates within the framework of the Nation-State, it will very likely prove unable to regulate ongoing social and economic changes. Politics might continue to "formally" govern the change, but society, technology and economy operate beyond those formal limits, and, quite often, are oblivious of politics. If politics risks vanishing together with the Nation-State, it will be very important to reconsider the relation between the State "and"

the Nation. The British experience teaches that a Nation can preserve its sovereignty even when the scope of the State is extremely narrow. Flexibility and ductility in international relations can co-exist with the strength of a nation, provided that such strength (a fundamental precondition to ensure the primacy of politics) be represented and supported by something else. For the U.K. this strength is represented by a civic and patriotic tradition, which often plays the role of a "quasi-religion". For Europe, namely continental Europe, the strength of a nation depends on the political subjects, parties, movements, and currents of thoughts, which gave birth to national identities and political systems.

The "Italian case" is an exemplary one. People abroad wonder how Italy is not capable of making the reforms strongly sought for her by public opinion. The answer is that reforms can only be made when solutions to still unresolved political questions are found. These questions are tightly intertwined with the problems of globalisation. Italy is among the countries which could suffer the most from the risks of globalisation, because in Italy there has been a form of statism without a State. After the State-Party of the Fascist period, there were the State-parties of the Republic. As a matter of fact, the party system has been destroyed, and the country is deprived of strong references well rooted in its national history. This is why, in the age of globalisation, Italy, as a nation, runs the risk of evaporating. How will Italy meet the need to start political globalisation immediately after economic globalisation? What will its contribution be like? On which identity will Italy build her role? There is but one choice: to adjust herself, both at the political and cultural level to Europe. While in Italy demagogy and justicialism were dismantling the party system, in Europe the great ideologies of social-democracy and liberal populism were growing, just like the traditionalist Right and the Left of social classes. The strength of Europe lies in its great political identities, in its heritage of experiences and capacities, and also of values, memories and, why not, of myths and symbols.

The only way to free our policy-making from the old paradigms of sovereignty and the Nation-State and to enable it to take up the challenges of globalisation is by building our political identities again, in the wake of the European experience. Otherwise, we will witness the death of politics and the decline of the nation.

ARTICLES

A CIVIL CODE FOR EUROPE: *EX PLURIBUS UNUM*

GUIDO ALPA

A civil code for Europe is an initiative of a group of scholars of different nationalities (Germany, Denmark, Holland, France, Italy, Spain and Portugal), in order to create a common code of rules of private law. The rights of European citizens could be strengthened by this initiative. The Steering Committee for the drafting of a European Civil Code has completed the text concerning the section on contract law, and is now attending to the drafting of the sections concerning restitution, unjustified enrichment, payment of an *indebitum*, special contracts, services, transfer of property and securities. The author discusses the origins of this initiative, its goals and the criticism directed against the unification of civil law in the European Union.

1. European Union Resolutions and the Codification of Private Law

By resolution of the 6th May 1994,[1] the European Parliament reaffirmed the resolution made on the 26th May 1989 concerning

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[1] In O.G.C.205 of 25th July 1994, p.518. In Germany the precursor of European codification was Konrad Zweigert, *"Il diritto comparato a servizio dell'unificazione giuridica europea"*, in *Nuova nv. dir. comm., dir dell'economia, dir. sociale*, 1951, I, 183 et seq. In Italy, the precursor was Rodolfo Sacco, *I problemi dell'unificazione del diritto in Europa*, id. 1953, II, 49 et seq. (republished in *I Contratti*, 1995, p.73 et seq.). On the history of scientific and institutional initiatives for harmonisation, uniformisation, unification, and codification, see Bonell, *Comparazione giuridica e unificazione del diritto,* in Alpa, Bonell, Corapi, Moccia, Zeno-Zencovich, *Diritto privato comparato. Istituti e problemi,* Rome and Bari, 1999, p.4 et seq.

On the problems of legal communication in Europe, on the role of comparison in European private law, on the perspectives for unification and on the training of the European lawyer, v. *Il diritto privato europeo: problemi e prospettive* (Reports of the Macerata international conference, 8-10 June 1989) edited by L. Moccia, Milan 1993. Among the contributions, see the introduction by Moccia p.vii *et seq.*

the harmonisation of certain sectors of private law among Member States.[2] The justification for this initiative is given in the preamble; in which it is stated on the one hand that the Union has already proceeded with the harmonisation of certain sectors of private law and on the other that progressive harmonisation is essential to attain a common European market. The desired result is the development of a "Common European Code of Private Law". This is to be developed through various phases of progressive rapprochement of the prevailing rules in the systems of Member States, which would lead to an initial partial harmonisation in the short term and then to a more complete harmonisation in the longer term. Within the scope of the resolution, reference is made to organisations which already concern themselves with harmonisation of laws, such as Unidroit, Uncitral and the Council of Europe. Reference is also made to the works of the Commission on European Contract Law, known as the Lando Commission, from the name of the Danish professor Ole Lando who chairs it.[3]

The resolution was sent to the Council of Ministers, to the Commission and to the Governments of Member States of the European Union. For its part, the Lando Commission has worked prolifically and drafted a text of rules for contract law.[4] The work did not stop at this point because, as a result of extensive research,

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Sacco *Il sistema del diritto privato europeo: premesse per un codice europeo* at p.87 *et seq.* and Grande Stevens, *L'avvocato europeo,* p.173 *et seq.* On the reconstruction of Italian law in the light of EU law, v. Lipari (ed.) *Diritto privato europeo,* Padua, 1997; and on the private law aspects of EU law, Tizzano (ed.) *Diritto privato comunitario,* (M.Bessone editor) Turin, 1999.

[2] In O.G. C 158 of 28th June 1989, p. 400

[3] Since 1982 the Danish professor Ole Lando has been working to construct a common European legal culture. See his publications: *European Contract Law,* in Vol. 31(1983) *Am J.Comp.L.* p 653 *et seq.; Principles of European Contract Law,* in *Liber Memorialis Francois Laurent,* Brussels, 1989, *p.555 et seq.; Principles of European Contract Law / An Alternative or a Precursor of European Legislation?,* in Rables Z 1992, p.261 *et seq.; European Contract Law,* in *Il diritto privato europeo, cit.* p.117 *et seq.; and The Harmonization of European Contract Law through a Restatement of Principles,* Oxford, 1997 (conference held at the Institute of European and Comparative Law organised by professor Basil Markesinis).

[4] *Towards a European Civil Code,* edited by Hartkamp, Hesselink by Hondius, Hondius, du Perron, Vranken , Nijmegen, Dordrecht, Boston London, 1994 (in this volume we can find in a general overview the introduction p.1 *et seq.;* the discussion of various drafting techniques for rules by Mueller-Graff, p.19 *et seq.;* a description of the contents of the rules collected in the first edition of the contracts

it is covering the other sources of obligations (i.e. torts, restitution, unjustified enrichment), which fall within the responsibility of a committee co-ordinated by the German professor Christian Von Bar.[5] In connection with this work, research is also being conducted in the field of securities, on insurance contracts and on sales. The tasks of the jurists who are involved with this harmonisation are very ambitious and also very difficult.

The expression "private law" is not further defined in the resolutions of the European Parliament, so that some problems of interpretation arise in translation:

(i) As there is no definition of private law available in the texts creating the European Communities, it is necessary to interpret the expression taking into account the meaning or meanings that have been given to this expression in the *koine'* (the common language) of the legal culture of Member States. In continental Europe, private law may be considered as a sufficiently uniform notion. Thus in Italian law (no differently, for example from French, Spanish, Portuguese, German or Austrian law), private law signifies the law governing relations which are instituted on an abstract basis between private persons or between the state, public and private entities. Thus one is referring to rules of ordinary law or to formulae or techniques governed by civil codes and traditionally ascribed to this subject. It is more difficult to identify a notion of private law in the jurisprudence of common law, where the division between private and public law is not easy and in any case does not correspond to the division on the Continent.

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code by Hartkamp, p.37 *et seq.*; the foundation on the tradition of the *ius commune* by Zimmermann, at p.65 and by Bollen and de Groot, at p.97; there follow essays on specific themes in the law of contracts and guarantees); Lando and Beale, *Principles of European Contract Law,* Dordrecht, Boston, London, 1995, in which there is a commentary on the rules of the "code" drafted by Beale, Drobnig, Goode, Lando, Tallon.

[5] By Von Bar, translated in English as *The Common European Law of Torts,* Oxford, 1998. The original *Gemeineuropaeisches Deliktsrecht* is being translated into Italian; Von Bar has also edited *Deliktsrecht in Europa,* Cologne, 1993.

(ii) We must also note that in all the continental countries mentioned above, the traditional distinction between private and public law is in a state of crisis. For some time in these systems there has been a trend towards "constitutionalisation" of private law, that is the direct or indirect application of rules contained in the respective constitutions to relationships between private persons. In France this process is rather slow, but it has started.

(iii) Beyond these definitions, the expression private law has an academic content (with reference to University teaching) and a formal content, which includes two branches of law: civil law and commercial law.

(iv) From the point of view of the sources of law, private law consists then of rules contained in the constitutions, rules contained in the codes and rules contained in particular statutes. Each system of the Member States uses sources, which are different from each other, which include regulations, administrative orders of independent authorities and so on.

If one should try to simplify the argument - and thus the tasks of the lawyers who involve themselves in harmonisation of the rules in a European context- one should make reference to the rules contained in the Civil Codes and Codes of Commerce of European nations. At this point, two further problems emerge.

(1) The reference models of the codes in force in continental European Countries are essentially two. These are the French Civil Code, introduced by Napoleon in 1804, and the German Civil Code, approved in 1896 and brought into force in 1900. To these one can add the models of commercial codes, which followed each other throughout the 19th Century and in our own time were incorporated in Italy in the Civil Code of 1942 and in Holland in the Civil Code publication of which in several volumes started in 1980.

(2) In the English common law and Irish common law there are no codes in the continental law sense, but there are statutes as well as the case law. In various States, however, one meets situations, which are still more complex, as in the Scandinavian countries. Taking this classification into consideration, the approach of the Commission for the project

of a European code has been cautious. The division between the rules of civil law and rules of commercial law has not been followed. Using a flexible and generic understanding of "private law", it is intended that the rules developed by means of harmonisation may apply to either civil law or commercial law.

No restrictions have been imposed on the method of drafting. The harmonised rules may be considered as a sort of "restatement" of the rules applied in Member States, or otherwise to constitute the fruit of unification of already existing laws, with adaptations and simplifications required for a genuine codification.

One must add that for certain sectors of private law there already exist unitary models of reference. Even if developed for difference purposes, the principles of contract in international commerce developed by the International Institute for the Unification of Law (Unidroit) constitutes a "restatement" of contract laws consisting of general and balanced rules.[6] The Lando Commission on European

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[6] See generally Bonell, *An International Restatement of Contract Law*, New York, 1994; *The Unidroit Principles in Practice: The Experience of the First Two Years* in Uniform L.Rev. 2 (1997), p.34 et seq.; *The Unidroit Principles: What Next?*, in Uniform Law Rev.3 (1998), p.275 et seq. On the discussion of the "Unidroit principles" in Italy, see the reports of the conference organised at the Unidroit premises in Rome by J. Bonell and F. Bonelli in 1995. Amongst the various contributions, see the essays by Di Majo, Ferrari and Alpa in *Contratto e impresa / Europa*, 1996,1, p.287 et seq.
For the construction of lines of development of contract law and an understanding of the evolution of the principles elaborated by Unidroit, and the effect of European Directives and the principles of the Lando Commission, v. Alpa, *Nuove frontiere del diritto contrattuale,* Rome, 1998 (summarised in the volume *Diritto privato comparato, cit.);* Koetz and Flessner, *European Contract Law,* I, Oxford, 1997, (English translation by Weir); Vranken, *Fundamentals of European Civil Law,* London, 1997. For a comparison of models of judgment, v. Markesinis, Lorenz, Dannemann, *The Law of Contracts and Restitution: A Comparative Introduction,* Oxford, 1997. Italian scholars have considered these initiatives with great attention: see e.g. Gandolfi, *Pour un code européen des contrats,* in *Rev.trim.dr.civ.,* 1992, p.707 *et seq.* Rescigno, *Per un "Restatement" europeo in materia di contratti,* in *Ii diritto europeo, cit.,* p.135 *et seq.;* Mengoni, , The Hague, Boston, London 1995; Zaccania (A), *II diritto privato europeo nell'epoca del postmoderno,* in*L'Europa dei codici o un codice per l'Europa?* Rome, 1993 (lecture given at the Center for Study and Research in Comparative and Foreign Law directed by J. Bonell).

contract law has referred to the Unidroit text in order to develop its own contract law proposal. There are also in progress other initiatives, such as the identification of a "common core" in contracts, undertaken by academics of the University of Trent, Italy, and the drafting of common principles in the French and German Law of Obligations on the initiative of the Sorbonne and University of Louvain-la-Neuve. There is also a further proposal for the drafting of a European Code for provisions of consumer law. The history of the initiatives attempted and achieved for unification, uniformity and harmonisation of the law has run for over a century and taken many diverse forms.[7] In any event, the numerous directives which the European Union has approved on subjects relating to the interests of consumers concerning unfair clauses, door-to-door sales, distance selling, time-sharing, etc. already constitute a form of codification of private European law in the relevant sectors.[8] What should be illustrated here is on the one hand the purposes of harmonisation (or unification) and on the other the doubts which have arisen in the discussion of this initiative.

2. The Purposes and Advantages of a European Civil Code

Next to the "economic area" and the establishment of a European jurisdiction,[9] one is now seeking to create a unitary legal space. The European Union's sovereignty is limited by subject matter. The European Civil Code therefore cannot extend to subjects outside the powers of its Charter. Areas such as family law, succession and real property law, are off-limits. However, the Law of Obligations is included within the jurisdiction of the Union, including contracts and tort, commercial dealing, restitution and remedies. Obviously, also matters arising from commerce, corporations, construction contracts etc. are included.

Article 100, and later Article 100A of the EEC Treaty attribute to

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[7] On this point, v. Bonell, *op. cit.* Monaco, *I risultati dell"Unidroit" nella codiflcazione diritto uniforme* in *Il diritto privato europeo, cit.* p.35 *et seq.*

[8] The directives and the relative rules for their implementation are gathered in *Codice del consumo e del risparmio,* edited by Alpa, Milan, 1999.

[9] On which, v. Carbone (S.M.) *Lo spazio giudiziario europeo,* Turin, 1997

the Council of Ministers the power to establish directives intended to bring together the "legislative, regulatory and administrative provisions of Member States which have direct consequences on the implementation and operation of the Common Market." Reference may be made to these provisions for the justification of the European civil code initiative, and to make them compatible with the so-called "principle of subsidiarity", which means any effort to avoid regulation. The European Union may choose between the use of regulations or the directives, or mere recommendations in order to work toward a European Common Code.[10] Why is it necessary to breach the barriers of the national systems on these subjects? The subordination of national barriers is a necessary part in achieving the single market. In other words, the different treatment of legal relations in private law in different countries is a considerable economic cost, an obstacle and a complication, which obstructs and hinders the implementation of the single market. A European Civil Code would enhance the free exchange of goods, services, capital and labour within the single market, that is, within the EU.

There is a strict correlation between open and free economic activity and the juridical form of civil law. In this light the initiatives of a European Civil Code encourage the market without dictating that legal rules by their nature must "mimic" economic rules. This follows the economic legal analysis as conceived in America by Professor Richard Posner.[11] In his sophisticated analysis of European law of contracts, Professor Juergen Basadow has underlined how conflicts between the rules in force in the various countries of the European Union can constitute a real hindrance to the market. Uniform private law rules emerge as necessary pre-conditions for the implementation of the single market. Thus a European civil code would indeed constitute a "building block" of the single market. An important objective of a European code is the simplification of the legal rules applicable to economic relations, too often dispersed among

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[10] Rev. mt. dr. Basedow, *Un droit commun des contrats pour le Marché commun,* in comp., 1998, p.26 et seq.

[11] For a survey of the views and objectives of professors Coase, Posner, Calabresi and other American scholars , v. the anthology *Analisi economica del diritto privato*, edited by Alpa, Chiassoni, Pericu, Pulitini, Rodotà, Romani, Milan, 1998.

codes or national laws. Uniform rules would help to prevent or simplify disputes, to ensure harmonious application of the rules to disputes that have arisen, to eliminate conflict between national systems, or the dominance of one over the other, or recourse to choice of the most convenient national law.

3. Criticism of the Initiative

The initiative to develop a European Civil Code has raised much enthusiasm, but also many doubts. Objective examination of the doubts and criticisms must take into consideration their origin, their reasoning, and their purpose. Primarily there exists the "fear of the unknown".[12] Lawyers typically are affected by this fear, because of their desire to maintain familiar notions, well-worn texts and their own method of reasoning. The abandonment of time-proven rules and (easily) predictable judicial resolutions of disputes remove an anchor point for jurists, who perceive in the introduction of a new text a leap into the unknown. This attitude however can be easily overcome, if one understands that to know and confront a matter exorcises the phantom of the unknown. All those who dedicate their time to comparative law, and those who are interested in understanding what happens in other countries far and near, share the idea that today it is more important to understand what unites us rather than what divides us. Much research is undertaken for the purpose of constructing a theoretical bridge ("bridging the continents" as professor Basil Markesinis defined it)[13] between different legal experiences; in order to identify the points of convergence between systems and in order to compare Common and Civil law in a constructive manner.

The dream of "bridging the continents" is close to realisation in Europe, owing to the creation of a common European legal culture,

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[12] Legrand, *Sens et non-sens d'un code civil européen*, in Rev. int.dr.comp. 1996, p.779 et seq. A perceptive criticism of the theories of Legrand has been conducted by Zeno-Zencovich, Ii "*codice civile europeo*": *le tradizioni giuridiche nazionali e ii neopositivismo*, in Foro it., 1998, V,60 et seq.

[13] Markesinis (ed.), *The Gradual Convergence. Foreign Ideals, Foreign Influences and English Law on the Eve of the 21st Century*, Oxford, 1994; *Foreign Law and Comparative Methodology*, Oxford, 1997.

whose existence is denied by some scholars,[14] even in the broad meaning of the German *Rechtswissenschafl.*[15] Today the books, essays, and encyclopaedias of European jurists transcend national frontiers, and contain ever more numerous references to the law and decisions of other countries. This comparative approach is utilised in order to achieve a better understanding of national law and to receive suggestions and models from other experiences. Without doubt the circulation of models (of codes, laws, and principles), which cross political and cultural boundaries, is a phenomenon increasing in an ever faster and broader manner. In the meantime, common legal values have consolidated in Western Europe.[16] This is so even if one does not consider the Roman Law tradition or the Mediaeval Law (so called *ius commune,* common law), which are quite different from the "European Ius Commune" of today.[17] In all the countries of the European Union there exist fundamental rights of an identical nature. In fact, the constitutional law of the European Union has materialised from the principles accepted in the written and unwritten constitutions of Member States. Moreover, all Member States have also ratified the European Convention of Human Rights.

Criticisms that codification is taking an excessively long time are less troubling,[18] as is the argument that codification of rules related solely to economic relationships would relegate human sentiments to the background or would sacrifice the "narrative function" of law.[19] The authority under which the proposed European Code has been drafted is subject to doubt.[20] In this case, one is dealing with authority understood in a moral, not a legal or institutional sense; since within

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[14] Schuize, *Le droit privé commun européen,* in *Rev.int.dr.comp.,* 1995, p.31 *et seq.* (with extensive bibliography).

[15] Legrand, *op. cit.,* p.785.

[16] Stein and Shand, *I valori comuni dell'Occidente,* Milan 1970 (on which, see Alpa, *I principi generali,* Milan, 1993); Hinestrosa, *Des principes généraux du droit aux principes généraux des contrats,* in *Uniform L.Rev.,* 3(1998) p.501 *et seq.*

[17] Amongst others, Schuize, *op.cit.,* p.10 *et seq.*

[18] Markesinis, *Why a code is not the best way to advance the cause of European legal unity,* in Eur.Rev.of Private Law, 5 (1997), p.519 et seq.

[19] Jayme, *Cours general de droit internationail privé,* Riv.dir.civ., 1997, I, p.367 et seq.

[20] Legrand, op.cit. pp.798, 803.

the scope of powers conferred on the Union the provisions of the treaty do not prevent, but rather favour, the creation of a unified legal space. A code of this kind appears also to be deprived of any systematic order, while each codification needs a systematic order. It is true that the code is being born section by section. But harmonisation may well proceed by degrees. Functional and practical demands prevail over those of order and efficiency.

More worthy of consideration are criticisms of a different nature, though even these are in my view surmountable. They may be summarised as follows:

(i) The structural difference in theory and practice between common law and civil law.
(ii) The elimination of the original national characteristics and the value of legal pluralism.
(iii) The appropriateness of using techniques of harmonisation other than the drafting of a unified Civil Code.

As for the first criticism: the structural differences between the common law and the civil law, the opinion of Professor Alan Watson must certainly be taken into consideration. "The legal tradition," he said, has a considerable impact on the shaping of the law, and the individual sources of law have different effects on the growth of the law".[21] The formation of a legal system on the basis of legislative sources rather than on the basis of judicial sources is one thing. However, one hardly needs to be reminded that now in English Law and in Irish Law not all creation of law relies upon case law. The province of statute law in those countries has become increasingly wider. The collections in English law edited by Blackwells are organised by subject matter, and the numerous legislative rules dedicated to the area of contract and commercial law is contained in several copious volumes. Furthermore, the membership of the United Kingdom and Ireland in the European Union requires application of all European Union regulations and directives, which obviously occur by means of written law. The attitude of many common law lawyers has also been changing vis-à-vis codification as a technique of

[21] Watson, *Roman Law and English Law: Two Patterns of Legal Development*, in *Il diritto privato europeo*, cit. p.10.

consolidation of legal rules. In his conclusion on future developments of commercial law in the United Kingdom, one of the most prestigious scholars of the subject, professor Roy Goodie, looks forward to the creation of an internal codification of the rules in force today relating to economic transactions.[22]

Meanwhile, it would be naive of jurists coming from European nations possessing civil codes to pretend that there has been no case law, which enlivens the written text, adds to it, and corrects it. The task of ascertaining facts is important in all legal systems. Reasoning by induction (as in common law systems) or by deduction (as in civil law systems) is apparently diverse in its process, but similar in substance. The classification of rules is uncertain in one or the other system when both case law and statute law is present in both. The identification of protected interests in terms of subjective rights is now common to both systems. Contractual texts are now ever more extensive and many of these are derived from the juridical experience of the common law countries concerning new types of contracts, methods of formation of contracts, techniques of notification, and transfers of money and title. So much so that in a new treatise on Italian private law, edited by Professor Rodolfo Sacco, there appears together with a volume on written sources, another volume on "non-written" sources of law, such as custom, case law, interpretation, commercial usage, and so on.[23]

As for the second criticism - the erosion of national differences and the value of diversity - this is not so important. Certainly the rules contained in individual codes will no longer be applied individually, but they will survive in the historical culture of the individual countries. It is of course true that the legal system is one of the fundamental characteristics of a country, but it is also true that its existence and importance is obvious only to jurists. Realistically speaking, it is not considered an identifying characteristic by the ordinary citizen. The appeal of history and

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[22] *Commercial Law in the Next Millenium*, London 1998, p.100 et seq. , and on the comparison between the technique of restatement and codification, International Restatement of Contract and English Law, in No 3 Uniform L.Rev., (1998) p.231 et seq.

[23] Sacco, *Lefonti non scritte*, Turin, 1999.

codification (or in any case to legal organisations passed down by tradition) must not be undervalued, but nor must it be overvalued. It is overvalued when a tradition emerges only to achieve finality or to prevent finality of a purely technical nature. Now, it is known how the Mediaeval Ius Commune developed in the context of a common legal culture in Europe[24] and that this formed the tree from which grew so many branches: the national laws of continental countries and island regions (England, Scotland, and more recently Eire). In the mediaeval period important changes took place, so important that they could be defined as revolutionary.[25]

Yet the legal history of European Western Countries is a fragmented one, which shows both progress (such as codification) and the contrary (such as the development of 19th Century dogma). Strange diversions have occurred, such as the greater affinity between Roman contractual law and common law rather than with the Napoleonic or Germanic models. Incredible combinations have taken place, such as the translation into English of a code of Napoleonic origin, which has become the Code of Quebec or the translation into English of the former Italian language Civil Code which has become the Civil Code of Malta. There have also been unexpected influences, such as those of canon law on English equity. This very evolution of models is not monolithic and uniform, as the critics of the Roman French tradition would want to represent it. One only has to think of the differences of application of the Code Napoleon in France and in Belgium where the force of the same written rules leads to remarkable divergences in interpretation in doctrine and case law. Differences are also observed in the common law family, not only between English and United States common law, but also between English common law and that in Ireland or in other common law countries politically connected with the United Kingdom. History provides a formidable reservoir of facts, experiences, techniques, and models, which can be used to unite.

In Europe, new codifications have been implemented or are in

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[24] Santini, *L 'Europa come spazio giuridico unitario: un armonia nel rispetto delle dissonanze*, in *Contratto e impresa / Europa*, 1996,I,p3 et seq.; but then see Grossi, Turin, 1991, p.ix

[25] Berman, Law and Revolution. *The Formation of the Western Legal Tradition*, 1983.

the course of implementation, as in Holland. Re-codifications have also occurred, as in Italy and Germany, without mentioning the great modifications occurring in all countries as a result of the implementation of EU directives. One should also consider that European Union Law is showing an expansive force, since it also tends to influence the general common rules, which are not affected by directives.[26] In any event, it is only a question of the level at which one wants to place the codified rules. One is still speaking of rules of a general nature, which leave the Member States free to introduce rules of a particular nature applicable to individual regions. The dichotomy between state law and regional law or the law of individual nations may be saved for sectors, which do not concern economic relations.

As for the third criticism - that other techniques of harmonisation are more appropriate - obviously the argument is open. We could continue with the introduction of directives scattered over various sectors. However this system of European Union lawmaking already creates difficulties of co-ordination of laws in terms of coherence, simplicity and applicability. We could turn to conventions or treaties. But this would not be of much assistance towards the desired solution. We could also think of a restatement or a collage of general principles.[27] Yet the rules of the Lando Commission, even if not very different from this proposal, are reflect a more creative process.[28] These alternatives have been fully considered by the Lando Commission, and have now been taken up by the von Bar Commission, which is proceeding with the work in the remaining part of the Law of Obligations. In any case these options are not new: they had already been assessed immediately after the Second World War by professor Rodolfo Sacco, who announced that the choice could not be based only on the solution of technical problems, but reflected above all considerations of a political nature.[29] Less worthwhile seems the other proposal, whereby instead of the drafting

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[26] See the references in Alpa and Dassio, Les Contrats des consommateurs et les modifications du code civil Italien, in Rev. mt. Dr. comp., 1997, p629 et seq.

[27] Zeno-Zencovich, *op.cit., p.67;*

[28] Lando, *European Contract Law,* in *Il Diritto Privato Europeo,* cit.p.218.

[29] Sacco, *I Problemi.* Lando, *European Contract Law* in *Il Diritto Privato Europeo, cit.* P.218.

of a European Code one would substitute the drafting of common rules of uniform international law. However this would be an interim and provisional solution, which would certainly not be definitive. It would give rise to problems of choice of the rules to be applied.

4. Problems of Codification

Before turning briefly to the advantages of European codification, we should reflect further on some additional problems concerning the initiative. The first problem is language.[30] The European Code must be drafted in all the languages of the European Union States. The rules already established for contract in general have been written in English. As is known, English is now the *lingua franca* (a language without borders) of commercial traffic. Together with French, English is one of the most practised languages in the European Union offices. English is destined to prevail. This is not so much by the merit of the power of the dominance of England, but above all by the expansion of the economic and political power of the United States, and also by the practicality and the simplicity of its grammar. English is the language of this work in progress, but a translation into the languages of Member States will be inevitable. It is therefore fundamentally important to choose written rules rather then those derived from case law. The choice of codification is no snub to the common law system. Many common law jurists and writers are now convinced that codification presents considerable advantages, such as simplification, certainty, and predictability of the rules. We must remember that the citizen of a European State has not the same easy access to the laws of his sister states. Very often he or she cannot read them in the original and may not fully understand them.[31]

Finally there is the structure. A code of this type, drafted for certain specific purposes, cannot be conceived in the same way as the old codes of the last century. It will be constituted by rules

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[30] Amongst the numerous contributions, v. Palmisciano and Christoffersen, *Aspects linguistiques de la communication juridique en Europe: pratique et problèms des "juristes-reviseurs" de la Commission des Communautées europénnes,* in, *Il Diritto Privato Europea, cit.* p.69 et seq.

[31] Lando, *op.ult.cit., p.118.*

intended for individual sectors having an internal coherence. It will not be complete, but concerned primarily with economic relationships. It will contain rules of general application, rather than rules applying only to narrow circumstances. A European Code will contain rules situated in a dynamic reality, not static one. It will thus be proved by its application, and modified where gaps are found. A comparative approach is necessary for this purpose and should be carried out with sophisticated instruments, and in the right perspective. "The task of science is (...) to exorcise the opposite absurd positions".[32] There will remain questions, which are not easy to resolve. For example, the identification of mandatory rules, with respect to the individual systems from which the common rules derive, the constitutionalisation of private law rules, the meaning of blanket rules (in German, *Generalklauseln)* such as "good faith", "public policy", "reasonable man" and so on.[33] We could also think about the unification of remedies, since the law need not be considered solely from the point of view of substance, but also from the procedural perspective. We could even consider the unification of systems of administration of justice.

5. Conclusion

Beyond the many advantages already shown, it is worth saying that unitary codification reinforces economic unity and is proactive for political unity. If it is true that the legal component, that is the entire organisation of law in a community, constitutes an essential characteristic of that community, then the drafting of a unitary code on the European plane will become one of the chief factors cementing the European Union and a factor in defining the collective European identity. The European lawyer will no longer have to grope around in the dust of research sources, commentaries and case law of other jurisdictions, encountering linguistic, conceptual and practical problems. There are also advantages for the judge, who in the administrative of civil justice, will not have to have recourse to deciphering the formulae of foreign law.

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[32] Sacco, *op.ult.cit., p.98.*

[33] Rescigno, *Per un "Restatement", cit.* p.142.

None of this will bring about the levelling of values or the standardisation of our work. The panorama will be varied. Differences will be maintained, and uniformity consolidated. The motto of Europe: "E pluribus plures" for the Civil Code could be converted into the American: "E pluribus unum". The countries, regions, cities and villages will keep their splendid and marvellous traditions, an irrepressible aspect, their individual beauty and their beauty in diversity. The unity of private law will not make Rome more similar to Paris or to London, the Italian language more like Swedish or German, or Italian art like the Flemish. But to paraphrase a famous saying of Voltaire: while travelling, we shall no longer be constrained to change law every time we change horses (or aircraft). Each of us will keep our own distinctive characteristics and will not have to renounce our particular historic inheritance; which, as Hans Gadamer reminds us,[34] constitutes the fundamental heritage of Europe. Still each one of us, by studying, interpreting and applying the unified Civil Code, will be and feel more European.

[34] *L'eredità dell' Europa, Turin, 1991,p.ix.*

"DEMOCRATIC INTERFERENCE", WITH REGARD TO THE HAIDER CASE

SALVO ANDÒ

This article comments at length about the legal implications of the reaction of the member states of the European Union to the formation of a government in Austria which included Haider's party; a party which is politically unpopular with the major European parties. The E.U. governments claimed that the purpose of their interference in Austrian political life was to guarantee respect for democratic values and principles and respect for human rights. However, the author is of the opinion that such interference is based on legal principles which are unclear if not completely unfounded. The action of the E.U. governments is unprecedented in that in practice it prohibited the formation of a government which included a party which is unpopular with the major European parties. It is now generally recognized that certain state prerogatives which until the Second World War were considered as non-derogable rights emanating from state sovereignty lose their validity if they lead to violations of fundamental human rights. However it is hardly fair to claim that the formation of a government which includes Haider's party is in itself a violation of human rights. Moreover, Austria has one of the most real and effective legislative frameworks found in the member States of the E.U. to prohibit any government or any political majority from committing any acts which would undermine fundamental rights. The interference of the E.U. governments has laid down a dangerous precedent, for there have never been dissenting opinions on the European level with regard to the party's participation in elections. It follows from the reasoning of the fourteen E.U. governments that for participation in government, more requisites have to be fulfilled than those required to hold a seat in Parliament. The 'democratic interference' exercised by the governments of the E.U. in this Austrian political event appears to be a grave, unjustified, abuse.

1. Politically speaking, the Austrian case confirms that if the European Centre Parties had to undergo a crisis it would not result

in a shift to the Left of the votes which would have otherwise gone to the Centre. However, it would result in the disillusioned voters who would have voted for the Centre to try to seek refuge in the Right Parties: both new and old. And since these voters are disillusioned by the traditional parties, the new Right above-all would turn to them mostly through popular, anti-party messages and programmes whilst exploiting their resentment of nationalistic attitudes. These are all factors hindering this New Right from easily integrating within a European Conservative Party setting. This Right Wing, due to its nationalistic roots, is in fact called upon to alleviate difficulties and misunderstandings arising within the course of European integration. It exploits the fear that integration produces in certain sectors of popular opinion, which are frightened by the emergence of an increasingly competitive supranational economic system, which is certainly less protective than the national systems.

In any case, the effects, which the "excommunication" of Haider will have on the Austrian voters, are not easily foreseeable. It is being argued that the European veto will strengthen Haider, turning him into a defender of the Austrian identity against Brussels' arrogance.

On the institutional plane, which is that on which the following observations will be based, the situation is even more complex. According to the justifications given by various European governments the interference shown by EU governments in the Austrian political life is depicted as being "Democratic Interference". The aim for this interference is to guarantee respect for democratic values and principles and respect for human rights. However, such interference is unprecedented in the history of the European Union and apparently it is based on legal principles which are absolutely unclear, if not completely unfounded.

2. The merits of the Austrian case, which lead to the European governments' stand against Austria, are well known. Haider's party has been in existence for a long time, long before Haider took its helm. This is the successor of the former liberal party, a nationalist party which, since the 19th Century, has had ties with filo-germanic thought. After the Second World War the liberal party was in decline because the Austrian political system evolved into a bipolar system. It was in this context that the collaboration between the socialists

and the pre-Haider liberals (1983-86) developed. The Haider phenomenon constitutes a sharp change as far as bipolarity is concerned. Haider owes his success to the growing dissatisfaction with the "great coalition" formed by the socialists and populars who have governed the country for a long time.

Haider becomes the leader of the party and whilst presenting it as the only possible alternative to the divisionary tactics of the "great coalition", secures its definite revival. Haider's party, which has its strongholds in Carinthia and Voralberg, secures support higher than the mean average of 20% in all the other Regions. Haider was being attributed with showing approval or perhaps understanding towards Nazism which attitude was subsequently rectified by a public declaration of regret. Besides, Haider was also responsible for the policy of resistance to immigration, which according to Haider was without limits or rules. Really, in the electoral programme of Haider's party there is nothing to this effect.

Moreover Haider has never been the subject of international sanction because of his political past. Neither can be it be said that Haider's party was outlawed by the Austrian government, no matter how unlawful that action would have been. The EU has never in effect intervened to bring up Haider's case considering that Haider was Governor of Carinthia and in such capacity he definitely has had relations with the EU. Besides, Haider's men already govern other Austrian regions. Perhaps, the criticism being levelled at Haider's party should have been raised before whilst the party was still spreading its roots.

Europe has in this case exhibited the power to safeguard, at least formally, democratic and human values instead of manifesting a solid and widespread culture of rights. In the light of the above, it is important to see whether in so doing, Europe has instead given a sign of worrying insecurity in view of the ever-increasing process of disaffection and estrangement which European citizens show towards the EU.

3. The anti-Austrian wave which spread across the 14 EU states – Austria excluded – was not the result of instigation by the organs of the EU and neither did it result in political decision originating in the organs of the EU. The initiative taken by heads of European States and government against Austria was objectively seemingly aimed at hampering the negotiations between the Populars and

Liberals directed towards the formation of the Government. Hence, such initiative was taken to "impose" as it were, the reopening of the negotiations between the Socialists and the Populars.

It was individual European Governments who have acted against Austria and not the Commission or any other organ of the EU. The stands taken respectively by the standing president of the EU, the Portuguese Guterres and the President of the Commission, Prodi, were diametrically opposed both in substance and in aim. Guterres seemed focused to pursue a severance in the political relations between the EU and the newly formed Austrian government hence favouring the uncompromising stands taken by the European Socialists of Chirac. Prodi on the other hand was committed to minimise the issue.

The sanction, which Guterres proposed against Austria aimed at avoiding the formation of the government, consisted in freezing the bilateral diplomatic relations between the single EU Member States and Austria. What suspension of bilateral relations really means in the case of a State, which is united to others by means of a number of political agreements, is not exactly clear. It seems that the threatened suspension should have more of a political nature than an act having precise legal consequences.

The freezing of the bilateral relations would be realised through some sort of "special surveillance" which would be exercised from the European side on the Government of Vienna on all the subject matters which fall within the interest of the community, from immigration policies to the budget.

Moreover, it has also been decided that should any candidate to an international office be Austrian he should not be supported by other Member States, while ambassadors from Vienna should get a second rate treatment in the European capitals. However, the relations between Vienna and the European institutions, such as the Commission, should remain intact.

The action taken by the governments of the Member States against a single country is unprecedented. In reality, in 1994, Pierre Cot, the leader of the Socialist group in the European Parliament had proposed to the Socialist group to interrupt political relations with Italy when Berlusconi formed a Government which had ministers from the Italian Socialist Movement (MSI). However, the proposal was never taken up not even by the Socialist group. Nowadays, Berlusconi is in the PPE and his position is even

stronger now. Recently, after the formation of the coalition government made up of Schussel's populars (OVP), Haider's liberal nationalists with Haider's men appointed ministers; the German Chancellor made a similar proposal to his European partners. He proposed to take a similar stand against Italy should the Centre-right command the greatest support in the 2001 elections and should Berlusconi form the government with the post-fascists of the *Alleanza Nazzionale* (AN). However, Italy's protests were unanimous coming from the government, all the Italian parties, the majority and the opposition. Shroeder withdrew immediately this proposal whilst contending that he was misunderstood.

4. Even this last event goes to show that the problem of democratic interference, that is the interference of the EU when national governments are formed to verify whether the elected parties will guarantee respect for democratic liberties exists and this should be examined with all its implications and also with reference to its legal basis. The fact that the EU can in similar instances adopt a policy which is not homogeneous – for example in the case where the EU is not dealing with little Austria but with countries like Spain or Germany – does not change things. However, the fact remains that Europe has passed a veto to inhibit the formation of a government, which is politically unpopular with the major European parties. It has outcast a party which has been active in Austrian political life for a number of years, it has denied the governing class of one of its Member Sates the right to interpret the mandate of its electorate who voted in favour of Haider (one out of three Austrians have voted Haider.)

Whilst interfering in Austrian internal affairs, Europe has exercised an influence on the internal politics of the Member States much more superior than that recognised to a federal State with regard to the political life in a Member state. Austria was therefore dealt with in a way, which is different from the way a State Member in a Federal State, which has an old and established federal tradition as the United States, would have been treated. In the United States there were governors belonging to extreme right who were tolerated by liberal Presidents, in the sense that they were neither ousted by the Presidents and neither interdicted politically when elected.

This is definitely not the forum to discuss the admissibility of the

right to interfere and in particular this "right to interfere" in the political life of a State. The problem seems to be not so much from this point of view, as to evaluate the validity ***or*** otherwise of the situation which gave rise to the interference, if the aim of such interference was to avoid violation of human rights. It is by now accepted by public international opinion, apart from the most evolved schools of juridical thought, that the principle according to which certain State prerogatives which until the second World War were considered as underogable collapse when faced with the right of every human being to exercise anywhere his fundamental human rights.

This right is a right protected not only by conventional and customary international laws, but also protected under universal jurisdiction, that is under the jurisdiction which every state can exercise when faced with a human rights violation, wherever and under whatever authority the violation is perpetrated. Any State can intervene and prosecute the perpetrators of the crimes, if such action falls within its powers. The recent affair of Pinochet who was tried by Spanish judges who had asked for his extradition from England where he was being hosted, confirms that this is the attitude which is becoming more widespread in different States when faced with crimes against humanity.

Therefore, the violation of State sovereignty is not a problem any more if such violation occurs because of a violation of human rights. Hence, this is not the problem. The problem lies in determining whether in the particular case there exist enough grounds, which justify the exercise of interference, and the consequences which follow such interference with regards to political responsibility should this right be abused.

Now, it seems that the mere fact that there has been the formation of a Government, which includes Haider's party, does not constitute a violation of human rights. This is because of at least three reasons:

(i) There is nothing to show that the newly-formed Austrian government has committed any violation of human rights; this "excommunication" exercised by European States is therefore, a sort of warning having the nature of a cautionary measure directed towards a government which had not yet been formed and hence which had not yet started operating;

(ii) There is nothing to show that the Austrian government intended to violate human rights in any way. This is reflected both from the Government action plan and from the electoral manifesto of the two parties which form the Austrian government;

(iii) Considering what is stated in the Austrian Constitution with regard to protection of human rights and considering also the liberal approach taken by the Austrian Constitutional Court in this field there is nothing to show that the Austrian government can freely and with impunity commit the feared violations of international law (irrespective of the repressive powers exercised by European Authorities should cases of violation of human rights arise.)

It is also important to consider from this point of view the fact that prior to its membership in the European Union, Austria had had to adapt its Constitution of 1920 and hence enhanced further the protection for human rights. Since 1.1.95 as a consequence of such adaptation, the "Federal Constitutional Law" has been called, even officially, "Constitutional Law of the Federation" (B-VG) which had been already in use for some time.

It is important to note that constitutional law of the Austrian federation is not solely made up of one document. There is a series of earlier constitutional laws contained in simple federal laws and approved with a 2/3 majority of the national Council and expressly recognised as constitutional provisions (Article 44 C. 1 of the B-VG). Moreover, Federal Constitutional Law of the 29/11/1988 on individual freedom significantly consolidates the Constitution. After World War II, Austria included in its constitutional law the provisions of the European Convention on Human Rights 1950 (with all its Protocols) as provisions which are directly applicable in its legal system. Moreover, it also included that Convention on the Elimination of all forms of Social Discrimination (1972), the Vienna Treaty. With the Vienna Treaty, signed after the end of World War II, there were included a number of provisions aimed at the protection of minorities. Within the ECHR, there are a number of freedoms which belong to every human being irrespective of nationality except insofar as those limits found in Article 16 (freedom of expression and association are limited with regard to participation in political activities by foreigners). Hence, it is

evident that with the signature of the ECHR, there has been a decisive step forward with regard to equality between foreigners and nationals. Even if the Austrian Constitution does not include a human rights charter (even though the final provisions refer to the fundamental law of the State of 1867 as constitutional law which fundamental law contains the first charter of human rights) there still exists a bill of rights which are constitutionally guaranteed which are found in the abovementioned texts.

Besides, even conventions in international law can become a source of constitutional law if they are approved by the necessary majority prescribed in Article 44, C 1 of the B-VG. A perfect example is furnished by the ECHR which can be considered from all points of view a source of constitutional law. Hence, it is not only the fundamental principles embraced in the Federal Austrian Constitution and other principles which can be deducted from the entire system which can be called upon for the protection against possible abuse committed by the Austrian Government or other commissions attributable to the parties which could bring about the deterioration of the democratic standards of political participation. It is also the ECHR which can be called upon in these situations for its provisions have the same standing as any other Austrian Constitutional law under the Austrian Constitution.

A further safeguard to these principles lies in Article 44 C 3 of the Constitution which states that it is the people who have to approve any amendments either to the Constitution in its entirety, or else even to one of its fundamental principles. A Government majority, no matter how strong, cannot alone be enough to amend this part of the Constitution, which is in reality a very strong constitution, without the people's approval.

Undoubtedly, the rule of law constitutes a fundamental principle in the Federal Constitution. At the basis of the rule of law there are again the fundamental rights and freedoms: those rights and freedoms which are singled out in the Constitution and those which are also prescribed in the ECHR which, as already discussed above, has the stature of Constitutional provisions.

Article 12 B-VG expressly provides further that the rule of law is guaranteed through the control of the lawfulness of the administration, both on the central level and that of the lander. Moreover, the Austrian Constitutional Court has a general competence in legislative issues. Hence such Court has the power

to ensure that all the citizens are treated equally by the laws (Art. 7 B-VG) and that the fundament rights are protected according to the principle of proportionality. Art. 144 of the Constitution gives the right of recourse to the Constitution Court in the case of a violation of a right constitutionally guaranteed without any reserve of such recourse to the citizens, considering how this faculty was dealt with in the Old Tribunal of the Empire (even if it was held that the rights which were found in the 1867 law were therefore not necessarily reserved for the citizens.)

The Constitutional Court, through its decision 29.6.9 has confirmed that the principle of equality before the law applies to all the citizens under articles 2 of the Fundamental Law of 1867 and 7 of the Constitution. Besides, such principle is applicable also to all foreigners under the Constitutional Law of 1973 with which the federal legislator has adopted and given application to the 1972 Convention. The Constitutional Court interprets the principle of equality as an obligation of the legislator and of the administration to treat both citizens and foreigners equally and without distinction as long as such distinction is not justifiable because of objective reasons, which are nonetheless reasonable and proportionate.

This legislative framework prohibits any government or any political majority from committing any acts, which could undermine fundamental rights. It has also been pointed out that Austria has adapted (with its accession to the European Union as from 1/1/1995) to the Constitutional law of the EU.

Austria's accession to the EU has been considered as a modification of the Constitution in its entirety and hence it has been submitted to popular vote under Article 44 C 3. A new Title has been included in the Federal Constitution - "European Union" – (art 23a-23f B-VG), under which Title there is a number of provisions introduced as a result of Austria's membership in the Union. The constitutionalisation of the principles on which the EU is formed has brought about supremacy of community law even with regard to Constitutional Law. This means that Austria has recognised the supremacy of community law much more than other EU Member States which, could even be viewed as the more ardent advocates of the European integration process.

In the light of all the foregoing – in particular, with reference to the provisions considered as constitutional provisions with regards to the "universal rights of the Austrian citizens", to the

constitutional character which is attributed to the basic principles of the EU and to the wide competencies exercisable by the Constitutional Court – it is unthinkable that in Austria there can be a party which, either at the federal level or at the level of a Landau, seeks to deny the human rights whilst blatantly ignoring the internal constitutional norms, the international constitutionalised provisions and the principles and provisions of general international law as those which are inherent in the Treaty on the European Union. If Austrian public authorities were to commit violations of fundamental rights, such violations would also be in violation of a system of safeguards of such rights which are some of the most real and effective systems found in the Member States of the European Union.

5. This being the position in Austria, on the level of the political agenda of the new Austrian Government and the obligations imposed on it first and foremost in the constitutional laws, it would be logical to state that the governments of the EU committed a serious abuse against Austria. At the expense of trying the Austrian Government's political inclination, the Government's intentions were overlooked, for the Government's agenda seem to be fully in line with the EU's democratic values. Hence, the principle adopted to regulate the political relations between the States of the EU is the fact that the participation in Government of a party which has professed, although in a distant past – or else it is being assumed that it has so professed – ideals contrary to the values shared by European democracies represents a threat, on the legal level, to the principles on which the Union is based.

This political choice exercised by the EU Member States which wanted to raise the Haider case is not only questionable on the legal plane, but it also amounts to a dangerous precedent. The 14 EU Governments who have excommunicated the Austrian government have deemed it an obligation to avoid the potential risks, which would arise through the participation in government by political parties who hold "negative values", from the point of view of major European parties. However, it is important to note that such Governments wanted to avoid the party's participation in government and not in elections since there have never been dissenting opinions on the European level, in this sense.

It is evident that this line of reasoning, for instance, can lead to

the hypothesis that there exists a right to political participation which is in effect changeable depending on whether the political participation be limited to Parliament or else even to the formation of the Government. Therefore, from the line of reasoning of the 14 EU Governments, it follows that for participation in Government more requisites have to be fulfilled than those necessary to hold a seat in Parliament. This theory seems to be absolutely incompatible with any principle of representative democracy. It is the same theory, which the Americans tried to impose on their allies, the Atlantic countries, immediately after the War. Hence, according to this theory, political representation was not denied to any party, as long as they were not expressly prohibited by law. However, the responsibility of government could not be exercised by all the parties, but only those which were from time to time ready inclined to accept the Atlantic values.

The stand taken by the 14 European Governments against Austria is even more surprising if it was taken as a precautionary measure. This is because should the new government violate its European obligations and the fundamental freedoms, it would find itself automatically outlawed under Article 7 of the Treaty. In this case the Commission could demand that the Austrian vote on the Council be frozen. Of course, it would amount to a crisis with an unforeseeable outcome since in the Treaties there exists no provision for the withdrawal of a Member State from the Union. Moreover there exists no provision for the sanction of expulsion (a difficult measure to apply in any case against the will of the effected Member State). When a State joins the EU, it does so permanently, and it is binding itself to accept permanently its founding principles. Hence, the obligation incumbent on the authorities of the Community is the obligation to bind the member States with regards to the observance of the obligations, which they freely assumed, not to preventively threaten them should they fall short of their obligations. This is already being done by the Treaties with their unequivocal provisions in respect of this field.

Many commentators have defended the EU's interference on the basis of Article 6 of the Treaty, wherein the following is stated: "the Union is founded on the principles of liberty, democracy, on the respect of human rights and fundamental freedoms, and also of the rule of law."

At the basis of the EU, therefore, there lies the concept of a

Europe, which is a political, democratic arena. Basically, Europe is also a Europe of nations, but it is united through common values and an underlying solidarity.

Undoubtedly, the intimation addressed to Austria, on the basis of the provisions of Article 6, does not have a clear juridical nature. Recourse has been made to a declaration made by the Portuguese presidency of the Union which was stated on behalf of the 14 Member States, because no other formal interference could be decided upon.

The reference of the "joint reaction" to Art. 6 and 7 of the Treaty on the European Union does not need to be explained. The Treaty binds both the new and old Member States. However, the reference holds insofar as it is done in relation to the fundamental values, which inspire these two provisions. These two provisions provide a mechanism which sanctions violations of human rights and fundamental principles of the Union by any Member State and such sanction should be effective and not only feared. No provision is made for the measures to be taken in case of merely potential violations of the Treaty with the aim of preventing them. Besides, in any case, such provisions would have to be in relation with decisions which are taken by the government which violate the Treaty, and not of action taken by a single party (but in the case of the government of Schussel, the agendas of the parties which form such government are adherent to the Treaty both literally and in spirit) which seeks to form part of the government. In this sense, it is significant that the fourteen Member States have decided a co-ordinated action, which bilaterally commits each State, that is, each Member State in its relations with Vienna.

In this case, the application of Article 6 is compulsory. The violations of "principles of liberty, democracy, respect for human rights and the fundamental liberties" have to be of fact. This is the only case in which the measure contemplated under Article 7 becomes applicable. Under this Article, the Council of the 15 Member States, made of up of heads of the State and Governments, deciding unanimously or by qualified majority on the proposal forwarded by at least 1/3 of the Member States or the Parliamentary Commission, and after having obtained the advice of the European Parliament, can call on the Government of a Member State. And should the government persist in its attitude, there could be the suspension of some rights including the right to vote in the Council

of Ministers, whilst all the obligations which under the Treaties are incumbent on the Member State against which Article 7 is applied remain applicable.

This Article has been referred to as the "Slovak Clause" for this has been drawn up in view of the enlargement of the Union and it seemed justified because of fears linked to the Slovak application. The Slovak Government was being accused of low levels of respect for minority rights and this caused the introduction of the Slovak clause. However, it has been made clear that interference should be allowed only in the cases provided for by the Treaties and in these cases the adoption of the measure under Article 7 is compulsory. Only in these cases is it possible to limit the principle of sovereignty of a member State, cases which boil down to, for instance, the justifications of the limitation of sovereignty which are listed in Article 11 of the Italian Constitution and of other Constitutions of Member States. The States, which accede to the European Union, do not renounce their sovereignty of course. However, they limit it themselves by attributing powers to the organization to which they have acceded for the pursuance of objectives and the reinforcement of values which improve the conditions of living of the international community. This attribution of power is done with the view of setting juridical standards in the organisation which standards have to be preventively met by the constitutional organs of the states. Therefore, no state limits its own sovereignty without getting anything in return, not even in favour of the EU, and not even when, as in the case of Austria, through parliamentary control in the capacity of adhering to a treaty, adapts its own Constitution to the Treaty, amending it to accept interference which, in reality, constitute a real divestiture of sovereignty. This emerges from a number of laws, apart from the abovementioned Italian Çonstitution in Article 11, there are Articles 23 and 24 of the German Fundamental Law, Article 67 of the Dutch Constitution, articles 168 and 169 of the Belgian Constitution, Article 28 of the Greek Constitution, Article 93 of the Spanish Constitution, and Articles 7.6.161 of the Portuguese Constitution.

In any case, for there to have been a formal "judgement of responsibility" against Austria, in order to arrive to formal sanctions or a warning to adhere to community obligations, before the imposition of sanctions, there should have been first a Council meeting with all the 15 members present, whilst in the case in

question, the meeting was held with one member missing: Austria herself.

6. Undoubtedly, under the norms of the EU Treaty and the Constitutions of the member States, the democratic interference exercised by the Governments of the EU in the Austrian political event appears to be a grave unjustified abuse. The abuse of the right to intervene and the responsibilities arising out of this abuse should be considered in the light of the provisions, which regulate the international relations of the single Member States.

If membership to the European Union does not divest the single Member States of the right to decide in full freedom the direction of their own political life but only involves obligations which have to be interpreted on the community level in the same manner as that of the concrete measures taken by individual Member States undoubtedly in the Austrian case the responsibility of these states has to be viewed in the light of their internal legal system. This is because there was no undue intervention by the EU in Austrian politics but by the Single Member States of the EU.

The Italian Constitution, for instance, under Article 11 provides some limitations to sovereignty, a provision common with the laws of other States, aimed at the formation of an international legal order which ensures peace and justice amongst the Nations. It is clear that for the realization of such objectives, Italy can intervene into the internal politics of other States and other States and organisation can intervene in Italian internal politics. However, Italy cannot go beyond this scope and neither can the EU from the point of view of the Italian Constitution. Interference which is otherwise motivated would pose very serious problems to the Italian Membership in the EU.

7. Hence, there is no provision in the Treaty, which empowers the EU to deal with the formation of the majorities in governments in the single States, establishing which majorities are compatible with the basic principles of the EU. Austria is not responsible – as has been shown – for any act, which violates Community law, and hence there were no grounds to impose any sanctions.

Europe did not even want to wait until the new Government, which includes the ministers of Haider's party, starts operating, to submit it to the European test, as it were.

As things stand, there is absolutely no doubt that the Haider case constitutes a precedent, which is prejudicial to the political future of the EU. On the basis of the precedent created by this case, if Europe were to expand towards the East it would have to verify the democractic credibility of, for instance, the ex-communists who have formed a government in these States. These parties could be new in denomination but certainly not in leadership, this leadership being the same as that which lead the older communist parties in power.

It is also important to question the legitimacy of condemning a government for the past of the people which form it without their being responsible for attacks on human rights and the rules of political co-existence.

Is national sovereignty not violated whenever the EU prohibits, not the violation of human rights, but even the creation of an undesirable political majority because it is not compatible with the political inclinations prevailing in the Union of the fifteen States? It has rightly been stated that with the decision emerging from Brussels there was rooted a "racist" principle: the *a priori* exclusion, without even being given the benefit of the doubt, of the group which does not fall within the class of the European politically correct. Can in this case the sovereignty of a state be violated by a "partial" political decision which political decision is aimed at proving Haider's incompetence in governing a State, which elected him and his people freely? The affirmation of the principle which should have emerged from this decision was that not even the sovereign vote of the citizens could quash the fundamental principles of the Union. This principle is beyond doubt and is a principle which, for instance, the States have firmly defended in the face of violations against the fundamental principles of the constitution. However, in these cases, there need not be extreme situations for the application of such principle. However, the Austrian Government has neither attacked, nor even put to question the fundamental principles of the EU. The EU's interference, therefore, appears directed against decisions which were taken in a free election and which were fully compatible with the Constitution.

The formation of the government has occurred on the basis of an alliance between parties, which had a right to govern. Such right was bestowed onto them by the people's vote and on the basis of a

political agenda, which did not violate any rules, or principles, which form the basis of "communitarian cohabitation". The EU Treaties do not allow the EU to intervene in the manner in which popular sovereignty is exercised as long as the form of such exercise does not run counter to the community obligations.

All the parties eligible to run for elections on the basis of the constitutions of the Member States obviously do so to form part of the government. A different principle would create an inadmissible different legitimization of the parties' participation in politics. Undoubtedly, under the Treaties, the EU cannot give any instructions to the Member States or Parliaments on the formation of the political structure of the Governments. However, it was stated (*Rodotà, La Repubblica*, 10.02.2000) that the interference of the 14 States of the EU is absolutely legitimate. Notably such interference in the formation of the Austrian Government was exercised for the protection of fundamental principles of democracy. Moreover, such interference was exercised in a matter which under traditional principles should be a matter completely internal and in the hands of the State in question. This is an affirmation of a perplexing principle. In this case it is not only the power of the States to renounce in the name of national sovereignty any external intervention when the latter deals with the protection of the fundamental human rights which is being, quite rightly, denied. It goes dangerously beyond this. It deals with questioning the popular sovereignty. This is being manifested when the vote of the citizens is not deemed to be enough in legitimising the participation in government of political forces which have adopted attitudes which run against fundamental democratic principles but which however do not result in the political agenda of the Government. Therefore, the principle being adopted here is that the past is not erased and that each politician and party is an unrevocable product of his/its political past.

It has also been stated (Rodotà) with regard to the Haider case that globalisation cannot be exalted when one is referring to the freedom of international trade without frontiers, whilst on the other hand ignoring it with regard to a new international dimension of rights. Obviously the problem arises on the practical level and not on the level of principles.

It is definitely true that democracy cannot only be founded on popular sovereignty. It is also true that experience of the popular

democracies has shown that that reference is insufficient to found the legitimacy of a democratic system. However, the idea that there are parties which pollute democracy and which constitute a threat to democracy by their mere existence may have abominable consequences. One of such consequences could very well be that of conferring upon a supranational authority the control of the political life of all the states.

Constitutionalism thrives on the idea of a formal democracy. Should the democratic system be "completed" into substantial democracy, such system would inevitably dissolve at the precise moment of its "completion".

For democracy to be compatible with freedom, it has to be understood in the terms of procedure, methodically. From this point of view, it is much more important to take into consideration how one is governing rather than who is governing. The majority of the people have to be able to exercise the right to decide according to the procedures, which also guarantee and respect the rights of the minority. Such procedures have also got to allow the non rigid predetermination of the majority. The limits which have to be imposed on the majority of the democratic majority are those which involve the inviolability of the fundamental rights of the individuals. However, to realise the "delegitimisation" of the majority the lack of respect for those fundamental rights have to be real. In democracy there is the guarantee of conflict which is nonetheless regulated. The divisions between various powers, between the majority and the opposition, and the orderly conflict between the various interests keep the authoritarian peril at bay. There exists no antagonism on the social and institutional level, which could be considered prejudicial to the future of democracy when analysed in the light of the level of respect shown towards the rules of democratic competition. Hence, such antagonism need not be tackled through the elimination of the liberal political competition.

Democracy can't be protected through the frustration of conflict, achieved through interferences which alter the democratic game. This would however result if one were to accept that the right to participation in politics and government are not equal for all the constituents and all the parties.

The legitimacy of a democratic system is based on the respect of the popular sovereignty and of fundamental rights. For such conditions to be realised, it is evident that there cannot be

limitations as to the majority in government or the type of political regime. Rather, the Government would have to adopt measures, which would be in line with this objective.

Given that constitutionalism, as the juridical technique of rights, has delivered the citizen from aggressive powers which eroded the rights competent to it, the international community cannot take the place of the former aggressive State, imposing orders, coercion and limitations which would corrode the citizen's freedom to decide who will govern him. A European Union which would attack fundamental political freedoms would constitute a dangerous step backwards in the attitude towards politics, which has been long consolidated in European social life. If the provisions of the Treaty fix the boundaries of the liberties of every individual, the EU can't change those boundaries.

Political freedoms, as all the other rights of freedom, have also a negative character with regards to their legal setup. These make sense as long as they can be enforced against any form of power external to the area, which for the individual is the area in which he can exercise his freedom. It is beyond the intentions of the European governments which have promoted the anti-Haider campaign to put to question this fundamental principle which holds both with regard to the power of the State and also to the power of the States, in whichever way they are united. Moreover, it would be erroneous to presume that the regime for political liberties and civil liberties is not the same. Moreover, in any case, there is reciprocal connection between the rights of freedom. The protection of human rights is inconceivable where participation in democracy is not guaranteed.

8. Hence, "democratic interference" can be considered as a step forward in the process of political integration if it is expressed through strict control of the European governments' behavior. Moreover, it can be considered as a step forward if it is expressed through strict control of those governments which will become members of the EU and which have no tradition of democracy, with the aim of verifying whether and to what extent minority rights, above all the right to collective identity and human rights, are being protected. However, democratic interference would be a different matter altogether if it is not limited to and directed towards the control of the governments. It would be a different matter should

it be only expressed through limiting access to government to the parties which are allies of the major European parties. It would be a different matter if it favours political approval of the majorities, hence politically isolating those governments which are not in line with the standard coalition which constitutes the "norm" in European political life. In this manner, a palpable and effective *conventio ad excludendum* would be promoted to the detriment of the parties which are not aligned to the stands of the major European parties and hence would be eligible for representation but not for participation in government. Wouldn't such *conventio ad excludendum* constitute a unique and a principal way to create a Europe with just one belief? If the interference is aimed at establishing which parties are proper candidates for government, there will be a new limit to the sovereignty of the state which is very piercing and definite, not falling within the ambit of international law.

It would be a matter of imposing on EU Member States not only a form of government but even a type of a coalition, which would be decided by the more "authoritative" States. Basically, it would be imposing a real directive on the political tendencies compatible with the values placed at the basis of the EU.

The fact that the anti-Haider stand could be the result of a strong preoccupation that the parties of the centre could align themselves to the parties of the right (including those which cultivate nationalist tendencies), rather than with leftist parties, aggravates further Europe's "excommunication" of Haider and the Austrian government. The fact that certain community authorities took action to impose on Austria a government, which is approved, in the major European States creates negative repercussions on public opinion in various European States. Hence it is becoming evident that there is a dangerous conflict between European peoples which claim the right to self-government, the right to choose their own governments and the EU which is being perceived as exercising control on the way political liberty is exercised within the States rather than exercising control on respect for the Treaties.

It would seemingly be more serious if the European stand was taken on mere political calculations, notably that of cornering a party such as the EPP crippled by recent scandals, forcing it to choose between its two ideologies, that which is mild and that which is more leftist, which pursues allegiance with the socialists.

Conclusion

One thing is certain. In whichever way European interference is interpreted in the Haider case, it definitely does not represent a step forward in the process of integration. It is not through shows of force which are so prejudicial to the political relations between the States that a European democratic conscience can be consolidated. In this sense, the reflections developed around this issue by some Europtimists appear to be unfounded on the legal level, apart from being too concerned on the political level.

It would be fallacious to say that through this stand against Austria, political Europe has advanced. Political decisions, not yet taken and on which depend a more accomplished identity of the federal EU, cannot be absorbed or surrogated by the attacks of the EU against the Austrian government, given, though not granted, that such attacks would be prolonged in time. In these cases, what is concretely done carries more weight than certain commitments entered into under the Treaty, destined perhaps to remain on paper for years.

Following the Maastricht Treaty, everything seemed to hint to an acceleration of the process of integration, whilst external policy and defence were being viewed as new competencies of the EU (and the Amsterdam Treaty confirmed and reinforced this widening of the powers of the EU). However, the conflict in ex-Yugoslavia made Europe realise that in this field, on the level of political will and essential material means, it is not in a condition to accomplish a single external policy and a policy of defence capable of resolving conflict. Hence it is not able to guarantee order to its own States without the defence and the intervention of the USA, its ally.
The European governments, who have applied the sanctions against Austria, have sought to show that Europe is not only united in respect of trade and of currency, but even with respect to the adhesion to the values of democracy and the respect of human rights. Moreover, even the ongoing negotiations regarding the new adjustments of the government of the EU –matters which were also dealt with in the IGC of February 2000, which should by December result in a new Treaty which renders possible EU enlargement – have shown how far the EU is from the aim of creating a Federal European State. The conference of the States of the Union, which started on 14th February and which will last for the whole year

(2000), was called to discuss the problems regarding institutional matters on which depends the striking of a new balance between state autonomy and powers of supranational interference. Such conference does not seem to be destined to immediate significant success. The Conference should address this and other problems relating to the adjustments of the power of decision in Europe. Hence, it is called to finally give European citizens the certainty as to who really governs in Europe. Only through a clear definition of the institutional identity of the European Government problems like those which were raised in the Haider case can have a definite and exhaustive reply. The most relevant matters in this field are always the same: such matters are now exasperated because of the new powers conferred upon the EU, such as those in the field of external and defence policy which cannot be really exercised. So, many problems which deal with the proper functioning of the institutions remain unresolved. For instance, for how long will the co-decision procedure between the Council and the European Parliament subsist? Is the extreme guarantee of the vote of the States members of the Council still justified even when Parliament has to decide with the Council, that is, even when there is a guise of democracy (constituted by the vote of Parliament)?

It is not foreseen that the IGC might succeed in defining a real Constitution of the EU. Hence it is not foreseen that the IGC will approve a document which contains the fundamental principles which the EU will always have to refer to and the norms which will regulate the organization of all the aspects of the functions of the communitarian institutions. It would constitute the "fundamental law" of a true Federal State. It does not result that such completion of the process of integration is within reach. However, it is possible that the conclusions reached by the Commission in drawing up a Bill of Fundamental Rights of the Union could be coupled with the work of the Conference.

Undoubtedly this is a fundamental task because the Bill of Rights of the European citizens cannot individuate the fundamental values on which membership in the Union is established, with difference to the actual Treaties. The Bill has to go beyond the national Constitutions and international Conventions. It has to address situations arising out of, for instance, new forms of discrimination and hence it has to approach similar instances more realistically than traditional Bills of rights. In this case, the supranational

protection of fundamental rights, including political rights, will be more developed than that available under the Constitutions of the States. Of course, the problem of imposing limits to the exercise of popular sovereignty could arise also in this context. A Constitution of European Rights could limit the electoral liberty of the citizens. The penalty inflicted on the States which would not respect the Bill would be that of international isolation.

However, this hypothesis is not so truthful. Irrespective of how binding a Bill of rights would be, it is undoubted that an open refusal to recognise its principles would not be expected from any European party. The problem would therefore be that of determining whether the acceptance of those principles is simply hypocritical, altering such acceptance to the extent of divesting it of any meaning.

However, in this context, the danger is that of abusing the control on the democracy of electoral practices. It would be better to maintain a procedural concept of democracy, whilst guaranteeing a conscious and free vote: a free and conscious vote in societies where mass media have a very strong influence. If anything, the slant should be on the redefinition of the idea of democratic procedure. Electoral practices should neither be conditioned by any form of violence nor should it be manipulated by information coming from one political segment only, or by excessive economic resources, which are invested by only one party. Safeguarding democracy is one thing, but threatening democracy for the safeguard of democracy itself is quite another, especially when the method employed to give life to the EU is not an example of democracy. The peoples of some Member States – Italy included – did not have the opportunity to express their will or otherwise to join the EU through a referendum. Hence, it was imposed on them through a governmental decision, as was, in fact, the decision to impose sanctions against Austria.

Let us assume that all the above assumptions become a reality. This would mean that the process of consolidation of the process of European integration would be accomplished in the form of constitutionalising the norms of organisation and of fundamental rights of the EU. It is only then that there will arise the problem of how to harmonise the democratic power of the EU with the democratic power of the States (or of the European Member States). Only then would the problem of EU interference in the political life

of States and hence in the limits which would be imposed on the political autonomy of the States arise. The EU in this case would not be a legal order between States but a real constitutional order. Hence interference would no longer be such but it would amount to guaranteeing a new citizenship, which carries with it a set of rights to all the citizens of the EU. In this case, it would amount to a radical revision of the Treaties. However, all this is just a hope for the State. And it is not on the basis of hope that the EU can nowadays exercise powers outside its competence, and which exercise contradicts the institutional identity conferred upon the EU by the Treaties.

To the States it seems that ostracising Haider is an important political fact which presents Europe as a strong moral power which after having refused to found its own common structures on an ideological pact, is however uncompromising on some humanitarian and democratic values. When faced with the collapse of various dogmas which constituted the DNA of the European left (the defence of the welfare state, of pacifism and of the refusal to accept the obligations arising out of adhesion to the NATO), Europe shows that it won't change its uncompromising stance when faced with restrictive policies on immigration and asylum. These are preoccupations, which cannot justify interference in the formation of governments and in the free demonstration of will of the constituents. Unless, of course, Europe made up of 15 States, does not want to claim the right to define the essential characteristics of democracy. This would be a difficult task but it would be even more difficult for Europe which has not yet managed to define neither its institutional identity nor a Bill or rights, whilst limiting itself to agreeing on a Bill regulating trade, to which up till now the rights have been subjected.

One thing is sure. The possible democracy which Europe will want to define when it will be able to do so will definitely not be the democracy of the single belief, which would legitimize the majorities of the government of the EU to "condemn" the electorate of one single Member State for authoring "politically unpleasant" choices.

Undoubtedly, as the process of political integration develops, politics, as a group of values, becomes increasingly indivisible, just like the economy or currency. However, the result of all this will not be that Europe, as the superior entity, can confer legitimacy

upon governments or divest them of it. It has been said that at the basis of the stand of the 14 Governments that have condemned Austria there is also the will to show a political and moral integration which does not end when it is faced with the sovereignty of the Member States. In this sense, EU intervention would not constitute interference.

In absence of a process of European constitutionalisation which clearly marks out the extent of the right to European citizenship, upholding that a Europe united only by currency and markets should be overcome does not in itself amount to interference in the internal affairs of a State which only recognizes reasons of political expediency.

It is only xenophobia, social hatred and intolerance which do not have a right to citizenship in the Union, not the particular policies adopted by the different parties in other fields. It is only in those matters that the political conflict between the EU and the Member States is not only allowable, but also a duty. This is a rule, which goes for all the European states.

State sovereignty is not a reality with variable geometry, recognised most when the parties in government are allies of the major European parties and recognised least when the opposite case applies. This would lead to undue interference in the political life of the States, which is absolutely incompatible with the sovereignty of States, whichever way such sovereignty is understood.

INCOME DISTRIBUTION, SOCIAL COHESION AND SUSTAINABLE DEVELOPMENT: THE ECONOMY OF COMMUNION MODEL

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Income Distribution is not attributed a distinct role that reflects the social consciousness of the owners of factor inputs in economic models of production. Economic theory distinguishes between the income accruing to factors of production and income accruing to persons. It links the two through the redistributive mechanism of the government's budget. This 'gap' in economic analysis is addressed by the Economy of Communion model of social interaction. The model is based on the idea of shared growth: all involved in the production and consumption of a commodity are expected to benefit from the growth of the commodity. This paper argues that the Communion model relates to the personal freedoms sought by liberal thinkers and tallies with the core ideas of sustainable economic growth. The realisation of the model's vision can co-exist with a capitalist system of production even though the model extends wealth creation beyond the pure self interest of capitalists and workers.

1. Introduction

'What is produced is distributed in the process of production' is a simple economic statement that implies complex social and moral connotations. The interrelationship between production and distribution of national output over time is only crudely understood in economic theory. In addition, ideological differences regarding asset ownership, wealth accumulation and income distribution render a holistic understanding of the production-distribution relationship more difficult to achieve. A recurrent socio-political agreement, effected through government policies generally determined by simple-majority coalitions, becomes essential for the attainment of a series of partial policy solutions in a parliamentary democracy.

The problematic relationship between production and distribution

could be briefly stated as follows. There exists the necessity to examine the issue of how a quantity of commodities should be produced – to concentrate upon the optimal resource allocation, including sectoral shifts, devising incentives geared mainly to production, with the aim to producing the highest attainable output per time period. At the same time, it is necessary to examine how distribution could be managed to exert the greatest influence on production without causing hardships. This means the redistribution of a growing national product among those who are active in production and also those who for valid reasons, such as infirmity, are unable to participate in the productive process. Viewed thus distribution becomes an incentive or a brake to economic growth.

If a growth/distribution trade-off is unavoidable, co-operation within a society becomes not only desirable but also crucial. Political consensus, at least among the majority, is indispensable for socio-economic development; the more so if social changes that are considered radical from a community's traditional views are called for.

The distribution of the aggregate output has long been acknowledged by economists as an important element in the mechanism through which market forces function in an economic system. However, despite this awareness, the state of theoretical analysis about the subject remains uneasy. This follows from the lack of a coherent exposition in which distribution is accorded a degree of autonomy.

Thus, one can emphasise the social element in distribution without minimising the power of market forces and insist that people react as collectively conscious groups to the conditions under which the social product is allocated through primary distribution. It may be argued that it is not enough to assume income distribution as an intermediate stage between production and income generation on the one hand, and spending or allocating distributed income to consumption and saving, on the other. If this were so, income distribution can be approached through production – following neo-marginalist supply-oriented theories, or through effective demand – following post-Keynesian demand-oriented theories.

The theory of functional distribution of income concerns the distribution of the social product among the factors of production that combine to produce it. To simplify exposition, productive factors

are generally limited to two, Labour and Capital where the latter term is made to represent the non-labour factors of production, namely, capital, land and entrepreneurship. Functional distribution reveals the shares accruing to factor labour and to factor capital, but not to the labourer, to the lender, investor and landowner. The size of the personal distribution can only be ascertained when the amounts of labour and other productive inputs at the disposal of every individual are known.

Besides, economic growth and income distribution cannot be abstracted from the sustainability on a global scale of the economic development pattern that evolved in the industrialised countries. The core idea of sustainable development is based on inter-generation solidarity: meeting the needs of the present generation without compromising the ability of future generations to meet their own needs.

All business is somehow, at some time, affected by ecological and socio-economic deterioration wherever they occur. Business activity takes place and actually lives on the kind of environmental forces emanating from the biosphere. Corporate welfare is also dependent on healthy social systems. Business worlds would cease to flourish without educated citizens, public safety and order, a supply of savings and credit, legal due process, or the observation of rights. These "life support systems" have to be protected and promoted – a premise which leads to a conception of the moral corporation. (Gladwin, 1999)

This paper examines the contribution of a recently proposed model of social interaction, the Economy of Communion, to income distribution and interpersonal support in a global framework. This contribution is assessed in a capitalist environment in relation to the self-motivations that inspire economic activity and to the social solidarity that is directed to countervail the personal hardships arising in everyday life.

The characteristics of the Economy of Communion model are described first. In turn, the underpinnings of Capitalism and the economic theory that explains – some say, supports – this system of production are highlighted. This is followed by an assessment of the role of profits and enterprise in a market economy, and of the various forms of legal ownership in a capitalist set-up. The innovative contribution of the Economy of Communion model to income distribution and output growth is then introduced.

2. The Main Features of the Economy of Communion Model

The Economy of Communion model was launched in 1991 by Chiara Lubich, the founder of the Focolare Movement, as one solution to present world economic and social problems. It envisages a communion of production, that is, the emergence of enterprises that care for producers, their suppliers and consumers. The model is based on the idea of shared growth: all involved in the production and consumption of a good or service benefit from economic growth, quality enhancement, cleaner environment, and a fair tax regime. In 1999, there were seven hundred and sixty one enterprises around the world practising the Communion system of management and profit sharing. Of these, ten firms employed more than 100 workers; fifteen firms engaged between 50 and 100 employees; and seven hundred and thirty six units employed fewer than 50 workers per firm. (Bruni, 1999)

The Economy of Communion model aims to give a human soul to the creation of wealth. It is directed to the humanisation of the system of production and distribution. It departs from the evangelical vision of a God, Father of Mankind, and all human beings are His children. It is this universal brotherhood which inspires the putting into practice of the moral value known to Christians as Charity (Christian Love) and to non-Christian believers as 'Benevolence'.

This vision rests on the tenet that all human beings are instinctively inclined to share or to give rather than to possess. The culture of sharing or communion is considered to be basic and lies 'deeper entrenched' in a person's psyche than the culture of possessing. All are called to respect and love others. Reciprocal charity gives rise to solidarity. Solidarity can become durable only if one's egoism is suppressed and difficulties are faced and overcome. This communal solidarity demolishes barriers that separate social classes, political ideologies, and nation states.

The Economy of Communion paradigm upholds the efficiency of the market system, the drive towards wealth creation and the generation of profits. The important difference between this social and economic model and a typical firm described in a textbook on economics lies in value judgements. The economic theory of the firm is value free. The ranking of social priorities regarding personal

welfare is transferred to the domain of politics which produces the legislation controlling production and distribution.

The theory of the firm leads to a classification of primary incomes arising from the exchange of services engaged in the production of commodities. And it stops there. It is then up to the government's intervention through the tax/appropriation-income transfer mechanism and to voluntary, non-profit organisations to redistribute the primary income into personal or households' income, thus creating a new configuration of the command over goods and services in a society. Personal consumption and saving depend on the secondary, personal or household income profile.

The Economy of Communion model envisages the bypassing of this mechanism of redistribution. The actual personal or household command over goods and services emanates directly from the primary, functional or factor income distribution. The dividends are not transferred to the entrepreneurs who combine labour and capital. Instead, they are distributed according to a set formula. A third goes to support the growth of the enterprise; another third is paid to those workers who are in need or allocated to generate new employment in the firm; and a third goes to finance the spreading of the vision of Economy of Communion.

Capital invested by 'entrepreneurs' in the Communion firm does not reap direct personal financial gains for contributors. These entrepreneurs earn a salary if they are also employed with the firm. The funds invested in the firm are virtually turned into a donation or contribution although the entrepreneurs are free to sell their equity at any time. The firm behaves like a non-profit organisation but with a major difference: the enterprise strives to generate profits and be at all times efficient. It will thus create its own supporting finance and render feasible its future growth. Profits are not directed to personal gain, but rather to support others and to disseminate the ideal of an Economy of Communion.

A variant of this profit scheme allows shareholders in public limited liability companies to opt out of their right to dividends for some time and allocate their share of profits on the lines described above. In this case, the shareholder's participation in the Economy of Communion refers to a voluntary renunciation to the right to claim dividends, a decision that may be reversed.

Firms participating in the Economy of Communion network are law abiding, avoid corrupt practices and are environment friendly.

At the same time, they concentrate on the production of useful goods and services and create genuine value for society.

Those individuals who benefit from assistance do so with the specific intention of renouncing to such support once they no longer need it. Indeed, they themselves will seek to assist others in the best way they can.

The vision emanating from the Economy of Communion model is dynamic. It is not based solely on the underlying solidarity principle, deriving its inspiration from theological sources. It is also forward looking. It foresees a global trade environment where the relocation of capital chasing low wages in search of profits could one day be difficult to attain. The non-profit firm will therefore assume greater importance especially in the sector of services.

This phenomenon is already apparent in developed countries. Hence the validity of reconsidering the interpersonal relationships within firms, among industries and internationally. Such relationships are based upon the underlying mechanisms that instigate transactors to act in the market economy. In particular, it is important to address the motive of self-interest that is generally attributed to be the driving force behind utility-maximising consumers and profit-maximising firms in a capitalist system. The main characteristics of Capitalism are now examined.

3. The Capitalist System of Production

Capitalism may be defined as a social organisational system of production based on the accumulation of social surplus or capital. This system is usually described in terms of four sets of institutional and behavioural arrangements, namely: a market oriented commodity production; private ownership of the means of production; a large segment of the population that cannot exist unless it sells its labour power in the market; and individualistic, acquisitive, maximising behaviour by most individuals within the economic system. (Hunt, 1992)

With the rise in productivity and incomes, a new social ethos referred as consumerism has become dominant. This is characterised by the belief that more income alone is always synonymous with more happiness. Indeed, carried to its extreme, such a view could imply that every subjectively felt need or unhappiness can be satisfied by the purchase of additional

commodities. This attitudinal set up, the outcome of a 'culture of receiving', applied to workers and capitalists alike.

Workers have to be continuously given incentives to create social surpluses. They need to produce more in order to enable themselves to buy enough commodities to render themselves happy. But notwithstanding the higher wages and the increased consumption, general unhappiness and anxiety persisted: the more one gets the more needy one feels, the harder one works the greater appears to be the need for even harder work in the future.

Capitalists, too, seem driven by acquisitive behaviour. In this endless struggle, the power base of any capitalist depends on the amount of capital that can be harnessed and controlled. The existence of a capitalist depends on the ability to accumulate capital at least as rapidly as competitors. Hence, the hallmark of capitalism: the drive for profits and their conversion into more capital.

Capitalist production is conventionally considered as being legally based on the private ownership of the means of production. But this view of private property rights exercised in capitalist production is misleading: capitalist production is based not on private property but on the employment contract. The capitalist does not just own capital inputs; the capitalist owns the firm. This 'ownership of the firm' implies the ownership of capital inputs plus a contractual role, that of hiring the workers and the other productive factors.

The firm's identity, however, may be changed by altering the identity between capital and labour, without changing the ownership of capital. If the hiring contract between capital and labour is reversed, so that labour hires capital and becomes the firm, then the identity of the firm changes without any transfer in the "ownership of the means of production". In capitalist production, therefore, the capitalist's 'authority' over the workers is legally based not on the ownership of the means of production but on the employment contract.

In economic theory labour and capital 'inputs' in a production function are symmetrical in terms of social power. Economists refer to the substitution of factor inputs without identifying who owns what. Adjustment decisions to change factor relativities (capital/labour ratios) could be made either by the owners of capital in a 'capitalist' firm, or by workers in a 'self-managed' firm.

In terms of might, however, capital and labour are not

symmetrical. The market power of organised capital – shareholders of a joint-stock company represent a single market participant who can negotiate with workers individually – has been reinforced, to date, by the social power of conventional thinking that capital hires labour rather than vice-versa.

This characteristic in an age of global, deregulated trade and capital movement is inducing radical organisational changes in many countries. Surveying Europe's new capitalism, the British newspaper, *The Economist*, recently observed that hostile turnovers that were once a taboo happened in telecomm, insurance, banking and energy. Besides, venture capital, leveraged buy-outs and cross-border mergers are booming. Old companies are shrinking and new ones springing up. (*The Economist*, 2000:75-78)

Profit margins in Europe are still one half those of American companies. Therefore it may be claimed that there is ample room for improving the performance of European corporate business. But owners cling to power at the expense of minority shareholders. European restructuring is at an early stage, with cost cutting a priority. By contrast, American firms that have already been through cost-cutting exercises, are merging to expand revenues or bring together convergent industries. Radical restructuring and deregulation are impeded by structural rigidities - such as delays to reform pension systems - and economic nationalism. But the direction seems clear: a capitalism that is more transparent, more efficient and "redder in tooth and claw".

In their efforts to understand the forces at work under capitalism, economic theoreticians have identified one determining factor and deduced two conclusions that have important social and moral overtones. Firstly, an equilibrating force named ' the invisible hand' ensured that free market exchange harmonised people's interests, created 'rational prices' and resulted in an efficient allocation of resources.

It is acknowledged, though, that market deficiencies remain. One example is the presence of an oligopolistic market structure where one producer's interests are defended through the explicit or tacit collusion with others with the aim of creating a common front and acting like a single seller in the market. In this way monopolistic profits will be generated and sustained in a market characterised by more than one producer. However, experience demonstrates that attempts by governments to countervail such market failures had

ended up producing inefficiencies of their own. Bureaucratic failures are nowadays seen as detrimental for output generation and enhanced worker productivity. Countries ended up having to cope with both market inefficiencies and public sector inefficiencies when the specific aim of governments' intervention was the correction of market failures.

Secondly, one outcome of price flexibility and the invisible hand mechanism was supposed to be the attainment of full-employment. Again, the experience of many years in many countries with economic demand management or/and forced sectoral re-orientation suggests that various direct interventions by governments have ended up with extensive welfare states or the collectivisation of property but not necessarily to full employment, sustainable economic growth and equitable income distribution.

Thirdly, it was held that the distribution of income as determined by the marginal productivity of the different factors of production is just. Efforts at forms of collective ownership, or governments' financial support to individuals in the various economic sectors in many countries, would suggest that this idea of fair and just rewards to productive inputs is perhaps more complex than one would like it to be. The personal and social considerations cannot be entirely divorced from the economic if pragmatic solutions to every day life are to be identified and implemented with success.

Thus, many countries have experimented with the Welfare State, that is, the creation of a society in which citizens are provided by the state with services that ensure economic security for themselves and their families. Welfare states start modestly, then commence growing in the size and the range of benefits they provide. Because of social and political constraints that render difficult substantial reductions or withdrawal of benefits once these are introduced, there does not seem to exist an equilibrating tendency that sets an upper limit to which welfare services may approach but not breach.

Experience demonstrates that rising unrequited transfers tend to encourage the abuse of publicly funded welfare schemes. Consequently, they raise unnecessarily the costs of the social welfare programmes. At the same time, citizens attempt to escape from paying the taxes and user charges that are raised to support such programmes. The end result is generally rising government sector deficits and public debts. The burdens of rising debt could

be reduced through inflation. But rising prices hit the expenditure potential of households with low and fixed incomes.

In many countries, rising or/and high unemployment rates and the intensification of competition in the exchange of goods and services have undermined the faith in domestic economic management which relied on relatively heavy controls on local and international trade. In the past two decades the world has seen a return to economic liberalism. For both individuals and businesses, economic liberalism entails freedom to decide how and where to invest their time and resources and which products and services to offer for sale on what terms. It embraces the right of people and businesses to move freely within national boundaries and to choose where to live and operate. Freedom of action for people and enterprises makes it possible for market initiatives to be taken and responses to be made while these in turn provide the means through which preferences freely chosen and freely exercised can be given effect.

Liberalism implies restricting the powers and functions of governments so as to give full scope for individuals, families and enterprises. Hence one of its leading principles is that of limited government in the economic domain as elsewhere. Governments, however, have a strategic role in drawing up and maintaining a framework in which markets can function effectively, in particular through the definition and enforcement of property rights.

The extension and exercises of economic freedom makes for closer economic integration, both within and across national boundaries. In this sense, liberalism is a means to removing elements of disintegration. (Henderson, 1998; Minford, 1998).

But this movement to liberalism is still potentially fragile. While people do not support full-blooded collectivism, yet they do not necessarily yearn for economic liberalism. They are after a sort of, what may be termed, "do-it-yourself-economics" – often a batch of intuitively persuasive policies often with a distinctly interventionist flavour.

This is the background against which the main ideas of the Economy of Communion model have to be examined. The model accepts the market system, enterprise and profits as important building blocks on which human economic activity is to be structured. At the same time, the model proposes solidarity and unselfish support to all those involved in a transaction and, more

so, to those in need. The objective is to instill a vision where self-help is basic to all people. All insist in carrying out their share of commitment with the aim of being economically independent and in a position of supporting others from their own generated surpluses. In turn, those receiving assistance have the paramount objective to relieve others from supporting them and strive to be of help to others themselves. These ideas are assessed in turn.

4. The role of the Market System, Entrepreneurship, Profits and Ownership in an Economy

Entrepreneurship, the market system, competition and profits are closely interrelated. They represent the networking through which output growth is encouraged in response to consumers' demand and the respective production systems in use both domestically and abroad. The resultant distribution of income reflects the distribution of the ownership of assets.

4.1 The Market System

Economic order rests on the fact that by using prices as signals, people are led to serve the demands and enlist the powers and capacities of other individuals of whom they know nothing. The success of an economic system may be considered as the outcome of an undesigned process, which coordinates the activities of thousands of individuals. The basis of economic development and the generation of wealth is this price or market system informing all, however imperfectly, of the effects of millions of events occurring in the world around us, to which all of us have to adapt ourselves and about which we have no direct information.

The basic function of prices is to inform people what they ought to do in the future in order to adjust themselves to the rest of the economy, local and international. Prices convey the most essential information and they pass it only to those concerned. As a result, the price system ensures that goods are produced in the most efficient and in the least cost way possible.

The market is directed to the production goal in a society. Till now, the attainment of other distributional goals, like the identification of and assistance to the needy, has been achieved outside the market system via the redistribution programmes of a government and by

work carried out by voluntary organisations. And, generally, a distinction is made between the price effect and the income effects of such variables as wages and profits.

If prices are to serve as an effective guide to what people ought to do, then remuneration cannot be made on present or past intentions. Prices should be allowed to change in order to indicate the activities that it will be worthwhile pursuing in the future. The ability to produce those goods that are expected to be in demand in the future is not distributed according to any principles of justice. People are unequally attired to make contributions as demand changes.

Therefore, the best way to achieve both efficiency and increased welfare is to let the market mechanism operate to indicate needs and attract supply. At the same time, enhance the transmission of price signals and provide individuals with the opportunities to adapt themselves, by retraining, while assisting directly those who are in need by means of income and wealth redistribution programmes. In this way an efficiently productive and caring society can be created.

4.2 Enterprise, Competition and Profits

All people are potential entrepreneurs. They are capable of making correct decisions about activities that can yield them financial and non-monetary gains. A correct decision calls for a shrewd assessment of present and future realities within the context of which decision regarding investment can be taken. A correct decision calls for reading the situation correctly. It calls for recognising the true possibilities and for refusing to be deluded into seeing possibilities where none exist. It requires that true possibilities should not be overlooked, but that true limitations are not overlooked either.

As all individuals are capable of exercising the entrepreneurial function, entrepreneurship is not a scarce resource. It is, in a sense, costless in that no incentive is needed to activate entrepreneurial vision. However, entrepreneurial vision is not uniformly and continuously activated to take advantage of all opportunities. Consequently, it is of primary importance for a society's well being to identify those factors that switch on entrepreneurial vision and discovery.

It is therefore necessary to establish an institutional environment

which can be expected to evoke those qualities of entrepreneurial alertness on which the search for efficiency in decision-making necessarily depends. This context may be best met by competition.

Following Hayek, competition may be defined as a procedure which allows the discovery of the various tastes and preferences which individuals in the market order possess and of the various mixes of inputs which will enable these decisions to be met at the lowest possible cost. (Butler, 1983). It is competition that urges producers to seek out and experiment with new ideas of demand and to satisfy the tasks and demands that may not have been recognised by other competitors. The presence of many potential competitors should stimulate an entrepreneur to move quickly and to explore new and untapped markets. Being first in the market place will reward the successful entrepreneur and the profits made will stimulate others to emulate the example.

Profits have a critical role to play in the discovery of new and untapped opportunities. The benefits and rewards for market activity stimulate people to serve the needs of others to the maximum extent possible without actual coercion. Profit is a strong means that induces people to act. Rewards have to exist; it is not possible to make believe 'as if' rewards exist when they do not. Suppliers have to learn through the process of acting competitively what consumers will pay for or what alternative productive methods will work most efficiently.

An enterprise which is insulated from market demand conditions is unable to act 'as if' it will be competitive, and is unable to learn the changing facts of the market which would enable it to serve its customers more efficiently and cheaply.

4.3 Ownership of Assets and Rewards

A capitalist appropriates profits. So does the State under a system of government ownership and administration of the means of production. Both capitalism and socialism claim to represent democracy. But in a sense capitalism and democracy fall on opposite sides of the basic social issue of voluntary contract. Similarly, bureaucrats could aim at maximising their own personal welfare while claiming to maximise social welfare.

The capitalist firm is a particular institution with no clear analogue in political theory. It is as if people in one country (the

shareholders) joined together in a contractual association (the firm) to elect a government (management) to govern the people in another country (the employees). The people in the second country (the employees) agree to another contract: a contract of subjection (the employment contract) to their governors.

A socialist firm is also undemocratic. Even assuming a political democracy, the employees in a government run enterprise are an insignificant portion of the electorate. The firm's managers do not govern the majority of the citizens, even though the citizens are viewed as indirectly selecting the management in the political democratic process.

The democratic firm, where the people managed is the people having the vote to select management, is the self-managed firm. Self-management is not socialism; indeed, it is diametrically opposed to the government ownership and control of industry. The idea behind the self-managed firm is closely related to Christian social doctrine: workers have a right to share in the ownership, management and profits of the enterprise where they work.

Over the past century, Catholic social teaching promulgated the need to integrate the system of "wage earning" (employment contract) with elements of a contract of partnership. Such integration leads on to the affirmation of the necessity, at least in large enterprises, of participation in management and to grounding this necessity on human nature. Recent Church documents refer to the "socialisation of the means of production" implying not a negation of private property but that the means of production should be the common property of those who work - the workers - and those who employ the workers. The Catholic Church thereby refutes the idea of the collectivisation of the means of production. (Skalicky, 1974; Pope John Paul II, 1981; 1987; 1991).

Of course, it is one thing believing in the "socialisation of the means of production" as a matter of principle which should be the guide for social interaction. It is another thing implementing this principle to benefit from tax concessions. Thus, certain employee-ownership plans are set up primarily to capture tax advantages by management uncommitted to providing employees with a substantial equity stake in the company or to really treating employees like co-owners. In this case, ESOP's (Employee Stock Option Plans) and other plans will be little more than a passing fad. In time, some other instrument with better tax breaks will replace those plans.

The commitment shown by firms to an idea will contribute to its enduring success. But so will basic logical behaviour. Thus, self-management enterprises did not achieve the expected success because workers in factories cannot be made interested in placing capital where it is most productive. Once efficiency, that is, the least-cost principle, is pushed aside, the independent survival of the firm is jeopardised. The real test of 'industrial democracy' – even when participation is restricted solely to managing the firm - comes when decisions are to be taken regarding investment and the capital-labour ratios to be operated in order to generate work at minimum costs and at a profit. If investment decisions demand a cutback in the labour force, workers would find it hard to vote themselves out into unemployment!

Under the capitalist system, decisions regarding the combination of capital and hired labour is carried out by management, who need not own the capital themselves. Under a co-operative movement, the workers may decide the amount of capital it pays the 'firm' to hire or purchase. But under a self-managed firm, voting-workers will find it hard deciding for an option involving the discharge of workers. If alternative employment were readily forthcoming, the decision would be relatively easier, from a social point of view. But if employment outlets are not readily forthcoming, efficiency may be sacrificed. Such an enterprise could only keep going if it is subsidised by taxpayers, through state subventions, or by the consumers of other goods produced by firms which contribute to a fund whose purpose is to assist firms in financial difficulties.

Entrepreneurial decisions, particularly those on investment, are taken under conditions of uncertainty. This means that they entail subjective assessments of future developments in demand, technology and factor supply. They are simply highly skilled hunches the only check on which is the end result. They imply risk taking; this quality of enterprise decisions does not make it easy to convert them into collective decision making by voting.

Decisions to increase the capital stock of a company and at the same time retain, if not add to, the number of employees could be successful if efforts pay off in the identification and production of new products into established or new markets. This condition implies that complacency in the competitive world of liberalised trade is ruled out and that workers and management are in a constant search for new profitable outlets.

In sum, prices have an important function to fulfill in an economy. They indicate what people ought to produce and to buy in the future. They condition the production goal in a society. Entrepreneurs operating in a competitive environment are enticed by price signals and by expected profits to be inventive. They strive to meet existing and new demands at efficient costs. Profits are the reward for the correct reading of market situations and for the timely and effective response to them.

There is another consideration beside production that demands constant attention, namely, personal welfare. Such welfare depends on both financial and non-monetary factors. Financial rewards arise from the ownership of one or more inputs used in the production process. Hence the distribution of ownership of inputs will affect income and, in turn, personal welfare.

Various forms of ownership have been introduced under the notion of "socialisation of the means of production". If such instruments were inspired by ethical beliefs, then the probability of endurance and success is greater than if they were applied as tax avoidance vehicles. The Economy of Communion model is one such collective support system that is based on a belief in human solidarity and in an efficient productive system.

5. The Economy of Communion Model: An Evaluation

Several observations may be introduced regarding the merits of the Economy of Communion model with regard to its relevance to real world economies. First, the model combines elements that lead to economic growth, an enhanced social cohesion, and a narrowing of wealth and income differentials. The model gives a wider scope to ethically correct human behaviour by encouraging human activity that is inspired by a culture of giving, of sharing, of communion rather than by the prevailing culture of receiving.

A direct effect of this ideal of communion is the integration of the two distributions of income: the factor income distribution which arises from the reward accruing to the respective inputs, say labour and capital, and the distribution of personal incomes arising from the way in which profits are allotted. An extensive implementation of such a profit allocation system will induce a reconsideration of the tax-welfare payments transfer mechanism associated with the welfare state.

Second, the model is in line with the basic tenets of liberalism on a personal and economic level. The freedoms to choose, to move and to trade are important blocks of the Communion ideal. Since the exercise of these freedoms extends beyond the boundaries of a nation-state, the model absorbs globalisation on economic and political terms in its vision. National boundaries do not hem in the Communion ideal.

Third, the model can live with a capitalist system. This fact is evident not because several hundred firms are living the Communion ideal but also because the main characteristics of a capitalist system of production do not exclude the behaviour inspired by communion. Capitalism will survive if "most individuals" behave in an acquisitive, maximising behaviour. Indeed, those others who may opt for a non-acquisitive approach could induce an identical response from those brought up on acquiring as their sole objective. The Communion model is based on this idea: if people realise that there is fulfillment and happiness in sharing, they will change their acquisitive attitude and reciprocate. It is in this way that the prevailing culture of receiving, thought to be synonymous with capitalism, can be gradually transformed into a culture of communion.

Fourth, entrepreneurs are attracted not only by financial gains but also by non-monetary benefits. One such benefit could be the satisfaction arising from helping others to grow out of their difficulties. The Communion model is consonant with such an idea. What needs to be addressed is the formation of the individual. Training in life-skills formation will assist in this process.

Fifth, the model aims to achieve economic efficiency and the encouragement of personal initiative and self-help. Such objectives are personally rewarding per se. But they can also be part of collective behaviour meant to improve the output and sales of firms or sectors thereby boosting the resources available for distribution for own use and for the undertaking of new initiatives in the interest of others. Such surpluses represent the fund of resources that is applied to support workers in need and new initiatives.

Sixth, the model takes account of the environmental impact that firms and consumers incur in the process of production, distribution and consumption. This consideration reflects the model's preoccupation with sustainable development. The Communion model is people-centred and nature based. Similarly, a sustainable society "communicates its civic order and decision-making,

democratises its political and workplace environments, humanises capital creation and work, and vitalises human need fulfillment ensuring sufficiency in meeting basic needs".(Gladwin, 1999: 4) The principles ruling the Economy of Communion model fit perfectly with such macro-level principles of sustainable development.

Besides, the market and the courts of law can combine to redress the results of certain market failures. Market failures arise from uninformed decisions. Market agents would be deciding on the wrong premise if some costs or benefits arising from their decisions were not considered before a decision is reached. By integrating such costs in the form of compensation, actual or potential, the courts would induce a change in the parameters on which transactors decide. Account will have to be taken of an eventual compensation for accidental harm to third parties either through the purchase of indemnity insurance, or through more attention and investment in carrying out work. In this way costs would change. So do prices, and in turn the value of goods and services produced and consumed. (Delia, 1997)

Finally, the Communion model is solidly derived from basic human values: charity, benevolence and solidarity. It emphasises a holistic development of the human personality implying personal fulfillment and the drive to self-help with the intent of sharing the surplus with others in need. The vision of Communion turns the "I" into a "We" culture where the "We" does not refer to the collusive 'solidarity' of oligopolistic market players or the elusive behaviour of 'free riders' who plan to benefit from the collectively provided public goods (Bruni, 1999). The "We" of the Communion model is a genuine interest in humanity at large and in the people – suppliers, producers, and consumers– who make up the players in the market in which transactions take place. The "we rationality" of the oligopolies or of the calculating participants in games scenarios are primarily motivated by interest in own self. The "we" approach of the Communion model is different. It is not seen as a strategy tool in the process of acquisition-consumption-retention-accumulation. Rather, it is indicative of man's social nature where human happiness depends not only on what one owns and consumes but also on genuine interest in the welfare of others and in participating in the improvement of others' welfare. Happiness is seen to be dependent on more than receiving and consuming; it is dependent also, primarily, on sharing.

6. Conclusion

Economic theorists sought to understand the underlying mechanisms that relate wealth formation, personal satisfactions, and social cohesion and support. Yet, the development of an integrated model of production and income distribution failed to attribute to income distribution a distinct role that reflects the social consciousness of the owners of factor inputs. Economic theory separates the factor incomes from personal incomes and consequently supposes a redistributing force via the government's budget.

The Economy of Communion model proposes one way of bridging this production-income distribution-redistribution-expenditure process by bye passing the redistribution stage exercised by governments and integrates the income transfers with the allocation of profits. The model is based on the search for the least-cost production set up in a market environment where competition on a global scale is operative. Enterprise is encouraged not only on a personal basis, through a culture of self-help, but also through the specific allocation of profits to assist the setting up of new firms.

The ideas of the Communion model are in consonance with the freedoms sought by liberal thinkers. But they are enriched because they emphasise the social nature of man and the close relation between humanity and the natural environment. In this sense, the Communion model tallies with the basic ideas of sustainable economic growth. Humanity has to consider seriously the way in which resources are utilised in the interest of all mankind, at present and in the future, and not solely in the interest of groups inhabiting specific areas.

The Communion model can co-exist with Capitalism. A capitalist system of production is said to require an acquisitive behaviour by most transactors. It does not need all transactors to behave like that. It, therefore, leave space for other motives to induce enterprising action. Indeed, this space is seen by the Communion model as a sound base from which to disseminate the Communion ideal. Once people realise that personal welfare is not solely dependent on acquisition and consumption, but could be even better satisfied through comprehension, collaboration and sharing then the number of practitioners who believe in the Communion model of living will increase. Wealth generation could become even more meaningful

and sustainable if the personal interest of 'others' is taken into account. Applied in a global context, such a view surpasses the idea of nation states, ethnic groups and social classes. It also influences the way in which solutions to regional and world issues are sought and implemented.

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LE CONCEPT DE CITOYENNETÉ DANS UN CONTEXTE ARABO-ISLAMIQUE

CHOKRI MEMNI

In an Arab context, can we talk about citizenship culturally rooted in ideas and practices? How can we situate this citizenship in the world wide democratization process? What are the factors that help construct a citizenship spirit in an Arab context? And what challenges should be faced to advance this process? In this article, possible answers to the four questions asked above will be presented.

Peut-on dans un contexte arabe parler d'une citoyenneté culturellement enracinée dans les pratiques et les idées? Comment situer cette citoyenneté par rapport au processus mondial de démocratisation? Quels sont les facteurs qui participent à la construction d'un esprit de citoyenneté dans le contexte arabe? Quels sont les défis à soulever pour faire avancer ce processus? Nous allons fournir dans cet article des éléments de réponses aux quatre questions posées.

1. Introduction

L'usage des termes citoyen et citoyenneté est relativement récent dans le monde arabe. Il apparaît au 20ème siècle pour être employé d'une façon plus accentuée avec la prise du pouvoir des États nationaux modernes. Éventuellement, comme construction sociale le concept de citoyenneté exige au minimum la présence d'une communauté politique dont le citoyen est membre à part entière.

Historiquement, on ne peut parler de citoyenneté qu'à partir du moment où l'individu appartenant à une communauté politique devient un sujet de droits et qu'il cesse d'être soumis au pouvoir absolu du souverain. Bien sûr, l'histoire ne connaît pas des grandes idées de changement brusque survenant du jour au lendemain. L'évolution des constructions sociales est éventuellement un processus d'adaptation à des contextes en évolution permanente. Elle dépend à la fois du contexte historique par rapport auquel se

positionnent les acteurs sociaux et du système de valeurs soutenues par les membres de la communauté politique elle-même. Nous défendons la thèse d'une citoyenneté en construction dans le monde arabe propre à chaque communauté politique arabe.

Quatre conditions importantes pourraient aider à cette construction:

- un système de valeurs qui n'est pas hostile aux valeurs humaines de la citoyenneté (participation, égalité et responsabilité);
- un processus d'institutionnalisation qui met en rapport l'État et le citoyen;
- une société civile en développement qui fait accentuer la demande de participation et crée une dynamique de mouvements des citoyens;
- un contexte mondial de démocratisation et de la défense des droits de l'Homme et du Citoyen.

2. Les origines culturelles et religieuses de l'esprit de citoyenneté dans le monde arabe

2.1 La citoyenneté à l'égard de l'Islam

Le principe de l'égalité des individus et des peuples devant Dieu était l'un des principes de la première cité musulmane (Médine). Tous les peuples et les individus convertis à l'Islam ont le droit d'acquérir des statuts égaux. L'Islam est reconnu comme un mouvement de lutte contre les inégalités sociales (entre seigneurs et esclaves, ou entre les tribus) et ethniques; grâce à sa vocation égalitaire il a pu se propager rapidement et obtenir des succès importants.

Le principe d'une convivialité égalitaire était bien soutenu particulièrement dans les anciennes cités musulmanes.

Dans les versets du Coran et dans la "*Sunna*",[1] l'Islam insiste sur les valeurs de la cité et de la vie communautaire. "*El mouamalette*" correspond à peu près au droit public dans la législation grecque ou celle des Romains. Le rôle joué par les

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[1] La conduite et les paroles du prophète MOHAMED.

"Oulamas", la catégorie des savants, est aux yeux de l'historien Khalidi (1992: 25-30) fort important pour comprendre l'existence d'une marge de liberté entre la loi divine et la loi politique faite par l'Homme. Pour confirmer cette thèse, Khalidi (1992) cite plusieurs exemples de cités et de communautés politiques musulmanes "la Koufa; Médine; la khilafa des fatimides". Pour discuter les thèses qui bloquent la culture politique dans des principes religieux fermes, Khalidi (1992) se refère aux anciennes écritures d'Ibn Mokaffâ, de Ghazali, de Abdel Hamid al-Kateb et de Tartouchi et d'Ibn Khaldoun:

> *"Al-Ghazali, however, is merely one representative of a large body of Islamic governmental literature, which began with such early figures as Ibn al-Muqaffa and Abd al-Hamid al-Katib, both of whom were state secretaries of the Umayyads of the eighth century, and continues with such classics as the Siyaset-Nameh of Nizam al-Mulk, Siraj al-Muluk of al-Turtushi and culmunates in the Muqaddimah of Ibn Khaldoun, for all these thinkers, Kingship is a special Kind of art; to master this art, certain basic rules have be maintained, rules about the balance of power, rules about taxation, rules about social harmony, rules of war, rules of diplomacy, rules of administration, rules of bureaucratic routine. These skills are often mastered by the ruler not through the study of religious texts but, like Machiavelli, through the study of history or, even more accurately, the study of comparative history: Arab, Persian, Indian." (Tarif Khalidi; 1992: 29).*

A notre avis, les valeurs de citoyenneté ne résident pas seulement dans cette marge rationnelle dont parle Khalidi (1992). Au moins deux principes religieux, qui sont l'égalité et la justice, ne font qu'appuyer les valeurs de citoyenneté dans le sens actuel du terme. Notre étude ne permet pas d'étayer un grand nombre de valeurs qui constituent ensemble l'éthique de la cité musulmane. A ce propos, il sera intéressant de reconnaître l'égalité, le respect de l'autre, la propreté et l'entretien de l'espace public, la tolérance et la paix comme les valeurs principales de la vie communautaire en Islam.

L'aspect moral de la religion Islamique permet de construire une base de valeurs religieuses et de principes rationnels propres à la civilisation arabo-musulmane et qui reste toujours favorable à la

mise en oeuvre d'une éthique civique. Il faut préciser qu'il s'agit de principes moraux et d'un système de valeurs, et non d'un modèle d'institutions toutes faites.

Le processus de la citoyenneté politique moderne a démarré à l'époque des nouvelles organisations appelées "Tandhimat"[2] et avec le mouvement réformiste du 19ème siècle dirigé par des personnes religieuses, mais ce mouvement était encore jugulé par la colonisation. Au cours du mouvement de libération, la même catégorie va pousser encore plus loin le processus de la citoyenneté en construction.

Badie (1992) attire notre attention sur le fait qu'*Ibn Badis*, le fondateur de l'association des "*Ulama* " en Algérie (1931), fait une nette distinction entre une nationalité culturelle et une nationalité politique. Badie (1992) dit:

> *"Le shey distinguait en effet une nationalité culturelle et une nationalité politique, la première s'alimente de ressources culturelles dérivant de la langue et de la religion et se trouve naturellement exprimée par le corps des Ulama; la seconde renvoie à l'articulation des droits et des devoirs de citoyenneté, mais n'admet aucune action politique autonome qui risquerait de reconstituer le jeu partisan, comme le firent précisément Messali Hadj ou Ferhat Abbas." (Badie, 1992: 170).*

Tous ces arguments historiques et religieux semblent suffisants pour confirmer que le monde arabo-Islamique n'est pas hostile aux valeurs démocratiques de la citoyenneté. La religion Islamique et l'histoire du monde arabe donnent un avantage en faveur d'une citoyenneté en construction. Nous confirmons cette thèse au fur et à mesure que nous avancons dans notre recherche.

Après avoir examiné brièvement les valeurs Islamiques qui peuvent favoriser la construction d'une citoyenneté moderne, examinons maintenant l'étymologie du terme citoyen.

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[2] Cela concerne les réformes des organisations politiques surtout à partir du 19ème siècle, avec l'exemple de Mohamed Ali (1769-1849), vice-roi d'Egypte, et de Khaïriddine Bacha(1822-1889), en Tunisie.

2.2 L'étymologie des mots patrie et citoyen en langue arabe

Avant d'examiner la problématique de la citoyenneté dans le contexte arabe actuel, nous faisons une brève présentation étymologique du terme. Pour la langue arabe, la patrie, "El Waten" est accordée à un verbe, "Watana", qui désigne l'action de choisir un lieu et de s'installer dans un territoire quelconque. Le citoyen, "Mouatten", désigne celui qui s'installe définitivement ou pour longtemps sur le territoire. Les deux mots, patrie et citoyen, ne sont pas synonymes, même s'ils partagent en langue arabe le même radical. La différence qui les sépare nous renseigne sur deux modes de vie différents et sur le passage historique de la transhumance à la vie sédentaire.

L'étymologie de ces mots nous renvoie à la vie des anciennes tribus arabes. Le modèle tribal privilégie les relations consanguines; il valorise la mémoire collective et le culte des ancêtres. Le territoire ne représentait pas un symbole d'appartenance ethnique ou politique, puisqu'il était illimité et provisoire. De ce fait, l'esprit communautaire religieux se débarrassait des frontières territoriales pour se transformer en une communauté universelle humaine, au-delà des différences ethniques et religieuses.

L'aspect universaliste est bien explicite dans la définition du nouveau dictionnaire Larousse en langue arabe (1989); il est dû à l'absence de l'Etat territorial et au statut à la fois humain et religieux accordé aux individus. Tous les individus sont des êtres humains qui ont un statut égalitaire face à un seul Dieu.

Si la citoyenneté gréco-romaine était liée à la cité et au territoire, celle de la conception arabe est fortement attachée à la convivialité, au voisinage et au respect de la morale religieuse. L'évolution des institutions politiques et des modes de production ont favorisé une stabilité de plus en plus assurée pour une importante part de la population. Le patriotisme du mouvement national et l'instauration des nouveaux Etats ont résolu le problème du territoire, pour faire avancer le processus de l'institutionnalisation et celui de la citoyenneté.

3. L'esprit de citoyenneté et l'instauration des États nouveaux

Touraine (1994) insiste sur le fait que la citoyenneté ne peut pas exister sans Etat, sans système de droits ni conscience politique. Badie (1986) distingue quatre caractéristiques qui fondent l'Etat:

- la dimension territoriale;
- l'idée d'institutionnalisation;
- l'idée d'universalisation;
- l'idée d'intérêt général.

L'avènement des nouveaux Etats doit normalement assurer les deux premières caractéristiques qui manquent dans un régime tribal; chose qui n'est pas encore évidente aux yeux de Badie (1986):

> *"La notion d'Etat se trouve ainsi remise en cause dans sa dimension territoriale dès lors qu'on applique au monde musulman. Il en va de même des autres caractéristiques qui le fondent de manière classique" (Badie, 1986: 126).*

Badie (1986) réfute l'idée d'une modernité universelle; il essaye de démontrer que le monde arabe et musulman reste à l'écart des idées de modernité, de rationalité, et ne présente pas les conditions socialement nécessaires pour construire l'État et la démocratie au sens occidental des termes. Pour lui l'expérience occidentale est unique et ne peut se répéter dans le monde musulman.

Il est vrai que chaque expérience est singulière, mais on a l'impression que l'auteur passe sous silence qu'à l'intérieur de ce monde existent des acteurs capables de construire une modernité en accord avec les valeurs communautaires et sans qu'elles soient nécessairement similaires à ce qui existe en occident. En fait, Badie (1992) témoigne de l'effort des intellectuels religieux arabes qui ont revendiqué une citoyenneté moderne (voir la citation de Badie, 1992, à la page 3).

Même si le concept de citoyenneté semble plus occidental qu'arabe, les valeurs démocratiques et les principes d'égalité et de justice qui sont à la base de ce concept ne sont pas écartés du monde arabe et Islamique. Il existe aussi des acteurs sociaux qui les soutiennent, comme le signale Khader (1997). De plus, des valeurs comme l'égalité et la justice ne sont pas étrangères à la culture arabe et leur usage est très courant dans la littérature arabe classique.[3] Si ces deux valeurs ont été bafouées à certaines époques,

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[3] Nous pensons spécialement aux anciens textes d'Ibn Khaldoun, et des auteurs du mouvement réformiste libéral du 19ème siècle. Nous revenons sur cette question dans notre analyse du texte du pacte de sécurité de 1857.

comme partout dans le monde, plusieurs chercheurs spécialistes du monde arabe avouent que ce dernier n'est pas hostile aux valeurs démocratiques d'aujourd'hui (Arkoun, 1986; Khalidi, 1992; Leca, 1994: 35-94; Salamé, 1994; Tamimi, 1997

Nous écartons donc l'hypothèse d'une vraie citoyenneté prototype occidentale inaccessible aux arabes et aux musulmans. Nous pensons que, d'une part, ce concept est fortement attaché à un contexte précis situé dans le temps et dans l'espace, et que, d'autre part, la citoyenneté ne dépend pas exclusivement d'une communauté culturelle; elle concerne une communauté politique où plusieurs groupes ethniques et religieux peuvent vivre ensemble.

Dans le monde arabe comme ailleurs, la question de la citoyenneté se situe par rapport, d'une part, à un niveau d'institutionnalisation politique, et, d'autre part, aux valeurs soutenues par la communauté et mobilisées par des acteurs sociaux. Si l'enjeu actuel de la citoyenneté européenne est de sauver ou sauvegarder la démocratie, dans le monde arabe la situation est plus délicate, car en plus de la question nationale qui n'est pas résolue, le grand enjeu pour instaurer et pour avancer sur la voie de la citoyenneté reste encore un enjeu d'adaptation à un système de valeurs démocratiques.

Il nous semble que les écrits récents sur la citoyenneté arabe s'alignent sur le courant du nouveau nationalisme soutenu par Touraine (1992; 1997); ils sont très intéressants pour résoudre la question nationale et celle de la problématique de la démocratie qui sont nécessairement imbriquées l'une dans l'autre. Ce courant combine le sens communautaire de la nation et les valeurs démocratiques assurées par une citoyenneté démocratique dans le sens que propose Touraine (1994).

4. La problématique de la citoyenneté dans le monde arabe s'accorde avec le courant du nouveau nationalisme

Aux yeux de plusieurs intellectuels arabes, les valeurs démocratiques associées à la citoyenneté ne sont pas du tout en contradiction avec les sentiments nationaux. Pour le courant nationaliste arabe (Allouche, 1985; Bouni, 1987; Chakir, 1991), comme pour d'autres (Saef, 1985; Azzi, 1987), la citoyenneté est conçue comme une nécessité et comme un élément indispensable à la construction nationale.

Dans un projet d'une société arabe unie et égalitaire, Bouni (1987), et Chakir (1991) lancent l'idée d'une égalité basée sur le statut de la citoyenneté au sens juridique et social.

Pour El-Bouni (1987) la citoyenneté assure l'égalité sociale et la justice:

> *"L'Etat de l'union est l'Etat de l'égalité face aux devoirs et aux droits; il est fondé sur une égalité de citoyenneté" (El Bouni, 1987: 81).*

Chakir (1991) utilise le concept de Civisme pour démontrer les limites d'une citoyenneté dictée par l'Etat dans son rapport juridique avec le citoyen. Pour lui, l'identité nationale et l'organisation démocratique vont construire ensemble l'union nationale. Chakir (1991) utilise le concept de citoyenneté dans le sens d'une rupture avec la soumission des individus à l'Etat afin d'instaurer un nouveau régime démocratique.

Nous situons avec Azzi (1987) le concept de citoyenneté dans le cadre d'un processus historique de démocratisation. Azzi (1987) s'inspire des travaux de Touraine (1980) et de Badie (1984). Pour eux, il est nécessaire de situer la citoyenneté dans un processus historique de démocratisation associé au développement de l'Etat et en interaction avec les acteurs de la société civile. Contrairement à Touraine, Badie (1992) garde toujours une conception individuelle et étatique de la citoyenneté même quand il situe la citoyenneté par rapport au concept de la société civile:

> *"La construction historique de ce concept a souvent été discutée et repose sur au moins trois principes discriminants: la différenciation des espaces sociaux privés par rapport à l'espace politique; l'individualisation des rapports sociaux qui confère ainsi à l'allègeance citoyenne une valeur prioritaire; l'horizontalité des rapports à l'intérieur de la société qui fait préférer la logique associative à la structuration communautaire et qui, à ce titre, marginalise les identifications particularistes au profit de l'identification stato-nationales". (Badie, 1992: 116)*

En fait Badie (1992) ne parle que de l'allégeance citoyenne comme principe du modèle étatique universalisé:

> *"Almond et Verba définissaient par exemple les contours d'une culture civique assurant à l'allégeance citoyenne le maximum*

d'accomplissement et leur permettant de classer les différentes sociétés sur une échelle de performances en haut de laquelle figurait la Grande-Bretagne et tout en bas le Mexique." (Ibid, 73)

Nous refusons d'assimiler la citoyenneté à l'allégeance citoyenne, comme nous refusons de convertir la nation en Etat. La position critique que détiennent les défenseurs de la nouvelle citoyenneté rompt avec les formes autoritaires de l'allégeance citoyenne. De ce fait, la citoyenneté moderne rejoint une mouvance d'une nouvelle culture démocratique en construction.

Il en résulte que dans des communautés politiques gérées par l'Etat-Nation, la citoyenneté se pose comme mode de régulation et comme mécanisme de cohésion sociale face aux crises d'identité, de légitimité, souvent liées à l'implantation des Etats jeunes. Comme le signalent Badie (1986) et Azzi (1987) l'instauration des Etats-Nations ne se passe jamais sans risques, sans crises d'identité nationale, de légitimité politique et du partage égalitaire des ressources matérielles ou symboliques. Dans son étude de la crise des Etats arabes, Sâad Eddine Ibrahim (1984) distingue trois questions fondamentales auxquelles les États sont confrontés: l'identité, la légitimité du pouvoir politique et l'égalité.

A notre avis, l'esprit de citoyenneté peut répondre à la complexité de la crise des Etats et des sociétés arabes. On se demande si une citoyenneté responsable et participative peut ressouder les sentiments nationaux et si elle peut garantir l'union nationale basée sur un contrat national valorisé. Cette citoyenneté consolide-t-elle les sources de légitimité politique dans le sens que définit Sâad Eddine Ibrahim (1984) et permet-elle de surmonter la crise des ressources classiques souvent épuisées? Les nouveaux Etats se trouvent-ils obligés, face à l'ascension de la société civile, de renoncer à leur monopole total de l'espace social et des pouvoirs pour admettre enfin la participation de tous les membres de la société civile et le respect mutuel du contrat national? Un nouveau nationalisme socio-politique va-t-il se substituer à l'ancien nationalisme étatique ou ethnico-culturel? S'agit-il d'une nouvelle identité qui se dessine aux horizons d'un processus historique de démocratisation?

Bien sûr, nous ne pouvons pas trouver de réponses tranchées car le processus historique est en cours et personne ne peut prévoir avec

certitude l'avenir. Nous posons ces questions pour aider notre lecteur à comprendre le débat actuel du monde arabe sur la problématique de la démocratie dans lequel s'inscrit le concept de citoyenneté.

Il nous paraît clair qu'un groupe d'intellectuels arabes s'aligne sur le courant occidental du nouveau nationalisme et contribue positivement à la résolution de la crise d'identité nationale et de la citoyenneté.

5. La citoyenneté face à la problématique de la démocratisation en monde arabe

5.1 L'idée de la démocratie avant la relance du processus mondial de démocratisation

Avant même la chute du mur de Berlin, plusieurs de nos intellectuels arabes contemporains, qui viennent de différents horizons disciplinaires et de différents pays, se sont penchés sur la question de la démocratie en monde arabe.

Nous admettons, avec Touraine (1994), que la citoyenneté démocratique s'emboîte dans un concept plus étendu et plus global de démocratie. Touraine (1994) distingue trois dimensions pour construire une démocratie: le respect des droits fondamentaux, la citoyenneté et la représentativité des dirigeants. Pour reprendre ses expressions, c'est l'interdépendance de ces trois dimensions qui constitue la démocratie. Donc, le concept de démocratie est fondamental pour étudier le processus de démocratisation qui ne peut, à notre avis, réussir que par la promotion d'une culture démocratique. Voyons dans ce sens l'apport de nos intellectuels arabes.

Saef (1985) a déjà distingué trois tendances différentes face à la question de démocratie:

- une tendance libérale qui a adopté sans réserves le modèle politique et administratif occidental et qui a donné naissance à la plus grande part des mouvements constitutionnels arabes;
- une tendance réformiste classique qui tient à sauvegarder l'héritage Islamique et à défendre la démocratie, tout en s'appuyant sur l'Islam;

– une tendance progressiste, plus récente, qui revendique un État rationnel et une nouvelle légitimité politique basée sur des principes wébériens (le respect des droits politiques; l'application de la constitution; la régularité des élections..,etc.)

Pour illustrer cette catégorisation, Saef (1985) s'est appuyé sur l'exemple marocain; il présente trois types d'intellectuels : Wazani, qui représente la tendance libérale, Allel El-Fassi, la tendance réformiste classique, et Mehdi Ben Barka, la tendance progressiste.

Sans mener une discussion sur la pertinence de la catégorisation que nous propose Saef, il semble clair que la pensée démocratique tient ses origines du mouvement national de l'indépendance et des contributions des réformistes arabes, à la fin du 19ème siècle. Dans les dernières années, cette question de la démocratie n'a cessé de gagner du terrain, pour occuper une position centrale à l'heure actuelle.

Pour expliquer le statut secondaire attribué à la démocratie dans le monde arabe, Néji Allouch (1985) a survolé rapidement les expériences politiques menées dans le monde arabe à partir du 19ème siècle. Pour lui, tous les mouvements sociaux et politiques ont été incapables d'instaurer une démocratie, y compris l'expérience Nassérienne et les mouvements constitutionnels libéraux. Néji Allouche (1985) développe une stratégie révolutionnaire pour instaurer la démocratie basée sur deux points: la constitution et l'action politique et sociale. Cette stratégie vise un idéal humain arabe qu'il reste à construire. Il s'agit de l'homme citoyen:

> *"Chez nous et dans le tiers monde en général, l'Homme est encore un non-citoyen; son statut est inférieur à un sujet de pouvoir "raïa". C'est pour cette raison que nous aurons besoin de tout le patrimoine humain pour aller dans le sens de la citoyenneté." (Allouche,1985: 45).*

Dans sa proposition Néji Allouche (1985) présente les droits du citoyen comme fondement de base pour la constitution. La citoyenneté se présente comme la clef de voûte pour la démocratie arabe. Salah Abdel Majid (1985) situe le problème de la démocratie au niveau de l'application et non de la constitution. Pour lui les droits de l'Homme et du citoyen sont présents dans une grande part des constitutions, mais les deux principales entraves qui empêchent

l'accès à la citoyenneté sont: l'ignorance et la distribution non équitable de la richesse.

5.2 Démocratie et processus mondial de démocratisation

Le débat sur la démocratie connaît son grand essor après la chute du mur de Berlin. L'opposition entre ceux qui revendiquent la démocratie et ceux qui la combattent devient plus intense. Deux nouveaux courants s'opposent actuellement face à la problématique de la démocratisation: le premier postule une thèse culturaliste et défend l'idée d'un "exceptionnisme" arabe ou Islamique face au processus mondial de démocratisation; un second courant récuse le postulat culturaliste et mobilise la recherche multidisciplinaire pour favoriser le processus démocratique dans le monde arabe. Comme le signale Salamé (1994):

> *"..la vague de démocratisation commencée en Europe du Sud, poursuivie en Amérique latine et en Europe de l'Est, n'a pas laissé insensibles les intellectuels de la région." (Salamé; 1994: 28)*

Face à ce processus mondial de démocratisation, Salamé (1994), Leca (1994), Al-Azmeh (1994) et d'autres, soutiennent une thèse optimiste quant à la mobilisation démocratique dans le monde arabe. Pour eux la démocratie est une nécessité dans un monde où les pays arabes ne sont pas l'exception:

> *"Exceptionnelle ou non, la démocratie pourrait émerger comme fruit de la nécessité plutôt que du hasard, fille des contraintes plutôt que des programmes" (Salamé; 1994:8)*

Pour le monde arabe, la question démocratique dépasse les limites des idéologies véhiculées d'inspiration libérale, nationaliste ou marxiste; elle prend actuellement une ampleur historique plus importante (Ghalioun; 1992; 1994) et met en confrontation deux tendances opposées: un culturalisme résistant, et un universalisme récent qui prend son nouvel essor avec la mondialisation des droits de l'Homme et du citoyen, et avec le nouveau processus de démocratisation politique.

Pour Ramez Anbatawi (1994) comme pour Saïd Zidani (1994) les droits de l'Homme et la démocratie politique sont inséparables, car la question des droits politiques et civils du citoyen est à la base

du processus démocratique. Il est nécessaire de préciser quelle démocratie les intellectuels arabes revendiquent aujourd'hui.

5.3 Quel projet de démocratie?

Le projet démocratique arabe nécessite davantage de clarté et d'opérationnalisation. De même, la notion de démocratie nécessite, quant à elle, davantage de précision et d'adéquation avec le contexte arabe actuel. Entre intellectuels arabes le minimum de démocratie souhaité n'est pas toujours le même et les conditions nécessaires pour instaurer la démocratie ne sont pas toujours identiques. De même, la conception démocratique varie d'un groupe à l'autre. Pour les moins exigeants (Salamé, 1994; El Azmeh, 1994) une démocratie représentative devrait être "le bien commun de l'humanité". Salamé identifie le seuil minimal de cette démocratie comme suit:

> *"Comme en premier lieu "un arrangement institutionnel" qui permet de garantir la participation des citoyens au choix de leurs dirigeants par la voie électorale, ou qui modère le pouvoir par des actes de troc et de marchandage entre forces rivales, elles-mêmes peu démocratiques" (Salamé;1994:9)*

Cette revendication se contente même au départ "d'une démocratie sans démocrates". Mohamed Jaber El-Ansari (1996) fixe quatre conditions primaires pour instaurer une démocratie arabe:

- accepter la présence d'une opposition politique;
- instaurer le principe de l'alternance au pouvoir;
- faire participer la majorité à la prise de décision politique;
- respecter les règles du jeu démocratique et éviter la violence.

Dans les deux cas précédents la démocratie recherchée se limite au volet politique et n'exige au départ aucune préparation de terrain en ce qui concerne les valeurs démocratiques de base, c'est-à-dire le droit à la participation, le droit à la différence, l'égalité et le respect mutuel. Jeorges Jackman (1994) est plus exigeant, il revendique une démocratie politique, institutionnelle et sociale qui garantisse à la fois les droits de l'Homme et de citoyen, l'égalité sociale, l'autonomie du peuple arabe et l'authenticité du modèle démocratique. Samir Amin, dans son livre "la crise de la société arabe", va aussi dans le même sens. Pour lui une démocratie est à la fois sociale et politique, mais il réfute la thèse d'un modèle

démocratique typiquement arabe. Jebâi (1988) présente une définition exhaustive de la démocratie définie en dix points. Il (1988) dégage plusieurs traits qui relèvent de la démocratie: l'égalité, la raison, la vie civique, la liberté, l'humanisme, l'individu, l'unité de la société autour des valeurs démocratiques,..etc.

Comme nous le voyons, les projets des intellectuels arabes se penchent sur des idéaux et des références idéologiques différents. Certains demandent un minimum pour activer le processus démocratique, d'autres exigent des idéaux attrayants mais dont la chance d'être appliqués à notre époque semble quasiment nulle. Pour être plus pratique il faut d'abord revenir aux questions posées par Nadim El-Bitar (1985): Quelles sont les forces qui portent intérêt aux libertés et aux droits démocratiques? Quelles seront les situations réalisables en fait?

Nous pensons que la faisabilité du projet démocratique est fonction de l'écart entre une situation réelle de départ et une situation souhaitée projetée dans l'avenir proche. Une analyse de l'écart entre les deux situations est quasiment nécessaire pour construire un projet démocratique.

Il est alors nécessaire d'identifier et d'analyser les ressources humaines et les moyens matériels qui peuvent être mobilisés pour construire le projet démocratique. En contre partie, il faut identifier les difficultés levables et non-levables face à la réalisation du projet démocratique. Les publications les plus récentes mettent l'accent sur les ressources et les entraves du processus démocratique (Khader, 1997; Belkaziz, 1997).

Jusqu'aujourd'hui le débat sur la démocratie souhaitée se poursuit. Non seulement les stratégies d'application sont divergeantes, mais encore les essais dans ce sens nécessitent davantage de précision, d'opérationnalisation et d'approfondissement. Nous parlons bien sûr de ceux qui prônent la démocratisation du monde arabe. Est-ce suffisant de faire des études prospectives pour justifier notre optimisme en énumérant les facteurs économiques ou démographiques qui favorisent le processus démocratique (Fargue; Luciani; Owen in Salamé, 1994)? Peut-on se contenter de réfuter les arguments culturalistes et contrer les tendances pessimistes? S'agit-il de dissiper les soupçons des intellectuels face à la réalité du processus mondial de démocratisation? Est-il possible de s'appuyer sur les organismes financiers internationaux, les forces politiques étrangères et les

associations multinationales pour instaurer un modèle de démocratie? Si cette possibilité est offerte, comment faire pour créer une volonté de démocratisation et impliquer les différents acteurs internes: citoyens, société civile, société politique, et Etat? Quelles sont les principales sources étrangères de démocratisation? A qui s'adressent-elles et au profit de qui vont ces ressources? Quelle position tiennent les Etats dans ce processus mondial de démocratisation? Quelles sont les acquisitions historiques qu'elles soient institutionnelles ou culturelles, qui peuvent présenter un point de départ pour relancer le processus démocratique?

Il est vrai que la question de la démocratie en monde arabe remonte au 19ème siècle, mais le vrai débat sur la démocratie ne fait que commencer et nous espérons qu'il ne fera que s'élargir de plus en plus pour concerner la majorité écrasante des citoyens, les membres actifs de la société civile, ceux de la société politique, mais aussi les Etats et les partis au pouvoir.

Nous croyons que la réfutation des postulats culturalistes est essentielle aujourd'hui. Plusieurs intellectuels s'engagent sur cette voie (Khader, 1997; Salamé 1994; Azmeh 1994) et récusent l'idée d'un exceptionnalisme religieux ou culturel face au processus historique de démocratisation. Le combat contre les thèses culturalistes est un combat contre les forces antidémocratiques. Cette réfutation des thèses culturalistes pourrait, à notre avis, être plus efficace si elle était associée à une analyse des difficultés et des entraves de la relance démocratique. Existe-t-il des moyens pour transformer certains éléments contraignants en des ressources réelles pour promouvoir la démocratie?

En fait, l'idée d'un exceptionnalisme arabe et Islamique est basée sur de faux arguments historiques et sur une vision statique fondamentaliste de la culture arabo-Islamique. Cette vision ne fait que fabriquer des contraintes imaginaires et transformer certaines contraintes levables en des handicaps historiques insurmontables. Cette résistance à la démocratisation ne fait que bouleverser les petits esprits par des expressions folkloriques "la vérité absolue des identités culturelles", "la culture partisane", "la culture Islamique", "la culture politique", "mentalité arabe et structures socials", ..etc. Charabi (1988) met à la disposition des courants antidémocratiques des éléments théoriques pour défendre l'idée d'un exceptionnalisme historique arabe. Son modèle exclusif du néo-patriarche qui s'étend sur toutes les relations humaines dans la société arabe, de la famille

à l'Etat, lui a servi pour exiger une séparation artificielle entre "une société arabe" et "une société occidentale", tout en mettant le monde arabe et musulman "dans une seule boîte".

Antoun (1989) va dans le même sens, en disant que le pluralisme politique est culturellement étranger à la société arabe, qui ne peut que suivre la ligne populiste de la politique partisane. Nous ne savons pas de quelle culture parlent les deux hommes, si ce n'est de leurs idées personnelles dictatoriales. Les culturalistes mettent à la disposition des forces antidémocratiques de faux arguments pour empêcher la propagation des idées démocratiques et pour contrecarrer le triomphe de la démocratisation.

Bien que nous adoptons, avec Khader (1997), Salamé (1994), Leca (1994), et d'autres, une position critique face à un culturalisme ni scientifique ni historique, nous ne discuterons pas en détail les thèses culturalistes. Plusieurs chercheurs se sont déjà engagés à le faire et mènent des discussions théoriques dans ce sens. Notre façon de contrer cette thèse culturaliste est d'étudier le cas tunisien comme un contre-exemple. Nous confirmons que le monde arabe n'a jamais été un monde clos, détaché des civilisations humaines, et que les idées démocratiques ne représentent pas un corps étranger à l'identité arabe et Islamique. En nous basant sur le cas de la Tunisie, nous défendons l'idée que l'esprit de citoyenneté y est en construction permanente, et ce depuis le mouvement réformiste du 19ème siècle jusqu'à l'époque actuelle.

Nous croyons que pour construire un projet démocratique arabe, il faut tout d'abord multiplier les études de cas par pays dans une perspective d'interdisciplinarité, pour couvrir une réalité multidimensionnelle et très complexe. La pluridisciplinarité et les études empiriques et spécifiques par région et par pays sont devenues une nécessité pour constituer une vision globale, discerner le spécifique du général et le réalisable de l'idéal.

Dans sa critique du courant réformiste du 19ème siècle Ali Oumlil (1985) reproche à ce courant de ne pas avoir une vue globale de la réforme et de se limiter à la dimension politique. Cette visée globale multidimensionnelle de la réalité ne doit pas manquer dans l'élaboration du projet démocratique. Le danger de restreindre le projet démocratique à l'activité politique ne peut que reproduire la crise et amener les pays arabes vers l'impasse. Bref, l'interdépendance des facteurs politiques, économiques, culturels, sociaux, démographiques et historiques face au processus de

démocratisation appelle tous les spécialistes à y contribuer positivement, à l'exemple du travail multidisciplinaire édité par Salamé (1994).

La multidisciplinarité dont il est question doit aider à surmonter le clivage entre les tendances séparatistes et les tendances globales, qui ne font que déclencher des querelles idéologiques fortuites. La stratégie commune est nécessaire pour collaborer entre pays arabes, mais elle reste insuffisante et détachée de la réalité si elle ne s'appuie pas sur des études spécifiques par pays et par région. Tous les spécialistes des régions arabes sont aujourd'hui d'accord sur la nécessité des travaux de spécification par cas et par pays. Des modèles de développement comme ceux de la démocratisation ne peuvent être que spécifiques, même s'ils adoptaient la même stratégie et défendaient les mêmes principes. L'accès progressif à une démocratie de plus en plus participative trouve ses racines dans les situations réelles de chaque pays présentant à l'heure actuelle des potentialités humaines matérielles et institutionnelles plus ou moins différenciées.

Nous savons que chaque pays représente, à part, une communauté politique qui a son Etat, son système politique, sa constitution (à l'exception de l'Arabie Saoudite), son histoire propre de mouvement national, un type de légitimité et de compromis entre société et Etat. Bref, à chaque pays correspond un modèle de développement et une citoyenneté en construction.

Cela implique que les potentialités et les entraves face aux processus démocratiques soient différenciées. Le degré d'ouverture sur l'occident et le pouvoir des défenseurs de la démocratie libérale diffèrent d'un pays à un autre. Les démocraties fragiles, implantées ça et là, n'ont pas les mêmes garanties pour se développer et pour ne pas être secouées face à la régression et aux coups des forces antidémocratiques. L'aspect différentiel des facteurs endogènes et exogènes entre les pays arabes existe, également car ces facteurs n'ont pas toujours ni la même importance, ni le même effet sur la démocratisation locale.

Il en résulte qu'actuellement, le seuil minimal de démocratie ne puisse évidemment être le même pour tous les pays arabes. Certains sont plus avantageux que d'autres. Nous espérons trouver des séries d'études comparatives faites dans ce sens, car elles sont nécessaires pour pousser la recherche sur la démocratisation arabe. Il est vrai que les études comparatives menées par Hermassi (1975; 1984; 1985; 1986; 1994); Perthes (1994) et Owen (1994) viennent combler

certaines lacunes mais elles devront être organisées dans un champ d'études scientifiques, pour couvrir un processus de démocratisation fortement complexe et en mobilité continue.

Belkaziz (1997) utilise le concept du passage démocratique comme une nouvelle alternative pour dépasser la crise. Le passage démocratique est un mécanisme interne de démocratisation lié à de multiples facteurs. Belkhaziz (1997) cite quatre facteurs importants:

(1) l'échec politique de la dictature,
(2) la menace des guerres civiles,
(3) la pression internationale,
(4) le développement d'une nouvelle culture politique démocratique.

Pour lui la question principale est de transformer la légitimité classique du pouvoir politique en légitimité démocratique et constitutionnelle. Belkaziz (1997) a le mérite de situer la problématique de la démocratie dans un processus interne de changement démocratique, mais ce qui manque dans cette analyse est l'identification des acteurs qui vont effectuer ce passage. Cette analyse réduit la complexité du processus de démocratisation aux facteurs politiques et à la culture politique. Sans identifier les enjeux réels du passage démocratique, le phénomène de démocratisation reste ambigu.

Khader (1997) présente un éventail de facteurs exogènes et endogènes qui peuvent favoriser le processus démocratique. Il n'écarte pas les facteurs externes mais il se penche, dans son article, sur l'analyse du contexte historique actuel qui a comme caractère général la crise des États arabes et la nouvelle émergence de la société civile. Cette dernière aura un important rôle à jouer dans le processus démocratique, même si, comme le dit Khader: *"Il n'y aura probablement jamais d'autonomie absolue de la société civile par rapport à l'Etat." (ibid: 13).* Nous revenons plus loin sur la question du rôle que peut jouer la société civile dans le processus de démocratisation.

La mondialisation du modèle démocratique libéral ne doit pas nous laisser croire qu'il s'agit simplement d'un modèle unique triomphant et qui, par nécessité historique, va envahir le monde arabe. Une telle conception mécaniste ne va pas aider à comprendre le processus réel de démocratisation dans chacun des pays arabes.

Nous partageons avec Khader (1997) l'idée que le modèle libéral-démocratique ne se reproduit pas d'une façon mécanique dans le monde arabe:

> *"La réalité est que le modèle libéral-démocratique ne pouvait être reproduit tel quel dans l'aire arabo-musulmane, au moins pour deux raisons. La première saute aux yeux et c'est la différence de situation entre deux contextes économiques, sociologiques et humains différents, différence accentuée par la période coloniale. La deuxième est plus fondamentale. En effet, le monde arabo-musulman rencontre l'Europe conquérante, aux temps modernes, avec l'expédition de N. Bonaparte en Egypte (1789-1800). L'Europe est donc immédiatement appréhendée comme un adversaire en tant que puissance de domination et non comme un modèle spécifique de civilisation et d'organisation étatique." (Khader, 1997: 17).*

Nous pouvons ajouter une troisième raison liée à l'impact du système politique international et des instances internationales sur les différentes régions du tiers-monde. Cet impact ne peut être que différencié même si l'unicité du monde et la propagation des valeurs du droit de l'Homme et du citoyen sont l'objectif ultime des organismes internationaux. Les interventions de ces instances sont généralement limitées car elles s'entretiennent souvent avec les Etats et rarement avec des organisations autonomes de la société civile. Ces interventions ne peuvent avoir toujours ni la même ampleur ni la même stratégie, car elles dépendent du contexte particulier de chaque cas. Il en résulte que la pression du système politique international n'est pas toujours omniprésente; elle est facilement contrecarrée et déviée. Par conséquent, l'impact des instances internationales est limité et ne peut déboucher sur des effets similaires.

Nous pouvons aller plus loin pour dire que tous les facteurs exogènes de démocratisation, sans exception, agissent différemment sur les états locaux et les différentes régions du monde: nous pensons à l'effet du marché et de la libre circulation des biens, aux aides financières internationales, à l'intervention directe ou indirecte sur la politique éducative, sanitaire, démographique et sociale,...etc. Les facteurs externes n'auront d'importance que dans la mesure où ils se conjuguent avec la réalité interne complexe de

nos régions arabes.

Ecartons le postulat des vagues démocratiques qui nous parviennent de l'extérieur avec des solutions toutes faites, et pensons pour le moment aux inerties internes capables d'être mobilisées dans le processus de démocratisation. Il faut d'abord penser aux rôles que peuvent jouer l'Etat et la société civile à l'égard de ce processus.

5.4 Le rôle de l'État et celui de la société civile

Nous retenons de Touraine (1994) sa vision qui consiste à admettre une coexistence entre l'esprit de citoyenneté et la société nationale:

> *"La citoyenneté ne requiert pas un Etat républicain tout-puissant, mais l'existence d'une société nationale, c'est-à-dire d'une forte association entre la société civile, le système politique et l'Etat." (Touraine, 1994:100).*

Il en résulte que la reconnaissance de la citoyenneté et des droits des citoyens est une condition élémentaire, non seulement pour rétablir un climat de confiance entre Etat et citoyen, mais aussi pour réussir un projet national d'une vie communautaire nationale moderne. Il sera fort utile que la citoyenneté tisse les liens entre tous les acteurs de la société nationale. Comment se pose cette question de citoyenneté au sein du rapport Etat/ citoyen dans les sociétés arabes?

Même si Ghalioune (1992) n'explicite pas l'enjeu de l'intérêt porté à la modernité, il est parmi les premiers à s'intéresser au rôle joué par les Etats arabes dans un processus de mondialisation des produits symboliques. L'Etat est à l'avant-garde du mouvement de la modernité au sens de la rationalisation, de l'accès à la culture scientifique et de la sécularisation. De ce fait, il s'oppose aux courants conservateurs qui refusent depuis longtemps le projet de modernisation, qu'elle soit forcée ou douce.

D'après Ghalioune (1992), l'Etat arabe est en rupture avec la société. Ce qui explique que la notion de société civile s'oppose, dans la littérature arabe récente, à la notion de société politique, comme s'il s'agissait de deux corps séparés. Ghalioune (1992) dit clairement que le premier problème à résoudre pour la nouvelle théorie politique arabe est de jeter un pont entre la

société civile et l'Etat arabe. Al-Azmeh (1994) réfute la séparation entre État et société civile; il exclut toute rupture entre société et Etat :

> *"Comme on peut le voir, la notion d'une séparation et d'une aliénation mutuelle entre l'État et la société a joué le rôle d'un agent pathogène conceptuel et idéologique, aboutissant à une conception populiste de la société." (El-Azmeh, 1994: 250).*

Une vision étatiste qui ne laisse à la société moderne aucune présence autonome risque d'élargir le fossé entre l'Etat et la société souvent maîtrisé par des idéologies populistes à courte durée de vie. Nombreux sont les intellectuels arabes qui nous ont parlé de la crise politique des Etats nationaux arabes. Les sociétés civiles émergent et se développent lentement partout dans les pays arabes; elles sont aux yeux de certains porteuses d'espoir (Khader, 1997; Allouche 1985; Ghalioune, 1994). Mais, face à l'hégémonie des Etats et du contrôle qu'ils détiennent sur la vie politique et sociale, la chance de la société civile de concurrencer l'Etat ou de confirmer son autonomie reste très faible. Aux yeux de certains intellectuels comme Rachid Chakir (1991) et Yassine El-Hafedh, les Etats arabes s'opposent par nature à la citoyenneté et au processus de démocratisation. Ils insistent sur le fait que les Etats arabes ne cessent d'imposer aux sociétés des rapports de domination "Raâwiya" et que le sentiment de citoyenneté chez une minorité n'atteint pas encore un stade "meurtrier".

D'autres intellectuels arabes sont moins pessimistes et se rendent compte du rôle que peut jouer l'Etat dans la relance démocratique (Labib, 1991; El-Ansari, 1996) Azzi, 1987; Moten, 1997). Ce dernier admet même la possibilité que l'Etat peut créer une société civile:

> *"Un Etat démocratique peut créer une société civile et une société civile démocratique peut aider à la construction d'une politique démocratique." (Moten, 1997: 7).*

A notre avis, un processus démocratique contre l'Etat est un processus très long et périlleux. Que la société civile prenne l'initiative, ou bien que le contexte oblige l'Etat à céder en faveur de la démocratie, l'Etat reste toujours un agent déterminant pour la réussite du processus démocratique. Ensemble, Etat, société civile et citoyens reculent ou avancent sur la voie de la démocratisation.

Nous partageons l'avis de Leca (1994), qui dit à ce propos:

> *"Il ne suffit pas à cet effet de transférer la question sur la constitution d'une "société civile" quelconque comme principale variable explicative... Le concept de société civile est un outil précieux pour mettre à jour la société complexe (et ses diverses théorisations) dont la démocratie fait partie comme régime politique (cf. Keane, 1988; Gellner, 1991; Cohen, Arato, 1992; Seligman, 1992), et il peut être utilement revisité et adapté aux paradigmes et aux débats du monde arabe (Zghal, 1992; Al-Alawi, 1992 Nortan, 1993)." (Leca, 1984: 56).*

Khader (1997) présente un éventail de facteurs internes prometteurs de démocratisation, dont les plus importants sont: l'émergence d'une société civile, l'accès à l'économie de marché et l'essor du système éducatif. Aux yeux de Khader (1997) la portée de ces facteurs est discutable car ils ne débouchent pas nécessairement sur une démocratie souhaitée. Ces facteurs ne sont pas seulement manipulables, car ils n'échappent pas au contrôle des Etats, mais aussi tout seuls ils ne garantissent en rien l'accès à la démocratie libérale:

> *"La corruption publique peut être stimulée par les firmes privées qui cherchent à obtenir des contrats de sorte qu'au lieu de passer du plan au marché, on passe du plan au clan." (Khader, 1997:18).*

Il en résulte que le facteur humain est capital quant à la relance ou à la régression du processus démocratique. Comme le confirme Khader (1997), la demande démocratique est prioritaire pour les intellectuels arabes et le secteur privé socioculturel est le plus intéressé à pousser le processus démocratique. Plusieurs penseurs arabes sont d'accord sur cette idée: Allouche (1985); Diyâ Eddine Zaher (1990); Ghalioun (1994).

Thana Abdallah (1994) fixe cinq facteurs inhibiteurs de démocratisation spécifiques au monde arabe:

- des difficultés qui résultent de l'héritage historique sous l'influence de la dictature et de l'absolutisme;
- les effets néfastes liés à la socialisation de l'individu/ citoyen;
- les querelles idéologiques stériles sur l'authenticité;

– les forces externes qui ne cherchent pas à encourager un changement démocratique en faveur des droits de l'Homme et des catégories défavorisées.

Nous considérons que les quatre premiers facteurs exigent un long travail d'éducation et de mise en oeuvre des pratiques démocratiques; quant au cinquième facteur de nature externe l'auteur n'a pas présenté des arguments fiables à ce sujet.

Nous comprenons donc pourquoi le sort de la démocratie sera aux mains de cette nouvelle génération qui pour le moment partage l'espace scolaire; elle sera décisive quant à l'appropriation ou le rejet des valeurs démocratiques. Une société démocratique se construit à travers les processus de socialisation et d'éducation aux valeurs démocratiques. C'est pourquoi nous croyons que les études sociologiques et pédagogiques sur les curriculums scolaires auront un apport direct et indirect important sur l'éducation, la socialisation et sur le processus démocratique.

6. Synthèse

La question de la citoyenneté est encore plus complexe quand elle se pose dans un contexte arabe. Sa présence dans la tradition politique et dans les principes religieux est discutable. De plus, le processus d'institutionnalisation qui est indispensable pour instaurer une culture des citoyens connaît aussi de sérieuses difficultés. Faut-il encore signaler que la langue arabe ne dispose pas d'un concept original qui soit l'équivalent de la citoyenneté occidentale.

Malgré cette vision ambiguë, nous défendons la thèse qu'une citoyenneté arabe existe. C'est une citoyenneté en construction. Ce qui fait naître et évoluer cette construction sociale, ce ne sont pas les anciens dictionnaires de la langue arabe, ni la tradition politique du Sultan. Nous ne trouvons pas cette idée de citoyenneté totalement construite; ni dans les écritures d'Ibn Taymiyâ,[4] ni dans

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[4] Ibn Taymiâ: célèbre homme de religion qui a vécu au moyen-âge et qui défend l'idée du pouvoir absolu.

[5] Mawdudi: écrivain islamique d'origine pakistanaise, mort en 1979. Il oppose l'idée de la république islamique à celle de la république occidentale.

celles de Mawdudi.[5] Il s'agit d'un concept en évolution et que le contexte actuel de démocratisation pourrait l'aider à se construire.

A notre avis, ce n'est pas le patrimoine culturel en tant que tel qui est déterminant. C'est plutôt notre lecture de ce patrimoine qui compte pour juger de la crédibilité de ce concept. Nous trouvons dans la religion Islamique et dans notre histoire, et notamment l'histoire contemporaine, des éléments constructifs pour une citoyenneté de demain. Notre lecture de la littérature arabe récente nous permet, à première vue, d'observer un rapprochement entre une citoyenneté nationale étatique arabe et le courant du nouveau nationalisme en Europe. Vraisemblablement, l'esprit national est si fort qu'il est difficile de penser à d'autres formes de citoyenneté indépendamment de la nation.

Cette citoyenneté nationale est confrontée à l'Etat actuel à un grand bouleversement d'idées face à un processus mondial de démocratisation. La problématique est suffisamment vaste et complexe pour créer des controverses profondes sur les agents de démocratisation, les facteurs endogènes et exogènes du processus de démocratisation. Il y a trois tendances à distinguer face au processus mondial de démocratisation: une tendance évolutionniste, qui insiste sur les facteurs externes pour revendiquer une démocratie politique représentative (Salamé, 1994); à l'opposé, une tendance culturaliste qui défend la thèse d'un *"exceptionnisme"* du monde musulman qui reste inaccessible à la démocratie (Sharabi, 1988); enfin, une tendance internationaliste mais qui cherche dans les potentiels internes les moyens pour réussir le changement démocratique (Khader, 1997).

En fait, le contexte arabo-musulman représente maintenant un bon exemple pour témoigner du caractère constructiviste de la citoyenneté. Précisément, ces différentes positions que détiennent les chercheurs ne font que confirmer le caractère d'une citoyenneté socialement construite.

Pour récapituler, nous dirons que la citoyenneté arabe en construction envisage trois grands défis:

- de construction nationale dans le sens d'une communauté politique et culturelle moderne, ce qui pourrait déboucher sur une résolution de la crise d'identité nationale et sur l'établissement d'institutions publiques crédibles et efficaces;
- de développement global pour satisfaire les besoins des citoyens;

– d'adaptation à la nouvelle culture cosmopolite et au processus mondial de démocratisation.

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INTERNATIONAL CRIMINAL JUSTICE: THE NEXT STEP, THE HAGUE

EZECHIA PAOLO REALE

This article is a detailed analysis of the Rome Statute for the International Criminal Court. This instrument aimed to establish a permanent international judicial body with jurisdiction over individuals who commit those crimes of most serious concern to the international community as a whole, such as genocide, war crimes, and crimes against humanity. The road to implementing the Rome Statute and creating an effective court is long and uncertain. Shortly after its adoption, national parliaments, diplomats, and the United Nations commenced their efforts to convert the International Criminal Court from a "paper institution" into an effective one. These efforts were supported by a large number of intergovernmental and non-governmental organizations. Furthermore, this article focuses on certain preliminary problems which must be remedied in order to facilitate the creation of the court. These problems are firstly the refining of the official text and its drafting in all official United Nations languages; secondly the drafting of additional instruments, such as the rules of procedure and evidence. These two problems are of a technical nature, involving primarily legal solutions. However the third problem succeeding in the ratification process, is principally a political matter. Yet each of them affects the setting-up of the International Criminal Court in a different manner and as such deserves separate treatment. The author concludes that the Statute is expected to come into force by the end of 2002, with the required 60 ratifications. Various inter-governmental organizations have advised member states to ratify the Statute. However, these efforts are not sufficient to ensure that the court will start functioning. The permanent attention of international public opinion is of utmost importance to put pressure on national parliaments and governments to ratify the Statute as soon as possible.

1. Introduction

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

adopted the Statute for the International Criminal Court[1] on July 17, 1998, at Rome. This act established a permanent international judicial body with jurisdiction over individuals who commit the crimes of most serious concern to the international community as a whole, such as genocide, war crimes, and crimes against humanity.

Thus, what had been previously termed "the missing link" of the international criminal law system has now come into existence. However, the road to implementing the Rome Statue and creating an effective Court is long and uncertain. Shortly after its adoption, national parliaments, diplomats, and the United Nations began their efforts to convert the International Criminal Court from a "paper institution" into an effective one. These efforts were supported by a large number of intergovernmental and non-governmental organizations

Initially, a number of preliminary problems must be remedied in order to facilitate the creation of the Court. These problems may be grouped as follows:

(i) Refining the official text and drafting it in all official United Nations languages;
(ii) Drafting additional instruments, such as the Rules of Procedure and Evidence and the Elements of Crimes;
(iii) Succeeding in the ratification process.

While the first two are technical problems, involving primarily legal solutions, the latter is principally a political matter. However, each of them affects the realization of the International Criminal Court in a different manner and as such deserves a distinct treatment.

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[1] Rome Statute for the International Criminal Court Adopted by the United Nation Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (A/CONF.183/9, 1998). For the English version of the text, as well as relevant documents issued by the Preparatory Committee on the Establishment of an International Criminal Court and the Ad Hoc Committee on the Establishment of an International Criminal Court *see* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998); For French, Spanish, Russian, Chinese and Arabic versions see the relative web site: For an Italian non official version of the text *see* Ezechia Paolo Reale, LO STATUTO DELLA CORTE PENALE INTERNAZIONALE, ISISC collection, CEDAM 1999.

2. Refining the official text

The English version of the Rome Statute contained several non-substantive errors that occurred during its drafting. This resulted from the fact that the Rome Conference succeeded only in its last working day.[2] For that reason, it was impossible for the Drafting Committee, which was headed by Professor M. Cherif Bassiouni, a prominent member of the Egyptian Delegation, to review and refine the whole final text before its submission to the Plenary Committee. This is primarily the result of the inability of the Drafting Committee to see Part 2 of the Statute until the afternoon of July 16.

As the Drafting Committee did not have the opportunity to refine the entire text, several cross reference, punctuation, and other related problems appeared in the adopted text of the Statute. A certain lack of consistency in terminology between the Statute's various parts was to be expected, as each part of the statute had been drafted by different working groups that had not coordinated with each other. Furthermore, due to time constraints, the English translation was the only version submitted to States for signature in Rome. As such, the English version was the only authoritative text which after being amended was to be translated into the other official languages, Arabic, Chinese, French, Russian, and Spanish.

The United Nations Office of Legal Affairs is now likely to have completed the correction process through the "non-Objection Procedure" that was established by the Treaty Section of the office of Legal Affairs and based on article 79 of the 1969 Vienna Convention on the Law of Treaties. The Secretary General of the United Nations, acting in his capacity as depositary of the Rome Statute, proposed a first group of corrections by communicating them to all States concerned.[3] Whereas no objection were notified

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[2] For an extensive discussion of the negotiating process *see* M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L. J. 443(1999); *also* Ezechia Paolo Reale, LO STATUTO DELLA CORTE PENALE INTERNAZIONALE, cit.

[3] Depositary Notification C.N. 577.1998.TREATIES – 8 and C.N. 502.1998.TREATIES – 3

by the date specified in the depositary notification, the required corrections became effective, as certified in the proces-verbal of rectification of the original of the Statute signed by Mr. Hans Corel, Under-Secretary General and Legal Counsel on November 10, 1998.[4]

After the completion of this first phase, it appeared that the text of the Statute contained additional errors. Accordingly, the non-objection procedure was repeated[5] and successfully completed, as certified in the proces-verbal of rectification of the original of the Statute signed by Mr. Hans Corel, on July 12, 1999.[6] Thus, the official Statute of the ICC has now incorporated the corrections accepted through the two above described no-objection procedures. At present, no additional errors have been identified, and there are no ongoing no-objection procedures.

3. The Preparatory Commission

3.1 Its tasks

Resolution "F" of the Final Act of the Rome Conference[7] provides for the establishment of a Preparatory Commission consisting of

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[4] See table I in appendix 1.

[5] Depositary Notification C.N. 357.1999.TREATIES – 14 of 18 May 1999 and C.N. 537.1999.TREATIES – 16 of 1 July 1999.

[6] See table II in appendix 1.

[7] F

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

(1) There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at a date to be decided by the General Assembly of the United Nations;

all States that were invited to participate in the Rome Conference. The Preparatory Commission is charged with proposing practical

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(2) The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;
(3) The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;
(4) The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations;
(5) The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:
  (a) Rules of Procedure and Evidence;
  (b) Elements of Crimes;
  (c) A relationship agreement between the Court and the United Nations;
  (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;
  (e) Financial regulations and rules;
  (f) An agreement on the privileges and immunities of the Court;
  (g) A budget for the first financial year;
  (h) The rules of procedure of the Assembly of States Parties;
(6) The draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be finalized before 30 June 2000;
(7) The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute;
(8) The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties;
(9) The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties;
(10) The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations;
(11) The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

arrangements for bringing the Court into operation, which include the preparation of draft texts of the additional instruments needed for the Court to function. The United Nations General Assembly[8] has accordingly called for three sessions in 1999, to be followed by further meetings in the spring of 2000 so that the Commission may finalize its draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes by June 30, 2000, as foreseen in the Final Act.

In addition to those instruments, the Commission will prepare draft texts of the agreements between the Court and the United Nations and between the Court and the Netherlands, which will host the Court. It will further draft the rules for the Assembly of States Parties, financial regulations, an agreement on the privileges and immunities of the Court, and a budget for the first fiscal year. Once the Statute enters into force, these draft texts will be placed before the first meeting of the Assembly of State Parties, which is the forum where key decisions affecting the vitality and effectiveness of the Court will be made. The structure and the functions of the Assembly are designed by the Statute so as to provide State Parties with an effective power of managerial oversight without affecting the independence of the Court. Ratification brings with it the right to sit in the Assembly of State Parties with the power to vote.[9] States that have signed but have not yet ratified the Statute or the Final Act will be entitled to sit as observers. After the first meeting of the Assembly, the Preparatory Commission will be dissolved.

3.2 Its proceedings

The Commission, convened by the United Nations Secretary-General held its first three meetings in 1999 at the United Nations headquarters in New York. These meetings were held between February 16 - 26, July 26 - August 13, and November 29 - December 17. On December 9, 1999, the General Assembly through resolution

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[8] Resolution 53/105 of 8 December 1998.

[9] One vote for each State Party.

54/105 renewed the mandate of the Commission and in accordance with paragraph 3 of that resolution the Secretary General was requested to convene the Commission in the year 2000 from March 13 - 31, June 12 - 30, and November 27 - December 8.

At its first and second meeting the Preparatory Commission elected its Bureau. The members of the Bureau are the following: Chairperson, Mr. Philippe Kirsch (Canada); Vice Chairpersons, Mr. George Winston McKenzie (Trinidad and Tobago), Mr. Medard R. Rwelamira (South Africa), Mr. Muhamed Sacirbey (Bosnia and Herzegovina); and Rapporteur, Mr. Salah Suheimat (Jordan). The Preparatory Commission also adopted its agenda.[10] Taking account of the priorities set forth by resolution "F" of the Conference, the Preparatory Commission agreed on an agenda for the February session focusing on two essential instruments necessary for the functioning of the Court: the Rules of Procedure and Evidence and the Elements of Crimes. The Preparatory Commission also began a preliminary consideration of the modalities for defining the crime of aggression contained in article 5, paragraph 2 of the Rome Statute. In order to facilitate the tasks of the Preparatory Commission, the Chairperson, in consultation with the Bureau, designated Ms. Silvia Fernandez de Gurmendi (Argentina) to serve as Coordinator for the Rules of Procedure and Evidence and Mr. Herman van Hebel (Netherlands) to serve as Coordinator for the Elements of Crimes. Also, in order to facilitate the work of the Preparatory Commission at future sessions, the Chairperson, in consultation with the Bureau, designated the following Coordinators: Mr. Rolf Fife (Norway) for the Rules of Procedure and Evidence relating to Part 7 (Penalties) of the Statute; Mr. Phasiko Mochochoko (Lesotho) for the Rules of Procedure and Evidence relating to Part 9 (International Cooperation and Judicial Assistance) of the Statute and Mr. Medard R. Rwelamira (South

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[10] PCNICC/1999/L.1. The adopted agenda is as follows: 1. Opening of the session; 2. Election of officers; 3. Adoption of the Agenda; 4. Organisation of work; 5. Implementation of resolution "F" of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, adopted on 17 July 1998, and paragraph 4 of General Assembly resolution 53/105 of 8 December 1998; 6. Adoption of the report.

Africa) for the Rules of Procedure and Evidence relating to Part 4 (Composition and Administration of the Court) of the Statute.

Taking account of the remaining tasks of the Preparatory Commission listed in resolution "F" of the Conference, the Chairperson, in consultation with the Bureau, asked Mr. Tuvaku Manongi (United Republic of Tanzania) to serve as the contact point for the definition of the crime of aggression. In addition, the Chairperson designated Mr. Hiroshi Kawamura (Japan) as the contact point with respect to the draft texts of the financial regulations and rules, a budget for the first financial year, and the rules of procedure of the Assembly of States Parties. In addition, Mr. Cristian Maquiera (Chile) was designated as the contact point for the draft texts of the relationship agreement between the Court and the United Nations, basic principles governing a headquarters agreement to be negotiated between the Court and The Netherlands, a draft agreement on the privileges and immunities of the Court, and the requests contained in paragraph 4 of General Assembly resolution 53/105.[11]

At its second and third sessions the Preparatory Commission proceeded with its work and, taking account of the priorities set forth by resolution "F" of the Conference, agreed on an agenda. As in its first session, the Preparatory Commission focused on the Rules of Procedure and Evidence and the Elements of Crimes. It also considered the question of the crime of aggression[12] and requested, in order to facilitate its own task, the Secretariat to prepare an organized and consolidated text of the Elements of Crimes and of the Rules of Procedure and Evidence on the basis of the proceeding of the sessions of the Commission.[13]

The Commission is enjoying strong support by intergovernmental and non-governmental organizations. In view of the heavy workload and the target date[14] set for the Rules of Procedure and the

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[11] PCNICC/1999/L.3/Rev.1 Report of the first session of the Preparatory Commission for the International Criminal Court.

[12] PCNICC/1999/L.4/Rev.1 Report of the second session of the Preparatory Commission for the International Criminal Court.

[13] PCNICC/1999/L.5/Rev.1 Report of the third session of the Preparatory Commission for the International Criminal Court.

[14] 30 June 2000 (see supra note n. 7)

Elements of Crimes, the Preparatory Commission should strive to work as efficiently as possible. In this respect, the important informal work that has been carried out at intersessional meetings is to be commended. These sessions have facilitated the work of the Preparatory Commission, notably in relation to the victim's access to the Court, which was discussed at an international seminar held in Paris from April 27-29, 1999. Also, with respect to procedural questions, two intersessional meetings have been organized by the International Institute of Higher Studies in Criminal Sciences and held in Siracusa, Italy from June 21-27, 1999 and from January 31 - February 6, 2000.

3.3 Its political role

The Statute contains all of the primary principles and procedures of interest to potential States Parties. What remains to be done through the Preparatory Commission and the first Assembly of States Parties is, then, to provide the details of the functional means by which the Court as an institution will operate. The ongoing sessions of the Preparatory Commission should not serve as an excuse for States to postpone ratification. The Rome Statute, itself, is a sufficient basis for a national legislature to proceed with ratification. There is no doubt that the fulfillment of the Commission's mandate will be a clear political sign that will place those States which have yet to ratify the Statute in a weak position in the face of world public opinion. It will also make clear which States are possibly to blame for the delay of the appearance of the International Criminal Court as a mechanism for deterrence and accountability with respect to situations of conflict.

Those who maintain that the Rules of Procedure and Evidence will simply implement or specify procedural and evidentiary norms that are already contained in the Statute are undoubtedly right, as are those who underline that the Elements of Crime shall only assist the Court in the interpretation and application of crimes within the Court's Jurisdiction. However, their completion within the settled time of the Preparatory Commission's proceedings will be beneficial for its indirect impact on the most political and difficult aspect that affects the effectiveness of the International Criminal Court, which is the ratification process.

4. The ratification status and problems

The Rome Statute will not enter into force until sixty days after the sixtieth instrument of ratification is deposited with the Secretary General of the United Nations Organization (Article 126 of the Rome Statute)[15]. At present, 94 States have signed the Treaty[16], but only seven – Italy[17], Senegal[18], San Marino[19], Trinidad and Tobago[20], Ghana[21], Fiji[22] and Norway[23] - have ratified it. In addition, many States have committed themselves to ratify it in the near future[24]. This can be seen as a sign of lack of interest or willingness by States to support the International Criminal Court's implementation, but that is likely an incorrect interpretation of the data.

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[15] Article 126
Entry into force
(1) This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
(2) For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

[16] For details, see the attached table in appendix 2.

[17] 26 July 1999.

[18] 2 February 1999.

[19] 13 May 1999

[20] 6 April 1999

[21] 20 December 1999

[22] 20 December 1999

[23] 16 February 2000

[24] For further information see the Progress Report on the ratification of the treaty for the establishment of an international criminal court as of February 16, 2000 prepared by International Human Rights Law Institute, DePaul University (IHRLI); Parliamentarians for Global Action (PGA); International Institute of Higher Studies in Criminal Sciences (ISISC) and International Association of Penal Law (AIDP), No Peace Without Justice, and the Lawyers Committee for Human Rights based on the country by country ratification report which was compiled by the NGO Coalition for an International Criminal Court and other sources.

Actually, taking into account the great number of problems that need to be solved before any national system would be prepared to accept the Rome Statute, it is not surprising that in a large majority of those States that gave their support in Rome for achieving the historical task, the ratification process has yet to begin. In fact, two approaches could have been taken by those States willing to ratify the Rome Statute. The first is to ratify the Treaty as soon as possible, postponing all possible adaptation problems. The second one is to provide its own national system with all adaptations whose need may arise from the entry into force of the Statute, before ratifying it.

Even if the large number of advocates of the International Criminal Court would prefer the first option. The second may also be reasonably selected by States for a number of reasons, especially with respect to the serious consequences of the entry into force of the Rome Statute for a State bound by it, when such State is not ready to fulfill its obligations arising from that international agreement. A State's failure to incorporate the Statute's substantive criminal law provisions within national legislation might result in a serious breach of its own sovereignty. This is because the State would be unable to prosecute and investigate cases in which national criminal provisions were not involved. This inability could be deemed as an unwillingness to investigate and prosecute such cases, which would open the door to the jurisdiction of the Court in any situation. The Court's jurisdiction is envisioned, as a rule, to be complementary to national systems, and States, in the view adopted in the Rome Statute, are the first and most important line for fighting and preventing war crimes, crimes against humanity, and genocide. Furthermore, not having passed any legislation suitable to ensure the fulfillment of the obligations to cooperate that are provided for in the Rome Statute, may result in a breach of the principle *pacta sunt servanda* that can open the door to international responsibility for the State concerned.

In supporting the point of view stated above, the history of the bill of ratification adopted by Italy is highly significant. On the occasion of the passing of the ratification law, the Italian government, without an in-depth exam of its domestic criminal system as a whole, proposed to be empowered by the Italian Parliament to make all possible adaptation rules whose need could have arisen from the Rome Statute provisions and place them into

the framework of the principles set forth in the Treaty as well as in the rule itself. The text drafted by the Government did not pass the test of the concerned Parliamentarian Commissions, namely the Justice, Foreign Affairs, and Constitutional Affairs Commissions, that highlighted how its approval would have involved serious breaches to the principle of legality as the entrustment of the Government would have been apt to affect both substantive criminal law and constitutional rules.

As made clear in the report of those Commissions, the only way to obtain an early ratification of the Statute - a need which arose from reasons of international prestige and the opportunity to reach the required number of ratification by reasonable time - was to cut off from the text the problems related to adaptation and reserve them to a specific and appropriate statute law to be examined later. At the last minute, the Italian Parliament agreed with this solution and cut off the adaptation rules. Subsequently, it approved the bill of ratification, and all that remains of the difficulties faced during the legislative process is only a new draft statute law, "Entrustment to the Government for the adoption of the rules implementing the Rome Statute." This law has been neither approved, nor discussed again until the time of writing. In addition, a mistake exists in the title of the bill of ratification itself, as published in the Official Journal n. 167 of July 19, 1999, where that wording is wrongly included, notwithstanding the cutting off of the related rules[25].

After understanding the lesson of the Italian experience, it may be useful to have an overview of the actual problems that a domestic legislature is likely to face in drafting implementing legislation consistent with the Rome Statute provisions that take into account that the design of the Statute is based on respect for State sovereignty and that all States have criminal jurisdiction over conduct committed on their territory or by their nationals. The Court's jurisdiction is an extension of this national criminal jurisdiction of its States Parties but, at the same time, the Court is not an extension of national criminal justice systems, it is just complementary to national jurisdiction, which have primary

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[25] The mistake was emended by a later note published in the Official Journal n. 175 of 28 July 1999.

responsibility for investigating and prosecuting genocide, war crimes, and crimes against humanity.

The degree and type of implementation appropriate to a given State will depend, of course, on its legal and constitutional framework. Although the requirements of the Statute are the same for all State Parties the way in which a State renders its legal system capable of complying with those requirements will vary. Therefore, it is impossible, and even useless, to examine the adaptation problems of each single domestic legislation, due to the specificity of each national criminal law and jurisdictional system. Rather, the attention will be focused on the three main classes of issues, which qualify the level of implementation of the Rome Statute provisions under any national law: substantive, cooperation, and organizational problems. Only in light of a clear understanding of the Statute can the extent to which legislation is needed, its appropriate details and modalities, and the necessary institutional arrangements be known with certainty.

This kind of approach is the one which has been chosen by the non-governmental organization community in supporting the efforts of those legislatures, especially those from least developed and developing countries, which are willing to pass a legislation consistent with the Rome Statute provision[26]. Furthermore, in order to show as clearly as possible the complexity of the difficulties that will be faced by national legislatures in adapting their domestic law to the Rome Statute, reference will be occasionally made to the Italian case, as it may be seen, under many aspects, as an emblematic one.

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[26] In July, during the ICC's Preparatory Commission IHRLI, PGA, ISISC and AIDP held two full-day briefings at U.N. Headquarters to provide technical assistance to 30 Less Developed Countries' on ratification. These briefings were also attended by other delegations. In that occasion was distributed the volume 13-quater NUOVELLES ETUDES PENALES (1998) containing studies and technical legal support in English, French and Spanish to assist in the development of national implementing legislation. Five thousand copies were later distributed worldwide to parliamentarians, government officials and interested experts.

4.1 Substantial problems[27]

(i) Domestic criminal law should encompass all relevant conduct in order to ensure that crimes set forth in articles 6, 7, and 8 of the Rome Statute can be prosecuted and punished at a national level in a manner consistent with those requirements and penalties provided for in the Statute. The most straightforward way to enable national legal systems to investigate and prosecute the crimes within the jurisdiction of the Court in a way compatible with the Statute is to incorporate or reproduce the relevant definitions, defenses and general principles, with appropriate penalties, directly into national legislation. That is crucial for States in order to preserve as much sovereignty as possible as where conduct prohibited under the Statute is properly investigated and tried nationally, the case is not admissible before the International Criminal Court.

Even if that may be seen as the most simple obligation to fulfill for developed countries, where national legislation is supposed to already encompass all relevant crimes, scholars and legislators who go through a detailed examination of their own legal system are likely to be surprised by its black holes.

Italy is not an exception to that rule. As noted in the above quoted report of Parliamentary Commissions, existing national law, notwithstanding the great number of international humanitarian treaties ratified by it,[28] Italy does not provide for, among others, the crime of torture or crimes against humanity.

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[27] See Bruce Broomhall, The International Criminal Court: A checklist for national implementation, ICC Ratification and National Implementation, volume 13-quater Nuovelles Etudes Penales (1998).

[28] INTER ALIA: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention Relevant to the Treatment of the Prisoner of War, Geneva Convention Relevant to the Protection of Civilian Persons in Time of War, all signed at Geneva on 12 August 1949 and ratified by bill of ratification n. 1739 of 27 October 1951 published in the Official Journal

(ii) Immunities granted by national law to persons or property of third States should not be wider than those available under the applicable international law. Italy, for example,

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n. 53 of 1 March 1952; International Covenant on Civil and Political Rights, ratified by bill of ratification n. 881 of 25 October 1977; First Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, ratified by bill of ratification n. 762 of 11 December 1985 published in the Official Journal n. 303 of 27 December 1985; Second Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, ratified by bill of ratification n. 762 of 11 December 1985 published in the Official Journal n. 303 of 27 December 1985; Convention on the Prevention and Punishment of the Crime of Genocide adopted at New York on 9 December 1948 and ratified by bill of ratification n. 153 of 11 March 1952 published in the Official Journal n. 74 of 27 March 1952 and implemented by statute law n. 962 of 9 October 1967; International Convention Against the Taking of Hostages, concluded at New York on 17 December 1979 ratified by bill of ratification n. 718 of 26 November 1985 published in the Official Journal n. 292 of 12 December 1985; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries adopted at New York on 4 December 1989, ratified by bill of ratification n. 210 of 12 May 1995 published in the Official Journal n. 126 of 1 June 1995; United Nation Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988, ratified by bill of ratification n. 328 of 5 November 1990 published in the Official Journal n. 267 of 15 November 1990; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction signed at Washington, London and Moscow on 10 April 1972, ratified by bill of ratification n. 618 of 8 October 1974 published in the Official Journal n. 316 of 4 December 1974; Treaty on the Non-Proliferation of Nuclear Weapons signed at Washington, London and Moscow on 1 July 1968, ratified by bill of ratification n. 131 of 24 April 1975 published in the Official Journal n. 113 of 30 April 1975; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof, signed at Washington, London and Moscow on 11 February 1971, ratified by bill of ratification n. 1042 of 5 November 1973 published in the Official Journal n. 81 of 27 March 1974; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction signed at Paris on 13 January 1993, ratified by bill of ratification n. 496 of 18 November 1995 published in the Official Journal n. 276 of 25 November 1996, amended and implemented by Statute Law n. 93 of 4 April 1997, published in the Official Journal n. 80 of 7 April 1997 and further implemented by Rule n. 289 of 16 July 1997; Convention on the

as many other States have constitutional rules[29] that limit the criminal responsibility of their own officials for acts committed in official capacity, except for certain crimes.

(iii) National law should exempt crimes within the jurisdiction of the Court from any available statute of limitation.

In the Italian law that rule does not exist, even if there is an applicable European Convention that addresses at least crimes against humanity.

Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted at New York on 10 December 1976 and opened for signature at Geneva on 18 May 1977, ratified by bill of ratification n. 962 of 29 November 1980 published in the Official Journal n. 17 of 19 January 1981; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, signed at Geneva on 7 September 1956, ratified by bill of ratification n. 1304 of 20 December 1957 published in the Official Journal n. 14 of 18 January 1958; Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York on 21 March 1950, ratified by bill of ratification n. 1173 of 23 November 1966 published in the Official Journal n. 5 of 7 January 1967;Slavery Convention signed at Geneva on 25 September 1926, ratified by bill of ratification n. 1723 of 26 April 1928 published in the Official Journal n. 176 of 30 July 1928; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, ratified by bill of ratification n. 194 of 6 January 1928, published in the Official Journal n. 46 of 24 February 1928; International Convention for the Suppression of the Traffic in Women and Children, signed at Geneva on 30 September 1921, ratified by bill of ratification n. 2749 of 31 October 1923, Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, signed at Lake Success, New York on 12 November 1947, ratified by bill of ratification n. 600 of 12 July 1949 published in the Official Journal n. 606 of 8 September 1949; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Second Red Cross Convention) signed at Geneva on 6 July 1906 and implemented by Statute Law n. 545 of 16 June 1907; Geneva Convention Relative to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929 and approved by Statute Law n. 1615 of 23 October 1930.

[29] Article 90 of the Italian Constitution of 22 December 1947 published in the Official Journal n. 298 of 27 December 1947 and entered into force on 1 January 1948.

4.2 Cooperation and organizational problems[30]

(i) State Parties should review national law to ensure that it permits full cooperation in accordance with the Statute with respect to its officials, as described in article 27 of the Statute.

(ii) National legislation on surrender to the International Criminal Court should allow for conflicting requests to be resolved in accordance with the priorities set out in article 90 of the Statute.

(iii) The Statute requires that, where a person sought by the Court brings a *ne bis in idem* challenge at the national level, national authorities should defer to the International Criminal Court's ruling in accordance with article 89 (2) of the Statute, rather than decide the issue on its merits themselves.

(iv) The obligation to cooperate with requests to arrest and surrender applies without distinction based on the nationality of the person sought. National constitutional or statutory prohibitions on the extradition of nationals should not apply to requests for surrender to the International Criminal Court, and national authorities should not be able to refuse surrender on that basis.

(v) Distinction between "extradition" and "surrender": the Statute anticipates that laws allowing for surrender of person to the International Criminal Court will contain requirements not more burdensome, and wherever possible less burdensome than those applicable to extradition from one State to another.

The simple way of ensuring fulfillment of the obligation to cooperate is to provide national laws that allow (with due regard for the Statute) requests from the Court to be passed to national authorities for execution in the same manner as a request from

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[30] *See* Bruce Broomhall, The International Criminal Court: Overview and Co-operation with States, ICC Ratification and National Implementation, volume 13-quater Nuovelles Etudes Penales (1998).

another country or as an order issued under national law. That seems to bring with it no constitutional problems, except the one related to the extradition or surrender of a national, barred in many countries by statutes or the constitution.

States Parties should also review the relationship between their military jurisdiction and their regular court to ensure that all those suspected of crimes within the jurisdiction of the Court, whether military personnel or civilians, are subject to appropriate investigation and prosecution.

5. Conclusion

As worldwide support for ratification is gaining momentum, there is good reason to expect that the Statute can come into force by he end of 2002 with the required 60 ratifications. A number of Intergovernmental Organizations have urged its member states to ratify the Statute. Among such organisations are the European Union, the Council of Europe, CARICOM, SADC, the Rio Group, and the South Pacific Forum. The 15 member states of the European Union adopted a resolution committing themselves to ratify the Treaty by the end of 2000. In addition, the Parliamentary Assembly of the Council of Europe, composed of parliamentarians from 41 European legislatures adopted Recommendation 1408 calling on Council of Europe member and observer States to ratify the ICC Statute as quickly as possible and to adopt the necessary implementing legislation. The Summit of the Organisation of the Francophone States held in Canada in September 1999 expressed the member States' support for the International Criminal Court and called on all States to become parties to the Statute in order to accelerate its entry into force. Also, the Committee of Experts of the League of Arab States has been working on its final report to the Council of Ministers of Justice. It is expected that the Report will be completed by mid-2000 and recommend that Arab states become parties to the Treaty.

Strong support has also been shown United Nations meetings in 1999, both in the General Assembly's opening debate and in statement made at the legal committee. At the opening of the General Assembly session, the Prime Ministers or Foreign Ministers of Canada, Ukraine, Germany, Uganda, France and Paraguay, among many others, expressed their commitment to the Court and

called for widespread ratification. At the legal committee the European Union, the Rio Group, CARICOM, SADC, and the South Pacific Forum made similar statements in support of early entry into force. Other States associated themselves with those positions.

These efforts, however, are not sufficient to ensure that the Court will become operational in the near future. The permanent attention of the international public opinion is essential in order to compel concerned parliaments and governments to ratify the Statute as soon as possible. It should be noted that there are powers that could exercise great pressure, directly or indirectly, in order to delay the ratification process. These powers enjoy a de facto power that stands to be limited with the establishment of an independent and permanent International Criminal Court. With that in mind, it should be further noted that only seven countries, among the 160 participants to the Rome Diplomatic Conference, voted against the Treaty, and three of them – China, India, and the United States – are nuclear powers, two of which enjoying also permanent status to the United Nation Security Council, and two of them - Israel and Turkey - have great importance for the international public order, as their internal and foreign policy sometimes reveals a dangerous tendency towards a leadership without international bounds.

The armed intervention conducted in Kosovo by NATO Armed Forces could have been the right occasion for reflecting about this central theme. For those States who claimed that arms were the only possible solution for avoiding genocide and serious breaches to humanitarian law, States supporting the ICC should have given a political reply, committing themselves to intervene in Kosovo and, at the same time, calling on those States for a signature of the Rome Statute in order to assure that, in the future, peace, and justice will not depend just on the force with which they can be imposed by.

Regrettably it is easy to predict that, before the entry into force of the Statute, chances will arise again where international conflicts or diplomatic crisis will show the need for using force or pressure against a country or in aid of a civilian population. Requesting those States who will propose those actions to sign and ratify the Rome Statute before obtaining help towards a common and shared international behavior will be, in that occasion, the more effective way to support international justice and peace and to assure the success of the efforts that so many are unsparing for the final affirmation of those principles.

APPENDIX 1

Table I

CORRECTIONS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

[-A- Original text]	[-B- Corrections]
Preamble, First paragraph	Preamble, Before the first paragraph, add: The Sates Parties to this Statute
Article 8 (1), line 2: ...when committed as a part of a plan	Article 8 (1), line 2: ...when committed as part of a plan
Article 8 (2), (4), (iii), line 6: ...under the law of armed conflict	Article 8 (2), (4), (iii), line 6: under the international law of armed conflict
Article 8 (3), line 1: 3. Nothing in paragraph 2(c) and (d) shall afect	Article 8 (3), line 1: 3. Nothing in paragraph 2(c) and (e) shall affect
Article 18 (4), line 2: ... in accordance with article 82, paragraph 2	Article 18 (4), line 2: ... in accordance with article 82.
Article 19 (9), line 1: 9. The making of challenge shall ...	Article 19 (9), line 1: 9. The making of a challenge shall ...
Article 19 (11), line 6: ... shall notify the State in respect of the proceedings of which deferral has taken place	Article 19 (11), line 6: ... shall notify the State to which deferral of the proceedings has taken place
Article 20 (2), line 1: 2. No person shall be tried before another court ..	Article 20 (2), line 1: 2. No person shall be tried by another court ..
Article 21 (3): ... such as gender, as defined in ...	Article 21 (3): ... such as gender as defined in ... (delete comma)

Article28: Numbering of paragraphs read as follows: 1. (a) (b) 2. (a) (b) (c)	Article 28: Numbering of paragraphs should read as follows: (a) (i) (ii) (b) (i) (ii) (iii)
Article 28 (2), line 1: ... not described in paragraph 1, a superior ...	Article 28 (2), line 1: ... not described in paragraph (a), a superior ...
Article 36 (2), (b), line 4: ... two-thirds of the members ...	Article 36 (2), (b), line 4: ... two thirds of the members ...
Article 36 (2), (c), (i), line 5: ... paragraphs 3 to 8 inclusive, and	Article 36 (2), (c), (i), line 5: ... paragraphs 3 to 8, and
Article 36 (7), line 2: ... membership in in Court ...	Article 36 (7), line 2: ... membership of the Court ...
Artcle 53 (2), (c), line 5: The Prosecutor ...	Article 53 (2), (c), line 5: the Prosecutor
Article 55 (1), (d), line 1: ... arrest or detention; and shall ...	Article 55 (1), (d), line 1: ... arrest or detention, and shall ... (replace ";" by ",")
Article 55 (1), (d), line 3: ... are established in the Statute.	Article 55 (1), (d), line 3: ... are established in this Statute.
Article 55 (2), line 4: ... made under Part 9 of this Statute, that person	Article 55 (2), line 4: ... made uner Part 9, that person ....
Article 57 (1), line 1: 1. Unless otherwise provided for in this Statute	Article 57 (1), line 1: 1. Unless otherwise provided in this Statute
Article 57 (3), (e), line 6: ... forfeiture in particular ...	Article 57 (3), (e), line 6: ... forfeiture, in particular ... (add a comma)
Article 61 (7), (a), line 2: ... there is sufficient evidence; and ...	Article 61 (7), (a), line 2: ... there is sufficient evidence, and ... (replace ";" by ",")

Article 68 (1), line 4: ... as defined in article 2, paragraph 3 ...	Article 68 (1), line 4: ... as defined in article 7, paragraph 3 ...
Article 72 (5), line 3: ... the Prosecutor, the Defense or ...	Article 72 (5), line 3: ... the Prosecutor, the defese or ...
Article 72 (7), (a), (ii), line 4: ... its obligation under the Statute ...	Article 72 (7), (a), (ii), line 4: ... its obligation under this Statute ...
Article 73, line 8: ... and refuses consent ...	Article 73, line 8: ... and refuses to consent ...
Article 77 (1), line 2: ... of a crime under article 5 ...	Article 77 (1), line 2 ... of a crime referred to in article 5 ...
Article 80, line 1: Nothing in this Part of the Statute affects ...	Article 80, line 1: Nothin in this Part affects
Article 81 (1), (b), line 1: (b) The conivcted person or the Prosecutor on that persons's behalf, may ...	Article 81 (1), (b), line 1: (b) The convicted person, or the Prosecutor on that person's behalf may ... (add comma after "person", delete comma after "behalf")
Article 82 (4), line 2: ... under article 73 ... Article 87 (5):	Article 82 (4), line 2: ... under article 75 ... Article 87 (5):
subparagraphs are not identified	Add (a) at the beginning of first paragraph starting with "The Court ..." Add (b) at the beginnig of second paragraph startig with "Where a State..."
Article 89 (3), (e), line 5: ... affected; provided ...	Article 89 (3), (e), line 5: ... affected, provided ... (replace ";" with ",")
Article 90 (7), (b), line 3: ... to the Court or extradite the person ...	Article 90 (7), (b), line 3: ... to the Court or to extradite the person ...
Article 93 (5), line 5: ... The Court of the Prosecutor ...	Article 93 (5), line 5: ... The Court or the Prosecutor ...
Article 93 (8), (b), line 3: .. for the purpose of generatig new evidence;	Article 93 (8), (b), line 3: .. for the purpose of generating new evidence, (replace ";" with ",")

Article 93 (10), (b): Numbering of subparagrphs reads as follows: (b) (i) (1) (2) (ii) (1) (2)	Article 93 (10) (b): Numbering of subparagraphs reads as follows: (b) (i) a b (ii) a b
Article 93 (10), (b), (ii), line 1: In the case of assistance under subparagraph (b) (i) (1):	Article 93 (10), (b), (ii), line 1: In the case of assistance under subparagraph (b) (i) a:
Article 93 (10), (c), line 3: ... a Party to the Statute ...	Article 93 (10), (c), line 3: ... a Party to this Statute ...
Article 95, lines 3 and 5: ... articles 18 or 19 ...	Article 95, lines 3 and 5: ... article 18 or 19 ...
Article 97 (b), line 3: ... in the custodial State ...	Article 97 (b), line 3: ... in the requested State ...
Article 99 (4), (a), line 3: ... pursuant to articles 18 or 19	Article 99 (4), (a), line 3: ... pursuant to article 18 or 19
Article 103 (3), (c): (c) The views of the sentenced person; and	Article 103 (3), (c): (c) The views of the sentenced person;
Article 112 (1), line 3: ... Other States which have signed the Statute ...	Article 112 (1), line 3: ... Other States with have signed this Statute ...
Article 119 (2), line 5: ... dispute or make recommendations ...	Article 119 (2), line 5: ... dispute or may make recommendations ...
Article 121 (5), line 1: 5. Any amendment to article 5 of this Statute ...	Article 121 (5), line 1: 5. Any amendment to articles 5, 6, 7 and 8 of this Statute ...
Article 121 (6), line 3: ... from the Statute ...	Article 121 (6), line 3: ... from this Statute ...
Article 121 (6), line 4: ... paragraph 1 of article 27, but subject to paragraph 2 of article 127 ...	Article 121 (6), line 4: ... article 127, paragraph 1, but subject to article 127, paragraph 2 ...

Article 122 (1), line 1: 1. Amendments to provisions of the Statute ...	Article 122 (1), line 1: 1. Amendments to provisions of this Statute
Article 122 (1), line 2; ... paragraphs 8 and 9 article 37 ...	Article 122 (1), line 2: ... paragraphs 8 and 9, article 37 ... (add comma)
Article 124 (1(: Notwithstanding article 12 paragraph 1, a State ...	Article 124 (1): Notwithstanding article 12 paragraphs 1 and 2 a State ...
Article 126 (2), line 1: ... approving or acceding to the Statute ...	Article 126 (2), line 1: ... approving or acceding to this Statute ...

Table II

CORRECTIONS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

[-A- Original Text]	[-B- Corrections]
Preamble, para. 9 (starting with "Emphasising"), line 2: ... in an armed conflict in the internal affairs of any State,	Preamble, para. 9 (starting with "Emphasising"), line 2: ... in an armed conflict or in the internal affairs of any State,
Preamble, para. 12 (starting with "Resolved"), line 1: ...lasting respect for the enforcement of international justice,	Preamble, para. 12 (starting with "Resolved"), line 1: ... lasting respect for and the enforcement of international justice,
Article 7 (2), (f), line 1: ... mean the unlawful confinement, of a woman ...	Article 7 (2), (f), line 1: ... means the unlawful confinement of a woman ... (delete come after "confinement"
Article 18 (2), line 1: Within one month of receipt of that notice,	Article 18 (2), line 1: Within one month of receipt of that notification,
Article 20 (3), line 2: ... proscribed under articles 6, 7 or 8 ...	Article 20 (3), line 2: ... proscribed under article 6, 7 or 8 ...
Article 43 (6), line 4: ... before the Court and others who are at risk ...	Article 43 (6), line 4: ... before the Court, and others who are at risk ... (add "," after Court)
Article 55 (1), (b), line 3: ... punishment; and	Article 55 (1), (b), line 3: ... punishment; (delete "and")
Article 55 (1), (c), line 4: ... requirements of fairness;	Article 55 (1), (c), line 4: ... requirements of fairness; and (add "and")
Article 55 (2), (c), line 5: ... means to pay for it;	Article 55 (2), (c), line 5: ... means to pay for it; and (add "and")

Article 57 (3), (e), line 5: ... article 93, pargraph 1 (j), ...	Article 57 (3), (e), line 5: ... article 93, paragraph 1 (k), ...
Article 61 (11), line 2: ... subject to paragraph 8 and to article 64, paragraph 4, ...	Article 61 (paragraph 11), line 2: ... subject to paragraph 9 and to article 64, paragraph 4, ...
Article 70 (1), (f), line 2: ... in conunction with his or her duties ...	Article 70 (1), (f), line 2: ... in connection with his or her official duties ...
Article 72 (5), (d), line 4 ... and the Rules.	Article 72 (5), (d), line 4: ... and the Rules of Procedure and Evidence.
Article 75 (2), line 3: The second sentence, beginning "Where appropriate", follows the first sentence.	Article 75 (2), line 3: Move the second sentence, beginning "Where appropriate", to a new line to form a second subparagraph of article 75 (2).
Article 87 (2), line 3: ... the requested State or in one of the working languages of the Court,	Article 87 (2), line 3: ... the requested State or one of the working languages of the Court, (delete "in")
Article 87 (4), lines 1 and 6: ... under Part 9 ...	Article 87 (4), lines 1 and 6: ... under this Part ...
Article 90 (2), (a), line 1: ... pursuant to articles 18 and 19 ...	Article 90 (2), (a), line 1: ... pursuant to article 18 or 19 ...
Article 95, line 1: Without prejudice to article 53, paragraph 2, where there is an admissibility challenge under consideration by the Court ...	Article 95, line 1: Where ther is an admissibility challenge under consideration by the Court ...
Article 99 (5), line 3: ... connected with national defence or security ...	Article 99 (5), line 3: ... connected with national security ...
Article 107 (3), line 3: ... the person to the State which has requested ...	Article 107 (3), line 3: ... the person to a State which has requested ...

APPENDIX 2

Ratification Status as of 01 January 2000

STATUS: *Signatures*: 92. *Ratifications*: 6.

Participant	Signature	Ratification
Albania	18 Jul 1998	
Andorra	18 Jul 1998	
Angola	7 Oct 1998	
Antigua and Barbuda	23 Oct 1998	
Argentina	8 Jan 1999	
Armenia	1 Oct 1999	
Australia	9 Dec 1998	
Austria	7 Oct 1998	
Bangladesh	16 Sep 1999	
Belgium	10 Sep 1998	
Benin	24 Sep 1999	
Bolivia	17 Jul 1998	
Brazil	7 Feb 2000	
Burkina Faso	30 Nov 1998	
Burundi	13 Jan 1999	
Bulgaria	11 Feb 1999	
Cameroon	17 Jul 1998	
Canada	18 Dec 1998	
Central African Republic	7 Dec 1999	
Chad	20 Oct 1999	
Chile	11 Sep 1998	
Colombia	10 Dec 1998	
Congo	17 Jul 1998	
Costa Rica	7 Oct 1998	
Côte d'Ivoire	30 Nov 1998	
Croatia	12 Oct 1998	
Cyprus	15 Oct 1998	
Czech Republic	13 Apr 1999	
Denmark	25 Sep 1998	
Djibouti	7 Oct 1998	

Ecuador	7 Oct 1998	
Eritrea	7 Oct 1998	
Estonia	27 Dec 1999	
Fiji	29 Nov 1999	29 Nov 1999
Finland	7 Oct 1998	
France	18 Jul 1998	
Gabon	22 Dec 1998	
Gambia	4 Dec 1998	
Georgia	18 Jul 1998	
Germany	10 Dec 1998	
Ghana	18 Jul 1998	20 Dec 1999
Greece	18 Jul 1998	
Haiti	26 Feb 1999	
Honduras	7 Oct 1998	
Hungary	15 Jan 1999	
Iceland	26 Aug 1998	
Ireland	7 Oct 1998	
Italy	18 Jul 1998	26 July 1999
Jordan	7 Oct 1998	
Kenya	11 Aug 1999	
Kyrgyzstan	8 Dec 1998	
Latvia	22 Apr 1999	
Lesotho	30 Nov 1998	
Liberia	17 Jul 1998	
Liechtenstein	18 Jul 1998	
Lithuania	10 Dec 1998	
Luxembourg	13 Oct 1998	
Madagascar	18 Jul 1998	
Malawi	2 Mar 1999	
Mali	17 Jul 1998	
Malta	17 Jul 1998	
Mauritius	11 Nov 1998	
Monaco	18 Jul 1998	
Namibia	27 Oct 1998	
Netherlands	18 Jul 1998	
New Zealand	7 Oct 1998	
Niger	17 Jul 1998	
Norway	28 Aug 1998	16 Feb 2000
Panama	18 Jul 1998	
Paraguay	7 Oct 1998	

Poland	9 Apr 1999	
Portugal	7 Oct 1998	
Romania	7 Jul 1999	
Samoa	17 Jul 1998	
San Marino	18 Jul 1998	13 May 1999
Saint Lucia	27 Aug 1999	
Senegal	18 Jul 1998	2 Feb 1999
Sierra Leone	17 Oct 1998	
Slovakia	23 Dec 1998	
Slovenia	7 Oct 1998	
Solomon Islands	3 Dec 1998	
South Africa	17 Jul 1998	
Spain	18 Jul 1998	
Sweden	7 Oct 1998	
Switzerland	18 Jul 1998	
Tajikistan	30 Nov 1998	
Trinidad and Tobago	23 Mar 1999	6 Apr 1999
Uganda	17 Mar 1999	
Ukraine	20 Jan 2000	
the former Yugoslav Republic of Macedonia	7 Oct 1998	
United Kingdom	30 Nov 1998	
Venezuela	14 Oct 1998	
Zambia	17 Jul 1998	
Zimbabwe	17 Jul 1998	

APPENDIX 3

BILL FOR THE RATIFICATION OF THE STATUTE ESTABLISHING THE INTERNATONAL CRIMINAL COURT ADOPTED BY THE ITALIAN PARLIAMENT ON 1 JULY 1999 AND SIGNED BY THE PRESIDENT OF THE ITALIAN REPUBLIC, H.E. C.A. CIAMPI ON 12 JULY 1999 (L. 12 July 1999 n. 232)

ARTICLE 1

The President of the Republic is hereby authorized to ratify the Statute establishing the International Criminal Court, complete with final act and annexes, adopted by the United Nations Diplomatic Conference in Rome on 17 July 1998.

ARTICLE 2

The provision of the Statute referred to in article 1 shall be implemented in full from the date of its entry into force in accordance with the provisions of article 126 of that Statute.

ARTICLE 3

1. The expenditure arising from the implementation of this act, up to the maximum of ITL 1,500 million per annum starting from year 2000, shall be covered in 2000 and 2001 through a partial utilization of the revenues earmarked in the 1999/2001 budget within the framework of the contingency reserve for current expenditures (special fund). For this purpose, partial use shall be made of the reserve set aside for the use of the Ministry of Foreign Affairs.
2. The Ministry for the Treasury, the Budget and Economic Planning is hereby authorized to make the necessary amendments to the budget by decree.

ARTICLE 4

This act shall enter into force the day after its publication in the Official Journal.

TECHNÉ, POLITICS, HUMAN RIGHTS: MILLENNIUM-EVE CONSIDERATIONS ON SOME ASPECTS OF GLOBALIZATION

CIRO SBAILÒ

Globalization is changing the paradigms of world politics. The principles of "sovereignty" and nation-state are undergoing a crisis and this entails remarkable consequences on human rights policies. The absence of any congruence and symmetry between the subject who takes the decision and the frame of effect of the same decision. is evident, for example. Such a situation may be described as a crisis of the primacy of politics with the advent of the supremacy of *techné*. Should such a crisis materialize, this would mean the end of any human rights policy. We should therefore understand the evolution and fate of *techné* and to what extent politics and the fate of man are tied to the theoretical and juridical apparatus of the nation-state and to the principle of sovereignty. This is both a political and philosophical problem whose solution requires an investigation of the roots of western thought. In effect, the globalization process, understood as the present manifestation of the evolution of *techné*, could bring about - contrary to the worst expectations - a weakening of the principle of territorial jurisdiction and the strengthening of the principle of "responsibility". The latter could open the doors for a new human rights policy: one which is no longer tied to the model of the national state and no longer limited by the principle of sovereignty.

1. Power, Truth, Sovereignty

Establishing an efficient human rights policy that does not conflict with the principle of national sovereignty is today extremely difficult. The Kosovo war or the crisis in East Timor, together with many other increasingly recurrent cases, prove that the principle of national sovereignty is one of the main obstacles to a worldwide human rights defence policy. The establishment of an international penal court for crimes committed in former

Yugoslavia, or the arrest of the former Chilean dictator Pinochet ordered by a Spanish judge testify to the crisis of the theoretical and juridical apparatus based on the principle of national sovereignty.

Nevertheless, it is nowadays difficult to figure out anything better than a nation state to defend human rights effectively. If a human rights policy has to be something different than simple humanitarian proselytism, i. e. if a "real policy" is aimed at, a series of coercive instruments ranging from embargoes to intercontinental missiles is necessary - these means being the exclusive prerogative of nation-states and of other organizations such as the UN and NATO, legitimized by the consensus of national states.

Therefore, if the political and juridical apparatus based on the principle of national states is actually in a critical phase, it is necessary to distinguish what has to be revised or rejected, from what has to be preserved. Should we ignore this, the risk is serious that the crisis of the national state and of the very principle of sovereignty may assist those who desire get rid of the "inconvenient" human rights question. The new emerging forces of the media and financial markets might thus develop unshackled and reach the climax of their power.

This article deals with the theoretical side of the whole question and analyses some data concerning specific events. First and foremost, we will discuss human rights in the light of the theoretical and juridical structure of the "nation-state". The question therefore arises whether philosophy, in this present day, is able to fix limits to the claims of power-holders? Is a philosophical foundation of human rights possible, today? This question presupposes that philosophy possesses an aristocratic impartiality in regard to issues of power and politics. However contemporary philosophy has itself given up this certitude. Whatever his philosophical trend may be, any thinker is nowadays aware that any philosophical "foundation" is possible only on the ground of modern reason, that also manifests in the forms of modern "power". Therefore, we know that modern philosophy and modern power have the same root. Any attempt to found human rights on a philosophical basis implies recourse to the theory of sovereignty. This is the core of the matter. We must recognize that in this modern age, "truth" and power are linked by a close

bond.[1] We exercise power through the production of truth: exercising power without a certain economy of discourses of truth[2] is impossible. Consequently, the transformation of the concept of truth involves the transformation of the conception of power and vice versa.

The crisis of absolute truth is also the crisis of sovereignty. It reflects the crisis in contemporary Western paradigms of political thought, which originated in the Middle Ages and developed in the Age of Absolutism. Thus instead of concentrating on the problem of the solid and global kind of domination that a dictator exercises over people, we should consider the problem of the manifold forms of domination that can be exercised within society. We should not think of the uniform edifice of sovereignty, but the multiple form of subjugation. We should stop looking for the "heart" of power. The image of the "heart of power" is an instrument of the political struggle within the system of power. It is a "paradigm". This paradigm has had its day and it is now obstructing the understanding of both present and past times. The description of the uniform building of sovereignty is surely simple. However we are concerned with the description of the manifold forms of subjugation that develop in our society:

> "Power is employed and exercised through a net-like organization. Not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are always also the elements of its articulation. In other words, individuals are the vehicle of power, not its points of application".[3]

We should abandon the theological vision of power. Power resides

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[1] M. Foucault, "Power, Right, Truth" [1972], in *Contemporary political philosophy: an anthology*, edited by Robert E. Goodin and Philip Pettit, Blackwell Publishers, Malden, Massachusset, 1998 (1997). Original published in *Power/Knowledge*, Colin Gordon (Harvester, 1980), pp. 92-108. Copyright 1972, 1975, 1976, 1977 by Michel Foucault.

[2] M. Foucault [1972], p. 543.

[3] M. Foucault [1972], p. 546.

entirely in its real and effective practices.[4] The purpose of repression is not the supremacy of some values and interests over others, but the use of the mechanism of power itself. Therefore, the definition of power sounds similar to that of *techné*. That is the art of effectively pursuing an aim. However that is in a sense also the definition of truth.[5]

2. Some political aspects of digital revolution

If we consider that power and truth are inseparable, and that no power may be used without some production of truth, our task is to examine how the human rights question is to be seen in a world which witnesses a change in the common concept of truth. We should therefore ask what the specific political aspect of the digital revolution? First of all we should recognize that the "knowledge economy" has become the main sector in our social life. For example, in the USA about 60% of new jobs originate in the media field. However, the growing tangle of productive activities linked to media world must be contemplated from another viewpoint. The "media revolution" also involves a transformation of democracy because the modern *agora* tends to expand to the whole *polis*. Expressing one's point of view within political and social debates thus becomes easier and easier. The élites are growing "horizontal" like "search engines that organise the ever-increasing body of information. Therefore it's necessary to reconsider the concept of political representation. For example, assuming that the parliamentarian machine is fundamental in order to involve people in the policy-making process what is the destiny of Parliament (as the development of the interactive-communication net tends to extend to political field)?

What relationship can there be between public and private in a "continuous" and "direct" democracy? Shall the illuministic ideal of a "transparent society" become true? The situation is indeed very entangled. Both the multiplication of "channels" and the extension of the net may make society more "opaque". In effect, the relationship between "being" and the "appearance" of an event, as

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[4] M. Foucault [1972], p. 546.

[5] See "Verità" in: Nicola Abbagnano, *Dizionario di filosofia*, Torino, UTET, 1971.

the production and the reproduction of news, is increasingly committed to *on-line* people, who now act both as receivers and transmitters of the same news. The extension of the net produces new and serious problems. For example, how can we assure that everybody has the same opportunity of joining the net? However, the matter in hand concerns not only the traditional defence of freedom of expression and the rights of cultural minorities, but also the defence of democracy against itself. Therefore, as both Alexis de Tocqueville and Max Weber proved, the trend towards an overall popular participation in policy- making - that is to an absolute transparency - may lead democracy to a soft self- destruction. The continuous and direct democracy is always on the point of changing into what Max Weber called *Strassendemocratie* (Streetdemocracy),[6] that is a political system apparently open to all opinions and to all social and cultural instances but actually firmly in the hands of some small elite. Today, it is not a fictional exercise to imagine that a well-organized minority may manipulate public opinion thus achieving a disproportionate power with regard to its actual consistence.

3. Globalization and old political "canons"

In parallel with the digital revolution, we should also consider the development that has occurred in finance and economy. How can a country shape its own destiny in a world where transnational business is increasing its power and technology is breaking down all the borders? Business seems to be the dominant institution on earth. 20 to 25 years ago we would attribute a ruling position to governments only. But the public perception of the role of the government in society is changing.

Nowadays, none of us could honestly deny that only a limited share of the world is in the hands of politicians, while most of it depends on financial top management. As Edward Luttwak shows in his latest book,[7] the market is becoming uncontrollable through an unfettered freedom to buy and sell. As business becomes more

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[6] See: Giorgio Rebuffa, *Nel crepuscolo della democrazia*, Il Mulino, Bologna 1991.

[7] Edward Luttwak, *Turbocapitalis*, Copyright 1998 by Edward Luttwak

powerful, governments run the risk of being seen as roadblocks. Take the example of GBDeC (Global Dialogue on Electronic Commerce) that describes itself as an "organisation that responds to the need for strengthened international co-ordination" created because "conflicting policies, rules and regional patchwork regulations are obstacles to the emerging on-line economy".

So, politics is seen as an obstacle to progress, that is to the freedom and well being of people. In a document signed by IBM, Time Warner, Sony, AT&T, Portugal Telecom and another hundred corporations, we read that the communication business came to an agreement to "identify solutions and provide input on regulation or business self- regulatory codes of conduct in consultation with governments". It is erroneous to consider the globalization purely as an economic issue. It is a serious political problem. National governments are forced out of the business concern and are losing their influence over the movement of information and capitals. We should understand that globalization can change political structures within countries. Politicians cannot ignore that domestic policies can excite some reactions by transnational firms that have interests within their own countries. Take the familiar case of a transactional business that employs a large number of workmen in a country, or the case of a transnational firm controlling most of the mass media in a country. How can the politicians of that country take certain decisions that could damage the interests of that transnational firm, without envisaging a rise in unemployment or an anti-governative press-campaign?

Globalization disrupts standard political practices. Let's consider an Italian story. In 1998 Mr. Berlusconi was about to sell his firm - "Mediaset" - to Mr. Murdoch. So, he could both make an astonishing pile of money and resolve the so called "conflicts of interests", the left charges him with because he's both a political leader and the best Italian manager in the field of mass-media (by the way, in that way Mr. Berlusconi would follow Mr. Luttwak's repeated advice). However the left, especially the neo-communist party, opposing the plan of Mediaset sale, was sometimes blandishing, sometimes attacking Mr. Berlusconi. Its first argument was that "Mediaset is a home-good, i. e. too much home business to let it fall into foreign hands". Some opinion makers suggest that the leftwing adopted that position because if Mr. Berlusconi had sold its business by himself he would have had politically "free

hands" and the left would have no longer been able to put pressure on him by bringing about some restrictive bills on the "clashing interests".Maybe there is some truth to this thesis. Certainly the Italian left- wing is deeply worried about globalization in that, effectively, it is not easy to imagine how globalisation will develop and what kind of effects it will have in various countries. For a small country, globalization can be a blessing for the enlargement of the market for its goods, but it can also involve the risk of being absorbed by larger countries.

4. The global village and cosmopolitan idea

Paradoxically, the development of the "global village" can originate a crisis of the western cosmopolitan ideal. There exits a tension between the cosmopolitan assumption of a universal "humanity" that transcends all specific cultural differences, and the western preference for democracy and constitutionalism. The western essential preference for democracy collides with the recognition of the variety of cultures and political traditions. From the contemporary western viewpoint, even non-democratic cultures and political traditions - which constitute the majority of the countries in the world - should be praiseworthy and respectable! So, we should recognise that the development of the new communication technology may not necessarily lead to democratic governance and individualism, as well as to the acceptance of the western conception of human rights. Most Arab and Asian governments while welcoming the economic advantages of new technologies, strongly oppose the spreading of democratic culture and the assertion of human rights.

In 1998, the U.S, Department of State, recognized that with the information Revolution, the struggle to control information has moved well beyond the realm of traditional media. In fact, many Asian governments, such as Singapore and China, violate basic rights of free inquiring and freedom of information and try to limit the access to internet and the business communication means such as cell-phones, modems and satellite television which are not easy to control. They accuse the western- democratic values to be responsible of sexual corruption. Paradoxically, those government vindicate their policy in the name of the preservation of the

religious and cultural identity of their countries, that is. in the name of the western democratic value of multiculturalism.[8]

The East Timor case constitutes clear evidence of how political matters are involved in globalization. On one hand, Internet has become the primary tool to defend human rights in East Timor. On the other hand, the political situation has become very complicated because it involves many interests that go beyond the nation-state framework. In November 1975, East Timor ceased to be a Portuguese colony. In December it was already invaded by Indonesian troops. Since the invasion of 1975 a civil war has been raging between the large majority of people (about 80 per cent) who opposed Indonesian invasion and a tiny minority supported by the Indonesian government and its troops. So far, according to conservative estimates by non- governmental organizations, including Amnesty international, the death toll in east Timor is about 300.000, that is more than 35 per cent of the population. Despite the increasing seriousness of political and human situation in East Timor, international institutions such as UN and European Union, have long followed a soft policy on Indonesian invasion: that is., many resolutions, but few active decisions. However, as access to Internet has become more affordable and accessible - since 1993 approximately – the East Timor campaign has become a well co-ordinated international campaign. In early fall of 1999, using the search engine "Altavista" we found 35.566 Web pages containing the phrase "East Timor". Now, in East Timor first hand information from the world is available in few minutes.

Under pressure of an increasingly shocked public opinion, the action of UN, UE and of western governments, especially of the USA administration, with regards to the East Timorese situation is becoming more efficient. In Spring 1999 the United Nations sponsored an independence referendum in East Timor, supervised by its observers. Violence by anti-independence militiamen was growing to madness, with attacks on civilians, UN officials and journalists. Nevertheless, on September 23rd 1999 East Timor voted on whether to become an independent nation or an autonomous

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[8] See: Charles Ess, "Cosmopolitan Ideal or Cybercentrism? A critical Examination of the Underlying Assumption of 'the electronic global village'", Drury College, Philosophy and Religion Department, Editor: John Dorbolo.

region within Indonesia. Obviously, voters choose independence. During election days, President Clinton warned Indonesia about the consequences of violence in East Timor. He warned the Indonesian president that should any incidence violence occur during the referendum regarding self-rule in East Timor, then relations with the United States would have been seriously damaged. The USA president had to overcome the firm opposition of American financial milieus with strong interests in Indonesia. USA action has been slow and uncertain although the aim has finally been achieved. At present, the situation in East Timor is still hot, but the main objective has been reached. Indonesia has, at least formally, taken distance from the guerrilla opposing independence.

5. The "rule of the law"

East Timor events are a clear evidence of how the situation has become increasingly complex after the end of the cold war. An epoch-making change has thus occurred which leads us to revise our political categories. Despite the fact that technology is often considered the driving force behind the globalization process, we should recognize that the word 'globalization' only gained currency after a political and ideological event such as the collapse of communist regimes in Eastern Europe.

Although some communist countries - such as China and Cuba - still exist, we can now declare that the communist era has come to an end. The latter began after the end of World War II, when the global political map was divided in three worlds: the first world, the so-called "free world"; the second world, that of communism; and the third world, that of developing countries. That geopolitical tripartition was the "paradigm" of all policies in the period between 1945 and 1990, as well as of human rights. Decolonization and growth in the number of independent nations were on the Agenda; the result was a dramatic increase in the number of United Nation members. The first and the second world wielded strong pressure on these new countries to join their blocks, the communist philosophy capitalizing on the interpretation of colonial exploitation, the rich North versus the poor South, etc.. If we now look at the worldwide political map, the scene is quite different. As a result of both the collapse of the Soviet Union and the success of their own economy, the United States are more than ever a leading

nation. The political unification is transforming Europe from a geo-economical community operating on a restricted scale, into a First world, geo-political giant, without any military power of its own yet. In the meantime, NATO has become the only international institution, which can effectively intervene, in a military-political crisis. Although the Security Council is now trying to free itself from paralysing vetoes, Unites Nations and all its allied institutions are nonetheless going through difficult times.

To be considered a "democratic country" and thus "on the right side" was enough. Therefore, western democracies often deliberately ignored repressive behaviour of certain anti-Communist governments, such as Pinochet's Chile, or Franco's Spain. Nowadays, things are increasingly difficult. The alibi of anti-communism no longer subsists, and a surface acceptance of democratic principles is not enough to be numbered among Western democracies, and this does not necessarily imply being recognized as a partner with whom good diplomatic and economic relationships may be entertained. On the other hand, a new problem arises: the framing of international policy within juridical categories and the ensuing primacy of law over policy and the supremacy of jurisdiction over national governments.

This is the challenge posed to the "rule of the law". A political system can be defined "democratic" if it is *accountable to* and not *above* the law. So, in a democratic system, universal human rights are neither juridical and nor politically disposable. We have to emphasize the difference between the "existence" of law and the "rule" of the law. The 1998 Human rights report of U.S. Department of State says: "Many governments confuse the existence of the law with the rule of the law. In too many countries - Cuba, Iraq, Libya, North Korea, Sudan, and Syria, to name only a few - the rule of law has been warped to oppress the whims of a tiny ruling élite. In others, well-intentioned laws, have become paper fictions, providing cover for corrupt politicians and criminals. Some governments legislate restrictions for free speech, free press, and other key rights in the name of the rule of law. For the rule of law to be truly effective, a country's legal system must be independent and in conformity with universal human rights principles".

So, in the age of globalisation we are being faced with a serious matter that must be dealt with, that is the trustworthiness of governmental local leaderships. The U.S. Department of State takes

various examples and particularly those of Russia and Ukraine, where "the persuasiveness of corruption, connections between government officials and organized crime, and the political activities of organized crime figures, allowed criminals to act outside the law to influence politicians, police investigations, and court decisions". But who lays down that law? Who is the lawmaker and who applies the law? In the age of globalization, the destiny of democracy lies entirely with this question.

6. Democracy and globalisation

Whether we are for democracy or against it, we used to consider a "symmetrical" and "congruent" relationship between politic decision-makers and recipients of politic decision, as peculiar to any democratic system. However with globalisation, that relationship is no longer obvious. In fact, usually, a broad definition of democracy should include the followings points:

a) participation by all people in the decisions that shape their lives;
b) government by majority rule, with the recognition of the rights of minorities;
c) freedom of speech, press, and assembly; freedom to form opposition political parties and to run for office;
d) Commitment to individual dignity and to equal opportunities for people to develop their full potentialities.

Obviously, point a) which is. at the basis of the other points - seems to involve a "symmetrical" and "congruent" relationship between policy decision-makers and recipients of political decisions. Such a strong relationship seems to be the only possible guarantee for citizen-voters, who can thus clearly identify those who are responsible for decisions as well as their geopolitical and juridical range of action. However, in the technological age a political decision can have very prominent effects beyond the geo-political and juridical sphere of its genesis. The most common example is that of a government deciding to install some atomic power stations within its territory. But today we can provide other examples, such as decisions concerning interest-rates, defence of environment, drug circulation or pornography on internet. The development of technology has set fire to the boundary posts of nation-states.

The process of restricting the range of influence of nationa governments develops within the borders of each country too "Authorities" independent from governments, parties and citizer voters, are multiplying in all western countries and they have jurisdiction on very important matters such as free competition, telecommunication, etc.[9] All through the twentieth century the idea that political decisions have to be legitimated by consent was usually accepted. But that idea has developed through the "paradigm" of nation-state. So, when we talk about "consent" we think of a community living within a well-bounded territory within a well definite jurisdiction, where political decisions affect that area and those citizens. However, in a worldwide system of regional and global interconnectedness the nation-state model is becoming less effective.

7. The destiny of *techné* and new human rights policy

Whenever violations of human rights occur, the basic topic put forward in public debates is that the reason of politics must prevail over those of economy, defence and technology. However we should ask ourselves what is it, that joins economics, defence and technology against politics? The answer is that the former falls within the range of "technique". What's "technique"? "Technique" is "rules set up for the effective achievement of aims". Technique demands "competence". What's politics? Politics is the science of government. Its aim is good government and the wellbeing of the community. Politics demand "responsibility".

So, we envisage a struggle between Jurisdiction and Responsibility. This picture is actually a "paradigm" to understand a lot of contemporary political problems. Movies (take for the example the film "Air Force One" with Harrison Ford), suggest some situations of conflict between a person who risks at most his career or some money - a capitalist, or a military attaché or a spokesman - and a person who, because the community relies on him, risks his

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[9] See: David Held, "Democracy: from city-state to a cosmopolitan order?", in *Contemporary political Philosophy...*, pp. 85-86; David Held, *Models of Democracy*, Cambridge, polity Press, 1996 (2). Copyright by David Held.

life - a politician for example. However, if technique and politics are set up against each other, they must be objects of the same kind. For example: black and white are reciprocally in contrast because they are both colours. So, if technique and politics are in contrast, what domain do they belong to? We should use here an ancient Greek word: *techné*. *Techné* is the art of making the world apt to be subjected to the human transformation activity. The aim of *techné* is not the transformation of the world, but its unlimited transformability.

In short, in order to frame the problem of human rights appropriately within the "global village" we should adopt a philosophical perspective. In particular, we should consider some aspects through the eyes of a philosopher who centres his reflection on the "destiny of *techné*", that is the Italian philosopher Emanuele Severino. Severino, especially in his latest works,[10] explains that *techné* is not a simple means man makes use of to attain his goals, but it is the main goal of all human issues or activities, so it is the horizon in which both the western individual and the idea of world (that's an originally western idea) rise.

All the great powers of the world - such as communism, capitalism or Christianity - use *techné* to achieve their aims. However, taken globally, the situation is overturned as if in a dark room, in that, *techné* uses the great powers of the world and their values to develop itself. Take for example the relationship between political parties and mass media world. No political party can do without the support of mass media and compete with the other parties. In Italy, during the electoral campaign for the European elections in 1999, left-wing parties did not use TV-spot. They did that for two reasons. "Politics isn't a brand of soap" some left-wing leaders said in public debates. However, there was yet another reason, "we will not finance the electoral campaign of Silvio Berlusconi" they said. In effect, Mr. Berlusconi is both the leader of a centre right coalition called "Polo per le libertà", and as the owner of three sevenths of the national TV-network besides being the biggest Italian manager in the communication field. Therefore, left wing parties lost the elections while Mr. Berlusconi's party,

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[10] See: Emanuele Severino, *Il destino della tecnica*, Milano, Rizzoli 1998

"Forza Italia", was entirely successful and became the first Italian party. Most of left-wing politicians recognized that the television self-blacking-out played a very prominent part in the electoral failure of their parties. So, a few weeks after the Election Day, the Italian centre-left government brought in a bill prohibiting all parties from conducting an electoral campaign by means of TV commercials. However the bill has been opposed not only by Mr. Berlusconi and his allies, but also by many authoritative left-wing politicians, who consider it both unjust and harmful for the left itself. Therefore, Italian government had revised many of its bills. Therefore, every party inevitably wants the mass media - i.e. the "means" by which it competes with its adversaries - to be more and more efficient. So, the means has become the target of political parties.

Obviously the mass media are not *techné*. Techné is the horizon of human activity. Techné is the work of giving rise to conditions of further and unlimited world- transformability. So, in all fields of human activity, such as economy, science or defence means become the very purpose. Techné is essentially a destiny. This destiny originally reveals itself in Parmenides' Philosophy which established the difference between real being and apparent world:

> "The thing that can be thought and that for the sake of which the thought exists is the same; for you cannot find thought without something that is, as to which it is uttered. And there is not, and never shall be, anything besides what is, since fate has chained it so as to being whole and immovable. Wherefore all these things are but names which mortals have given, believing them to be true — coming into being and passing away, being and not being, change of place and alteration of bright colour".[11]

Through Parmenides western civilisation takes the first step towards nihilism, i. e. towards the firm belief that the whole world has risen from nothing and that it will return to nothing. Parmenides foretells the nihilism and fights it, but paradoxically,

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[11] Parmenides, *On Nature*, VIII, 35-40, translation by John Burnet.

he opens the road ahead of it. Therefore, with Parmenides begins the "western insanity". Severino says that if someone does not believe in the Nothing, the things are capable of being isolated and the world is untransformable and aimless too. This discourse isn't a criticism of western civilisation at all. *Techné* is not an option; it is rather a fate. It is our truth. We should ask ourselves how we can remain within the destiny of *techné*. Severino's thesis may suggest new ways for the development of the question concerning human rights in the age of the "global village". We cannot be sure at all that the development of *technés*' destiny involves the establishment of technology and the power of technicians over politicians. According to recent experiences, we learned that someone, who is both endowed with an elasticity of mind and is driven by a high sense of responsibility towards other people, can be more efficient than someone who is simply "competent" and pursues only his personal success.

Beginning mid-eighties, all main political disturbances in the world came about to dismantle some big power-structures that were founded not on responsibility but on "competence" and "knowledge"; within those, it was very important to be able to reach information and resources which could grant access to power posts. The breakdown of East-European communist regimes is the best example. Likewise, even not so violently, happened in other countries, such as Italy and United Kingdom. In Italy two thirds of the ruling political class had been eliminated by inquiries about political corruption. A lot of wrongs have been made. Magistrates accused most political parties, especially the socialist party, while they were more lenient with some politicians, especially communist and left Christian-democrats. In this way, some people were imprisoned or left abroad, while others, although they were not alien to old politics and its evils, got free. Magistrates became the idols of the people. They posed as sociologists and political analysts. At last, they could finally fulfil the intellectual and political ambitions they had cultivated since the Seventies, when university leavers and full of ideals, they had been attracted within the area of the communist party. After the storm, people have lost their affection for magistrates-heroes and now they are asking that the magistrates, instead of writing the history of the Italian political system, become more efficient and strict against urban delinquency and hardened criminals.

So, in the UK the Thatcherian policy dismantled some structures of the Welfare state and began the privatisation of public enterprises, thus destroying some old fashioned power-systems. So, it gave rise to new chances for all people and compelled both left-wing politicians and trade unions to abandon the old dual scheme proletariat-capitalists, and to take up the variety and changeability of the post-industrial society. After that, British society became economically more efficient and more competitive, because a lot of privileges and old customs that might hinder new people's social improvement had been removed. So, British people began to demand a policy caring more for social problems. Labour party came therefore back in power, but with a quite new policy. The UK therefore, has not witnessed a victory of the finance "technicians", and in Italy there has not been a victory of the "technicians" of the justice. Both in UK and in Italy "technicians" have been used to contrast other "technicians". So, the development of the civilization of *techné* doesn't involve the subjection of politics, but on the contrary, it seems to entail the supremacy of politics, i.e. responsible powers.

8. The death of the "Westphalia model"

Globalization means the death of the "Westphalia model", i.e. the model of international regulation that ruled over western countries after the peace of Westphalia, in 1648. On the basis of the Westphalia model, the world is made of sovereign states recognising no superior AutoRoute and where disputes among states are often settled by force. The political-philosophical side of the "Westphalia model" is Hobbes' idea of power. Assuming that the state of nature is like a "war of all against all", the international system of states is in a continuous "picture of war". This is the foundation of the so called "Realpolitik".

The foundation of the Westphalia model is essentially philosophical, inasmuch it is the very philosophy of the "subject" - this is even more evident if we consider it in the light of its historical development. Modern "subjectivity" has originated, in its development, the multiplication of "subjectivities", and of their inter-relationships. A crisis has therefore emerged of this subjectivity, which may be only defined on the basis of its inter-relationships. Similarly, the Westphalia model has produced a crisis

of its foundation, i.e., the idea of nation-state.

The Westphalia model itself starts a process of global interconnections among states and societies. With the development of industrial capitalism, defence policy began to be linked to economic goals. Power sovereignty became more and more dependent on the economic resources of a country and vice versa. So, the Westphalia model covers a period from about 1648 to 1945. The awful and boundless destructive power of the nation-state defence-machine showed itself in World War I e II. Such evidence induced western countries to reconsider the "Westphalia model" and to find the way to connect sovereign states through a dense network of relations, both *ad-hoc* and institutionalised. So, the Westphalia model evolved into the "UN Charter model". Against the doctrine providing that international law primarily concerns political and strategic affairs of nation-states, now international law is progressively concerned by orchestration and regulation of economic, social and environmental matters. But this structure is founded on the division of the globe into powerful nation-states, with different geopolitical interests. So, in the UN Charter model there is a contradiction between the fundamental recognition of nation-state and the objective of a transnational interconnection among people. This contradiction is particularly manifest in the special power accorded to the five permanent members of the UN Security Council. So, UN shows itself very susceptible to the agendas of the most powerful states: the rights of nation-state always prevail against the rights of people. The same happened during the crisis in Kosovo, when the veto of China and Russia stopped UN's armed intervention against Milosevic and NATO started up its armed mission in Kosovo and Serbia.

The UN's model remains a state-centred model, in which the transnational actors, as non-governmental organizations and social movements, play a minimal role. This model is essentially contradictory: on one hand, it holds the equality of all countries (one country, one vote in the general Assembly), on the other hand it recognises a special role to geopolitical strength (special veto power in the Security Council granted to super-powers). However, globalization involves the crisis of nation-state model. But that's not a regular trend. Paradoxically, many countries and people, in the age of globalization, are looking for their identity in their traditions or in their past, or are finding new aggregation models no longer

founded on the nation-state concept but on ethnical or religious traditions. So, the globalization can lead either to a global integration or to unlimited fragmentation.

In many cases the national sovereignty has become quite illusory. For that, we have to distinguish between the *de facto* and only *de jure* sovereignty. A lot of third World countries, that had previously been denied sovereignty, today consider sovereignty as a defence from globalization. But their sovereignty is merely de jure. They are de facto, economically dependent and vulnerable to globalization. *De facto*, power sovereignty heavily depends on the economic resources of a country. We should ask ourselves: how can we expand democratic institutions and agencies? In fact, that is the only way to defend democratic systems.

Today's political scientists no longer construct institutional models only through economic, social, historical and ideological paradigms, and, at last, they acknowledge that institutions have an active and conditioning function in shaping political behaviours and values of both social classes and individuals. So, it would be theoretically much easier to build and legitimate some *ex-novo* institutions to defend human rights over and above all juridical bounds of nation-state. This is very important because today's globalization tends towards a restriction of the nation-state's range. Which institutional models can we now design in order to regulate new conflicting situations? Maybe we have to train ourselves to elaborate some institutional models without the "category" of nation-state. So we could tackle the fate of democracy in the light of the development of globalization. Understandably, in some countries, politicians strongly resist the radical reforms that people claim. In fact, a radical reform of a political system can involve the destruction of power-systems that are intertwisted with the structure of a nation-state and its national history. But within the global village the defence of human and civil rights is no longer possible throughout the nation-state. Human rights can only be defended through transnational institutions.

This means that our policy-making ideas should be entirely revised, as the instruments of political analysis, conceived within the nation-state category, are no longer valid. On the other hand, western-democratic though has invested most of its energies and credibility on these instruments. We should therefore tackle the root of the problem, the same basis of western political rationality in

order to reconstruct the theoretical building of democracy. The destiny of human rights linked to a philosophy. Only a serious philosophical work could enable us to redesign a theory of the rights of man in the globalization era, without the limits and the convictions of the principles of sovereignty and the existence of the national state. We should investigate the roots of the western thought and find new inputs to elaborate a theory of human rights.

The same notion of "subject" may not be seen as the basis for a theory of the "person". The "subject" is proving to be – what he has always been – an invention of modern times, exactly as the national state. How can we define a "subject" when we are actually dealing with a multifaceted reality such as Internet? The search is not necessarily bound to be successful, but every great step on the path of knowledge is always a leap in the dark.

CRIMINALS, MONSTERS, HUMAN RIGHTS – ARE HUMAN RIGHTS FOR MONSTERS TOO?

FRANCO SIDOTI

The idea of the monster as an evil person with no human feelings and deprived of any rights is a recent creation of the collective imagination. The confusion of the notion of criminality with the teratological notion of the monster is a typical fable of the troubled times we are living in. The monster begins his adventure in the traditional Western culture as a prodigious creature. He is endowed with benevolent understanding in the famous pages of Montaigne, presents the occasion for sanctity to the canon Giuseppe Cottolengo, suffers peculiar amorous throbs in tales from Mary Shelley to Mel Brooks, and is called "delicate" by Baudelaire. He is even enrolled among indirect educators by Bruno Bettelheim, because he could be useful in children's fables to prepare them for the horrible experiences they will have to face on becoming adults. Sadly the monsters of the past are no more, as the Granguignol-like analyses of the private slaughterhouses of the cruelest murderers show in detail. The children of darkness and the children of light battle on in the twilight of the old certainties; while the survival and the meaning of democratic systems are called into question by new "demoniac religions". Unfortunately, we still need monsters to calm us. The monster is the alien in our midst; and his radical otherness can help us to define ourselves. It could help support an uncertain, ambiguous, and shaky identity. In conclusion, the monster is often a kind of cheap therapy to assuage the persistent mental disorders of the average citizen of our times.

1. In this paper I shall try to show that the idea of the monster, an evil person with no human feelings and deprived of any rights, is a recent creation of the collective imagination. The revolutionary ideas of the Enlightenment, following in the footsteps of authors like Beccaria and Voltaire, proposed the idea of the humanization of the criminal system. Since 1764, the year when Dei delitti e delle pene (Of crimes and punishment) was published, the age of torture, public executions and quartering began its decline. The criminal

slowly became one of us, almost like us, marked by specific but not really hateful characteristics, which covered all the degrees of ordinary humanity, from bad luck to ill health, obviously including the extremist pursuit of personal interest. In 1968 our compassion with the criminal reached its highest point of compassion, which had been building up for two centuries. However, almost immediately after this date a precipitous inversion started: the criminal was often labelled a monster. Not of the wonderful, occasionally good-natured kind, as in the past, but a new type of monster, who no longer incarnated physical abnormalities but total abjection and utter waywardness. A personification of Evil.

2. A direct line descends from the Magna Charta Libertatum to the American Bill of Rights of 1791, and then on to the Universal Declaration of Human Rights of 1948. The human rights tradition is almost universally considered the best Western tradition, born on the basis of the universal brotherhood preached by Christianity (which clearly distinguished itself from Judaism on this point). In the paradigmatic case of Anglo-Saxon history, the achievement of human rights came about in the form of graded progress in each century: civil rights in the 18th, political rights in the 19th and social rights in the 20th century.

In the Sixties many new rights were vociferously established: for students, workers, women, children, refugees, the handicapped, homosexuals, ethnic minorities, the mentally ill, drug addicts, and so on. While people began talking of the rights of the plant kingdom and of the animal kingdom (including fleas, bugs and mosquitoes) even criminals made it to the terminus of a historic route: from the recognition of their status as human beings, with rights that could not be ignored, we moved on to proposals for the abolition of prisons and to a romantic idea of the delinquent, which did exist in the past but now appeared in the colours of new ideologies. Suffice it to mention the manner in which the perception of the author of a crime was turned on its head: he now came to be considered first of all as a "victim" of a repressive, authoritarian, capitalist society and so on.

In the endless history of criminality very significant changes have come about, which in certain aspects are surprising. The year 1968 was a fundamental turning point which marked the apogee of a centuries-old trend to reduce crimes and the serpentine

beginnings of a different trend: a fresh increase in crime and a new social anxiety. The great sociological movement of the 19th and 20th centuries had stressed the importance of the ever-growing cult of the individual and of personal dignity to explain the reduction in crime supported by indisputable numbers (for example the figures for murders decreased objectively and significantly).

In modern societies, parallel to the process of civilization of customs and coexistence, there has been a process of the civilization of crime Between the civilization of crime and the establishment of human rights there is an evident logical and chronological relationship: the constant decrease in crimes co-existed with a constant enlargement of the sphere of the individual's recognized rights.

The rise in crime that began in 1968 came to the public's attention especially after the fall of communism, when it was evident that a new age was born, marked by politological, technological and sociological aspects on an international scale which were very different to those of the past. If we take a look at the history of criminality through the centuries, the enormity of the change is impressive. From a period marked by the decrease in crime we progressed to a period characterized by a marked qualitative and quantitative increase.

3. The terrorist attack on the Twin Towers in New York was followed by the attacks on the Tokyo underground, both of which left deep repercussions on the public's imagination. Those attacks mark a turning point in the perception of contemporary societies, because these concrete demonstrated how vulnerable their structures are. Comments have been made on the shift from horizontal terrorism (the subway) to vertical terrorism (the skyscrapers); one can speak of the combination of both, or better of the effect of both: the one multiplied by the other with the sum total repeated in a kaleidoscope of possibilities. Every country adapts itself to the spirit of the times by observing national traditions. For example, sabotage on the Deutsche Bahn, the railways of very well organized Germany, led to the mobilization of helicopters with infrared visors and Tornado squadrons equipped for electronic reconnaissance. The traditional skill of the Italians to make an art out of everything also led to an ingenious novelty in this field: not only illegality as a form of art (a topic which would

need someone like Burckhardt, the author of Die Kultur der Renaissance in Italien, to give an adequate explanation), but the use of terrorist attacks as a symbolic means of explanation, communication and bargaining. This is what some people see in the serious attacks carried out in Rome, Milan and Florence.

In an extremely vulnerable world, for a series of technological, demographic, and economic reasons which are known to all, the potential of making threats and of destruction is enormous. Even from this perspective the old, or better the eternal, topic of criminality is metabolized and exorcised within unprecedented cultural forms. Some old patterns for absorbing the thrusts of fear have become obsolete, namely those linked to communism or to the direct anti-communist reaction. In the industrial age fear was materialistically and rationalistically motivational (especially as a social fact, and only exceptionally as degeneration of science and industry). Now the definitions of fear are more intense, widespread and indeterminate, occasionally connected to an unprecedented phobia of the body and sexuality, worthy offspring of this age of genetic engineering, organ transplants, test-tube fertilization, hard drugs and AIDS, and the thriving commercialization of corneas, kidneys, blood, embryos, gametes, virgins and children. It's not that reason has gone to sleep, but worse in a sense; reason is surrounded and in certain aspects it has been overpowered by a world which is brimming with traps and dangers. The monsters of Goya were separate and distinct from reality, like the windmills of Cervantes, the imaginations of Ariosto or the damned of Dante. Now reality is apparently producing monsters who live in the real world, feeding on threats and real nightmares.

It is certainly a new age in various aspects. The founder of criminology had a certain idea of the criminal, not of the monster. Since 1870 following Lombroso's approach a vision connected with a historical evolution which, at the individual level, could get blocked or move backwards towards the ancestral and animal past of humanity has prevailed. He stresses that primitive instincts "eliminated from civilization could turn up again in just one individual"; he believes that the criminal is incapable of pain and morality, and is marked by instability and by the violence of passion; he concludes by defining delinquents as "savages living in the midst of a flourishing European civilization". The ideas of Lombroso are also shared by other eminent authors of his time; for

instance in Freud's descriptions of the psychology of the masses, certain dynamic processes are seen from a non-historical and universal perspective which can be defined as typically Lombrosian: Freud considers the repressive action of civilization as positive and he fears the risk of release from moral inhibitions, with a possible unsettling return of "relics of primordial times" to the human mind, which reawaken, re-emerge and drive one to the satisfaction of primeval aggressive and violent urges.

The eighteenth century criminal was not a monster: he was still a human being, perhaps even too humane; at worst he was a savage, as in Lombroso or Freud. This concept was perfected during the twentieth century. For instance it was pointed out that there are different ways to judge a person who is considered guilty in the juridical sense of the word. For a considerable amount of legal literature, the larger part of the kind of behaviour which is termed criminal is simply the result of failure in the battle for sharing wealth. The theory according to which "it would not be possible to draw a clear line between the behaviour of a person who works honestly and that of those who are commonly called rogues" has been "a constant point of reference, confessed or unconfessed, of much scientific writing".

Highly respected criminologists have often insisted on the normality of criminals; from this point of view many persons condemned to imprisonment (for example for crimes against mankind's heritage) are substantially prisoners of war, unlucky fighters, captured in the course of military operations aimed at re-enforcing trench outposts in the battle for control of the economic system.

Regarding the normality of much illegal behaviour, a number of treatises have stressed one important point: certain acts can become criminal overnight (like the consumption of alcohol in the United States during the period of prohibitionism) or they could be redefined as no longer criminal after having been considered so for many years (like voluntary interruption of pregnancy). The more significant problem, however, is a different one: in societies where conflict for sharing power and money is very marked, everyone attempts to brand his rivals criminals, or to present as legal their own illicit behaviour. On this subject Marxist writers have written whole libraries, but even non-Marxists and anti-Marxists have stressed this point; in this perspective Pareto, in paragraph 2086

of the Treatise, points out how fine the line that separates the legal from the illegal actually is: "Whoever uses illegal violence would like nothing better than to transform it into a legal action".

4. Sophisticated and articulated ideas on criminality were established and became dominant until, from 1968 to 1989, there was another epoch-making turning-point. This change threw interpretative categories into confusion. For instance the concept of the "criminal State" entered into literature based on the massacres of minority groups and innocent peoples (Hebrews, gypsies, Armenians, Kulakis, Cambodians, etc.). Such atrocities had always occurred in history but now they open up an interpretative category, which is welcome since it serves as a justification of direct and indirect intervention in many parts of the world. The term "criminal state" is associated with the so-called "democides", that is the mass massacres perpetrated by governments which, in this century, have been calculated as reaching the figure of about 170 million victims.

According to certain observers a complex of events (first of all the cold war, but in a significant manner also the disturbing traffic in psychotropic substances) must have produced the criminalization of wide sectors of the international economy, so much so that some experts, like the American senator Kerry, have affirmed that reality has surpassed the imagination and that we should start no less than "a new war"; it is true that states have often adopted behaviour which can be considered as typically criminal, but today the spread of the notion of criminal states seems to be a tortuous way to depict the global village as lacking law and order, waiting for the arrival of a pure-hearted and fearless sheriff.

The major risk here is that excessive demonization will not only affect innocent people but that will also build up solidarity for the actual perpetrators or it will induce persons who need answer only for small errors to behave like louts.

To better explain this evolution, or degeneration, of the interpretative categories it will be useful to mention the transformations of the Mafia, which constitute another evident case of deviation of phenomena that, on account of the extraordinary historical acceleration of our times, have undergone a kind of genetic mutation. Up to 1968 the Sicilian Mafia was a pre-modern relic within the industrial society. It used to function in general like

a kind of parallel state, selling its protection in a more efficient way than the state proper, dealing out sentences and collecting taxes, on the basis of a strict moral code, albeit bloody and illegal: they never murdered women, magistrates, policemen, and so on. The old code of honour has now disappeared, taking with it its Spartan and sober customs which in its own way, respected law and order. The term itself has become a metaphor, and has been taken out of its original geographical context; in fact now one speaks of the Russian Mafia, the Albanian Mafia, and so on, with reference to criminal organizations which are characterized by a tribal set-up and by their ferociousness.

Originally, the Sicilian Mafia was anything but tribal and ferocious; the constant search for a privileged relationship with the forms of political power corresponded to a vocation for order that made it a parallel state rather than a criminal organization, so much so that people spoke about it with authority as an institutionalized power.

In a situation of great tension the evolution of intelligence apparatus is very significant. According to an age-old tradition these were intended to act against a foreign enemy, against them and not against us. It is increasingly clear, however, that the distinction between external and internal is becoming less important. Besides it has been stated that the "more important" element for the definition of intelligence units is the concept of threat, because "without threats there would be no use for intelligence services... A threat is not only an unknown factor which could harm somebody's interests, but something which is capable of causing very serious harm". It has also been observed that intelligence itself can be defined as "the threatening collection of secrets which threaten someone else".

The central position of the concept is therefore relevant both concerning threats, which must be faced, and threats which one may pose to his adversaries. Some intelligence operations, which have taken years of hard work, like the French secret services' efforts to trace Carlos the Jackal, or like the American secret services' quest for Aimal Kansi, have followed the logic of instilling fear in a world in which it is necessary to be in a position to dissuade, in the old traditional sense. The consequence being that an idea which actually already existed in classical culture, although in the midst of limitations of various kinds, could be extended to extreme limits:

the idea that the formal legal set-up and common morals themselves are not completely binding.

Hobbes rightly said in his *De Cive*: "All the duties of those who hold power are included in this one saying: the salvation of the community is the supreme law" (XIII, 2). On the occasion of very serious events, people often speak of monsters, and so one must ask: how shall we behave when dealing with monsters? A special case is how to deal with terrorists. Of the members of the Real IRA who in 1998 killed 28 persons in a bomb attack in Ireland, Tony Blair said that they were "psychopaths" and minister Mo Mowlan stated: "These are not normal persons, they are animals" (slandering, as often happens, those animals which are known for their gentle nature, and in general all animals which, from a moral point of view are much more likeable than persons who coldly plan the murder of innocent people and even try to justify their actions by referring to so-called revolutionary values).

In all countries, the media and the people become obsessed by the idea of monsters. The consequences are of great importance. There is an element of truth in Frederick Nietzsche's statement that: "as a result of looking down the abyss, the abyss looks inside us". When they are convinced that they are facing events that do not seem typically human but more akin to the behaviour of savages, animals or monsters, many people (private citizens as well as victims, the media and the police) may resort to behaviour, which does not respect the careful observance of procedure. This kind of deviation may induce a large number of anomalies, ranging from rough justice to the manipulation of evidence.

One can conclude that in an age marked by shifting moral criteria and by a high level of vulnerability, there is the constant risk of monster-hunts, inspired by the desire to hunt down a scapegoat to appease bloodthirsty public opinion. A step back from the process of civilization can be taken by whoever perpetrates the most hateful crimes as well as by the well intentioned who oppose these crimes. Private vendettas, the rejection of commitment for civil liberties, calls for lynching and capital punishment are legitimate products of this new age of criminal phenomena. According to various observers a deep identity crisis is at the root of many cases of deviation which have occurred inside corrective institutions and which have led to serious charges against officials who should be responsible for maintaining public order. If the

concept of guilt becomes controversial, even the concept of responsibility will become hazy. When these fundamental ideas are distorted and become problematic, uncertain and ambiguous notions, then the citizens can easily be induced into misunderstandings and errors, and the corrective institutions themselves will be the victims of serious confusion about the usefulness and the meaning of their role.

It is highly significant that the notion of criminality is often confused with the teratological notion of the monster. It is a typical fable of the not-so-tranquil times we are living in: the monster begins his adventure in the most classical and oldest Western culture as a prodigious creature.

The monster is endowed with benevolent understanding in the famous pages of Montaigne, presents the occasion for sanctity to the canon Giuseppe Cottolengo, suffers peculiar amorous throbs in tales from Mary Shelley to Mel Brooks, is called "delicate" by Baudelaire, and he is even enrolled among indirect educators by Bruno Bettelheim in The Uses of Enchantment because he could be useful in children's fables to train them in facing all those horrible experiences that they will have to face in adulthood.

Sadly the monsters of the past are no more, as the Granguignol-like analyses of the private slaughterhouses of the most cruel murderers show in detail. The children of darkness and the children of light battle on under the livid sky of the twilight of many certainties; while the survival and the meaning of democratic systems are called into question by new "demoniac religions".

For all these reasons, as used to happen in the classical shifts between fantasy and reality, unluckily "we still need monsters to reassure us". The monster is the alien in our midst; he's the inexplicable, the incredible, and the inadmissible that has finally become visible and tangible. The radical otherness of the monster can help us define ourselves; it could give credit, by contrast, to an inexistent kindness; consequently it can give reassurance to an uncertain, ambiguous, shaky identity. By way of conclusion, the monster is often a kind of cheap therapy for the thumping mental disorders of the average citizen of our times.

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COMMENTS

THE ACCUSED'S PRESENCE IN CRIMINAL PROCEEDINGS: MALTA AND STRASBOURG

JOHN J CREMONA

The paper considers first the overall rigidity of the general principle governing the necessity of the presence of the accused during his trial proceedings in Maltese law (with the attendant consequences), contrasting it with the perilous laxity of a relatively recent amendment to certain provisions concerning the trial of certain "petty cases" before the Commissioners for Justice. The principle is considered also in relation to the relevant provision of the Maltese Constitution. The emerging position is then assessed against the general background of the jurisprudence of the European Court of Human Rights on the subject. In the context of such jurisprudence, the paper deals in some detail with the question whether the right of the accused to be present can be waived, the problem of abscondence, the possibility in certain circumstances of trials *in absentia,* and of course necessary safeguards.

In June 1958 during my tenure of office as Attorney General of Malta it came officially to my knowledge that criminal proceedings were pending in Italy against a Maltese by the name of Emmanuel Spiteri who on board an Italian ship had set upon and wounded another Maltese. The Italian magistrate in Naples had in fact issued letters of request (*rogatoires*) for the taking in Malta of the evidence of four persons, including the victim and the aggressor himself, who was being prosecuted *in absentia* and was then in fact in Malta. The request concerning the accused[1] could not be executed as being contrary to Maltese law, which sanctions

[1] In this paper the expression "the accused" (which in Malta is normally reserved for persons indicted, is used to cover all persons criminally charged.

the principle of the non-compellability (as opposed to the undisputed competence) of the accused as a witness.

The request as to the evidence of the victim could be executed only because of a special provision in the Maltese Criminal Code (now section 649 (1)) to the effect that in the case of *rogatoires* the magistrate may examine the witness "notwithstanding that the accused be not present." Indeed, were it not for this special provision, this request would also have come up against the difficulty that under Maltese law all evidence must as a rule be taken in the presence of the accused.[2] The practical reason for this special provision is of course that ordinarily the accused is at the place where trial proceedings are being conducted whereas some witnesses may happen to be abroad. This "notwithstanding clause" is, however, very significant in that it underscores the important general principle of the necessary presence of the accused during his trial proceedings in the Maltese criminal system. The rule is ultimately derived from English law.

The aversion of Maltese law to trials *in absentia* may be seen also from a provision of the old Extradition Ordinance of 1880 amending the Extradition (Italy) Ordinance of 1863. The amending provision stated that if the sentence of the Italian tribunal was given *in contumacia,* the Maltese court was to proceed with its normal examination irrespective of the sentence ("as if such sentence did not exist"), provided that if it was satisfied that, had the offence been committed in Malta, the evidence produced would be sufficient for the committal of the accused for trial, the court was to order that the accused continue to be kept in custody for the purpose of being delivered up to the Italian authorities if (and this introduces an interesting condition) the Head of the Government deems fit to direct such delivery, notwithstanding that for the said offence the accused is not in Italy entitled to a new trial *in contradittorio* (section 4).

The present Extradition Act (Chapter 276) also has a provision (of general application) to the effect that the responsible Maltese

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[2] Where it is necessary to examine a witness who, either through infirmity or old age, is unable to appear in court, the witness is examined in his place of abode, and his evidence is then read out in court. In such a case, according to section 647 (2) of the Criminal Code, the accused is **entitled** to be present.

minister may refuse to comply with a request for the return of a convicted offender where the latter has been convicted *in absentia* and the requesting country has not given an assurance, accepted as sufficient by the minister, that such person will be granted a new trial if he so requests (section 11 (2) (c)). It is to be noted that in these cases the matter is ultimately left to the minister's discretion and the condition about the availability of a new trial in a sense foreshadows, as we shall see, an important aspect of the approach which has been taken by the European Court of Human Rights (hereafter "the European Court") in the matter of trials *in absentia*.

In an early reported case *Regina v. Vella*[3] the Criminal Court of Malta (then known as Her Majesty's Criminal Court) firmly affirmed the undisputed principle that Maltese law does not admit of trials *in contumacia* in criminal matters. The Criminal Code does not say so in terms, but in several of its provisions clearly postulates the necessary presence of the accused, also providing a sanction for his non-appearance. It is in fact provided in section 443 that on the day and at the time appointed for the hearing of a case or of any question incidental thereto the accused is to be put, without any restraint, in the place appointed for the purpose (i.e. at the bar). If he is in custody he is brought to court "in such manner as may be necessary to prevent his escape". If he is not in custody, he is required to appear by means of a summons and, in case of non-appearance; *an order is to be made for his arrest.*

It will thus be seen that in Maltese law the presence of the accused at his trial is not only a right (indeed a human right under the Constitution) but also an obligation, which is visited with a sanction. The rule is also that the accused must appear *personally*, but such rule is relaxed in cases of "contraventions" (minor offences cognizable by the Magistrates' courts, as opposed to "crimes"). The Code (sections 375 (b) and 374 (b) provides that in such cases the Court may, on good cause being shown, exempt the accused from appearing personally and permit the husband or wife, or a near relative by blood or affinity, or any other person having the charge of the accused or authorized by him in writing to appear instead. But it will be seen that this is plainly in the nature of an exception

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[3] Judgment of 18 November 1898, Law Reports, Vol. XVI, Part IV, p.54.

and is subject to a number of qualifications. If the offence charged is not a "contravention", then if the accused himself was not personally present, both the judgment and the proceedings are null.[4]

Then there are cases where the law, in the public interest, *requires* rather than permits, another specified person to appear instead of the offender, and this is where there is an "unabated nuisance" arising out of a contravention or a non-compliance with a legal precept which requires taking care of without delay, e.g. where some structure in a person's property is dangerous to the persons inhabiting the property or to passers-by. In these cases the police of course normally summons the alleged offender himself, but if the latter is, on account of mental illness or other physical incapacity, unable to appear in court, or is absent from Malta, or has absconded, and a police officer (not below the rank of inspector) certifies on oath that it is urgently required that the nuisance be abated or that the law be otherwise enforced, the court orders the summons to be served on the lawful representative of the alleged offender or on the person having the management of his property or, if these are unknown, on the alleged offender's husband or wife or son or daughter. In such cases, if the nuisance or non-compliance with the law is proved, the court orders that the nuisance be abated or the law carried out by the police at the offender's expense, or, in appropriate cases, by the offender's "representative" within a time, sufficient for the purpose, to be fixed by the court, under penalty of a fine for each day of default. Where for any reason service of the summons cannot be effected or if the offender is unknown, or it is not known who the person responsible for the nuisance or non-compliance is, the court may make the abovementioned order for remedial action by the police on the sole application of a police officer (of the said rank) confirming on oath the existence of the nuisance or non-compliance as well as the urgency of the relative remedial action, and on such additional evidence, if any, as the court may deem fit to require.

It is to be noted, however, that this can only happen in certain specified cases of contraventions and in certain specified

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[4] *Police v. Sharon Zammit et,* Court of Criminal Appeal, 7 September 1994 and other judgments therein cited, Law Reports, Vol, LXVIII, Part V, pr 342.

circumstances, and in any event the court must, so far as regards the application of any punishment for the offence, adjourn the proceedings until the person concerned is fit to stand trial or returns to Malta or becomes known and can appear before it. This is what is provided in section 321 of the Code of Police Laws, but analogous provisions, similarly dictated by urgent necessity in the public interest, have found their way into other laws as well, such as the Food, Drugs and Drinking Water Ordinance, the Explosives Ordinance, the Prevention of Disease Ordinance and the Housing Act.[5]

Indeed there are cases where the accused's presence is dispensed with irrespective of his own choosing. One such provision (in principle also of English derivation) is in the Criminal Code itself. It is there provided (section 524) that if before any court of criminal jurisdiction the accused so behaves himself as to disturb the good order of the sitting and, after being admonished by the court, persists in or repeats such behaviour, the court may order him to be removed from the place of trial or, if he is in custody, to be taken back to his place of custody, and may commence or continue the trial with the assistance only of his advocate or legal procurator or, if he has none, with the assistance of the Advocate for Legal Aid or of any other advocate or legal procurator appointed by the court.

This provision was added by Ordinance XV of 1937. I cannot recall that it has ever been applied within living memory, although I remember my elders speaking with awe of a solitary case where this is said to have happened because the accused had relieved himself *in faciem curiae*, and although his defence lawyer attempted to ascribe it to fear (what the old lawyers used to call *timor reverentialis)*, the scandalized court thought otherwise. The case appears to be prudently unreported.

Mention must also be made in this connection of certain special provisions in two *lois particulièrs*, one quite old and the other reasonably new. In the old and rather truculent Spirits Ordinance, promulgated in 1911 (when illicit stills seem to have been plentiful and customers not too choosy) it is provided (section 97) that where under the Ordinance or any regulations made thereunder a distiller

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[5] See J.J. Cremona, The consequences of a conviction in the criminal law of Malta in *Selected Papers 1946-1989*, Malta, 1990, pp.52-53.

or retailer of, or wholesale dealer in, wines, beers or "spirituous liquors" is liable to a penalty and a charge is brought against him, the summons may be served either on him personally or by leaving it with any person who is apparently a clerk or servant found in the licensed premises or, in default, by affixing it in a conspicuous manner to the street door or street wall of the premises. Where the distiller, dealer or retailer is abroad when the summons is served, then the court, on being satisfied of the service, proceeds to investigate the charge (whether an agent appears on his behalf, as he is entitled to do, or not) and if the charge is proved, the court may adjudicate upon it and order that any fine awarded be levied upon the goods and other property of the person charged. It is to be noted that offences under this Ordinance are deemed to be "crimes" (i.e. the more serious of criminal offences, as opposed to "contraventions").

The other relevant law, enacted in 1981, is the Commissioners for Justice Act. It is true that this law is stated to "provide for the establishment of a system for the depenalization and trial of petty cases," but especially since the *Oztürk*[6] judgment of the European Court (which also dealt with decriminalized petty offences *"Ordnungswidrigkeit"* in Germany and was given in 1984, after the enactment of this Act) it is very possible that the nature of the "scheduled" offences for certain purposes of the European Convention on Human Rights, (hereafter "the Convention"), the substantive provisions of which are part of Maltese law, remains nevertheless criminal.

It is provided in this law that the summons, apart from details concerning the person summoned and the facts of the charge, is also to contain a form of consent by which the person charged may, under his signature, authorise a Commissioner to proceed with the hearing of the charge in his absence, and in such a case he would in fact be contesting the charge but need not appear. A more recent (and, in view of the importance of what is at stake, questionable) amendment of 1995 provides that if a person, duly served with a summons, fails to appear before the Commissioner, he is deemed to have admitted the charge (a warning to this effect is also to be

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[6] See also the earlier judgment of *Engel and Others*, 8 June 1976, Series A no 22.

included in the summons) and, "notwithstanding anything contained in the Criminal Code", the Commissioner proceeds to order the payment of the penalty and make any other relevant orders (section 7). Before the amendment the sanction for non-appearance was, quite understandably, a warrant of arrest together with a penalty. If that was eventually found to be inadequate, the legislative alternative might have been that the person summoned would in case of non-appearance be deemed to have waived his right to be present, (with an appropriate warning to this effect in the summons). But the legislator wanted to go further and in my view also a little too far. Indeed this touches upon an even more basic principle in criminal matters, the presumption of innocence.[7]

It will be noted that the very wording of the provision relating to the form of consent of the person concerned (which is intended to "*authorise* a Commissioner to proceed with the hearing of the charge in the accused's absence) essentially reaffirms the general principle of the necessary presence of the accused. Indeed, apart from a few exceptions, this general rule remains dominant in Maltese law. As it is, in the event of the accused's non-appearance at his trial, after having been duly summoned, the Maltese Criminal Code provides no alternative to a warrant of arrest and also makes no exception, reservation or proviso. This has created hardship situations where, for instance, the accused is genuinely sick and unable to appear in court, at least without seriously endangering his health. The courts therefore had to find other solutions "on humanitarian grounds", as they put it. Usually when it is established that the accused is owing to ill-health unable to stand his trial an adjournment is granted, and in the event of repeated adjournments, similarly motivated, the case is usually put off *sine die* with directions to the

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[7] Clearly it is one thing for the accused to enter a plea of guilty at his trial (i.e. to make of his own free will an admission of guilt in open court attended by all appropriate safeguards) and quite another thing for him to be *deemed* to have waived his right to the presumption of innocence. Actually here the sanction for the accused's non-appearance is for him to be presumed guilty. This acquires even bolder relief in the light of section 392 (5) of the Maltese Criminal Code, under which if the accused stands mute when, at the beginning of the proceedings he is asked if and what he wishes to reply to the charge, he is considered to have pleaded not guilty.

Attorney-General or the police, as the case may be, to apply to the court for a restoration of the case to the list as soon as the accused's condition improves well enough for him to be able to stand his trial.

But the position may at times get exacerbated. Again during my tenure of office as Attorney-General I remember a case, which also introduces a slightly comic element, of an accused who, though in general enjoying relatively good health, ended up totally immune from trial and eventual punishment "on humanitarian grounds".

One, Giuseppa Tanti from the village of Zebbug, being charged with the relatively serious crime of calumnious accusation, failed to appear before the Magistrates Court sitting as a court of criminal enquiry (Magistrate G.O. Refalo) on 28th December 1959. As a medical certificate was produced stating that she could not attend court in Valletta owing to the fact that travelling in any kind of vehicle caused her vomiting and giddiness ending in severe prostration, the case was put off. At a later sitting, after the village doctor who had issued the certificate was required to confirm it on oath, which he did, the court appointed a medical board of three doctors to examine the accused and report on her condition. A fortnight later the doctors confirmed that she was suffering from severe motion sickness but would eventually, with proper treatment, be able to attend court. They added, however, (perhaps rather ominously) that this required her cooperation. At the next following sitting three weeks later the village doctor reported and confirmed on oath, as detailed by the court, that he had duly prescribed to the accused the medicament which he had agreed with the other doctors of the board that she should take to overcome the condition which was preventing her from attending court, but she had flatly refused to do anything, and was thus unable to attend as she could not travel in any vehicle. The court must probably have considered the possibility of requiring her to walk all the way from Zebbug to Valletta but, considering the distance, dismissed it.

The case was then put off *sine die* and died an early death whilst Tanti lived jubilantly to perambulate to her heart's content about her entire native village and environs in complete immunity from legal process by simply but firmly, with or without legal advice, withholding her cooperation. I, as Attorney General wrote to Government that this was completely unsatisfactory and that an

appropriate amendment to the law was called for.[8] In this, like the doctors, I also met with uncooperation. And Tanti won the day.

The general rule of the necessary presence of the accused is in fact part of the daily practice of the courts. It is also affirmed in a number of court decisions, many of which are however unreported since the question normally arises as a procedural incident (the accused actually fails to turn up) and is thus dealt with in a decree, which usually remains unreported. In an old reported case, *R. v. Carmelo Borg*,[9] this rule was linked to that of the publicity of proceedings. Court-appointed medical experts had reported that the accused suffered from attacks of hysteria and that a public hearing would be apt to provoke such attacks. There was therefore a request from the defence for the case not to be heard in public. The court was thus essentially faced with the alternatives of dispensing with the presence of the accused or with the publicity of proceedings. It rejected both. It stated that the presence of the accused during the hearing is "indispensable" and that the case did not fall within the exceptions to publicity envisaged by the law.

So what happens if the accused, being at large on bail, is nowhere to be found, after failing to appear on the day appointed for his trial? One thing is absolutely certain – he cannot under Maltese law be tried *in absentia*. On the appointed day his case will have to be adjourned. If he has absconded and is accused together with others, then his case may be disjoined from that of his co-accused so that the latter can be tried separately. I recall that this is in fact what happened in the case of *R. v. Spiro Quintano et,* where there were four co-accused, one of whom, Spiro Cordina, was found to have left the island (sitting of the Criminal Court of 1 February 1955). But there is no possibility of the case being heard *in absentia.*

The necessary presence rule is carried also into the appeal stage. In fact it is provided in the Criminal Code (section 422) that if on the date appointed for the hearing of the appeal the appellant fails to appear, his appeal is taken to have been abandoned and the

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[8] File SEC 43/60

[9] Decree of 8 March 1901, Vol. Decree 1901, p.112 (reported by Judge Giuseppe Cremona in *La Giurisprudenza nel Codice Penale)*

judgment appealed from is carried into effect.[10] Both academic and practising criminal lawyers have always taken this as an application of the necessary presence rule, even though in reality it applies to any appellant and so not only to the accused but also to the Attorney General in the limited range of cases where the latter may appeal. Indeed it may perhaps be taken as a combination of an application of the necessary presence rule and a sanction for lack of interest.[11] Actually there is here a notable difference from what happens in *civil* appeals when the appellant does not turn up, but his counsel does (section 209(2) Code of Organisation and Civil Procedure). But in any case it is hardly reasonable to throw out an appeal, taking it as having been abandoned (*dezert)* also when there is counsel present and ready to plead for the appellant, and this on the sole ground that the appellant himself is not present. In view of certain pronouncements of the European Court in some of the judgments to be referred to later, this may also be of dubious validity in so far as Article 6 of the Convention is concerned.

What is interesting is that the Constitution of Malta, which came into force in 1964 and as to its human rights provisions was in great part inspired by the Convention, deals expressly (and not, like the Convention, by implication) with the important matter of the presence of the accused in his trial proceedings and does so in the provision (in the chapter on human rights) corresponding in general to article 6 of the Convention. It lays down that, except with the consent of the person charged, his trial cannot take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence (section 39 (6) *in fine*). Thus, keeping in view some of the exceptions already referred to, the Constitution reaffirmed expressly the principle, which is clearly implicit in the whole body of the Criminal Code (procedural part), of the necessary presence of the accused,

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[10] See also section 512.

[11] But if the appellant was unable to attend because of illness or for any other reason independent of his will and within four days makes an application accompanied by a sworn declaration of the said reason, the court appoints another day for the hearing of the appeal.

subject in particular to the qualification relating to his consent. So in this respect the Criminal Code is even stricter than the Constitution itself.

Now this question of the accused's consent provides an interesting link with the jurisprudence of the European Court on the subject of criminal proceedings *in absentia*. In a sense it may be said that this constitutional provision anticipated the question, which was after the promulgation of the Constitution raised in the European Court, as to the possibility of an accused person waiving his right to be present in criminal proceedings against him. The first case to come before the European Court on the matter was *Colozza v. Italy*. The applicant was prosecuted for fraud in Rome and was in the first place declared by decree to be untraceable (*irreperibile*). A warrant of arrest issued against him could not be executed and, having been considered a fugitive from justice (*latitante*), he was tried and sentenced *in absentia* to six years imprisonment. Having been subsequently arrested, he lodged (apparently out of time) an appeal, which was declared inadmissible in a decision eventually confirmed by the Court of Cassation.

The European Court first of all made it clear that, although this is not expressly mentioned in paragraph 1 of Article 6 of the Convention, the object and purpose of the article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing.[12] Thus, though in the Convention, as in Maltese law, not formulated in express terms, this is a right, which, like that of access to, a court (also implicit in Article 6 of the Convention) claims an important place by necessary implication.

As to a possible waiver of this right (which is in fact the other side of the concept of consent) the European Court skirted the issue by saying that it was not necessary to determine whether and under what conditions an accused could waive the exercise of this right since, according to the Court's established case-law, waiver of the exercise of a right guaranteed by the Convention must be

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[12] *Colozza v. Italy*, judgment of 12.2.85, Series A no. 89, p.14, para 27, and see also *Brozicek v. Italy*, judgment of 19.12.89, Series A no. 167, p. 19, para. 45, *FCB v. Italy*, judgment of 28.8.91, series A no 208-B, p.21. para 33 and *T v. Italy* judgment of 12.10.92, Series A no 245 – C, p. 40, para 27.

established in an unequivocal manner and here this was not so. The Italian authorities, relying on no more than a presumption, which was not a sufficient basis, had simply inferred such a waiver from the status of *latitante*, which they had attributed to the applicant.

The Court added that even if the right to take part in person in the hearing was not absolute, its complete and irreparable loss was not justified by the circumstances of the case before it. Where domestic law permitted a trial to be held in the absence of a person "charged with a criminal offence" who was in the applicant's position, that person should, once he became aware of the proceedings, be able to obtain from a court which had heard him, a fresh determination of the merits of the charge. The contracting States, the Court added, enjoyed a wide discretion as regards the choice of the means calculated to ensure that their legal systems were in compliance with the requirements of Article 6 (1) in this field; the Court's task was not to indicate those means to the States but to determine whether the result called for by the Convention had been achieved. In this case the remedy available to the applicant – a "late appeal" – did not satisfy the requisite conditions. As a "tribunal" competent to determine all the aspects of the matter had thus never heard the applicant's case in his presence, it was unanimously decided that there had been a breach of Article 6 (1).[13]

It is to be noted that the Court was not insensitive to the fact, which was stressed by the Government, that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice, but it nevertheless held that in the circumstances of the case, this fact did not appear to be of such a nature as to justify a complete and irreparable loss of the entitlement of the accused to take part in the hearing.

With regard to the question of waiver, the European Court took the same position in the subsequent cases of *FCB v. Italy*[14] *and T. v. Italy*[15] even though in the former of these cases it noted that it

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[13] *Ibid*, pp 15 – 16, paras 29-33.

[14] Judgment of 28.8.91, Series A no. 208-3, page 21, para 35 *in fine*.

[15] Judgment of 12.10.92, Series A no 245-C, page 41, para 27.

did not appear "that the applicant, whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself" and in the latter case that the Court was here "not concerned with an accused who has been notified in person and who, having thus been made aware of the reasons for the charge, in an unequivocal manner waived his right to appear and defend himself". In both these cases the Court cited the amendments to the Italian law on the subject, which had followed the *Colozza* judgment. But it is interesting that in *Brozicek v. Italy* judgment, which was delivered in the intervening period between *Colozza* and these two other judgments, the Court, without taking the position that, because of lack of unequivocality, it was not necessary to determine the question of waiver as in the other cases, just said: " The evidence does not establish that Mr Brozicek intended to waive his right to participate in the trial".[16]

The Court seems to have come nearer to determining the point about waiver in *Poitrimol v. France,* where it said: "Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge in respect of both law and fact. It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself, but at all events such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance".[17] The Court is here clearly contemplating waiver as a distinct possibility. Also in *Zana v Turkey*[18] the possibility of such a waiver seems to be distinctly implied, always provided it is established in an unequivocal manner.

Having said that, if I may now revert for a moment to the Maltese Extradition Act, this important requirement of the possibility of a fresh determination of the merits of the charge finds an interesting echo in the provision of that Act which has already

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[16] Judgment already cited, para. 45.

[17] Judgment of 23.11.93, Series A no, 277-A, pg 14, para. 31.

[18] Judgment of 25.11.97, para. 70.

been referred to. With regard to the other important requirement of "unequivocality" in respect of a waiver of the accused's right to be present, it is true that the Maltese Constitution does not expressly qualify consent, but inasmuch as consent to proceedings *in absentia* entails a waiver of this right to be present, it is a firmly established rule in Maltese jurisprudence that waiver of a right requires by its very nature unequivocality.

Poitrimol is interesting also because it raises a related issue. In this case the applicant had, as the European Court noted, clearly expressed his wish not to attend the appeal hearings and thus not to defend himself in person. On the other hand, the evidence showed that he intended to be defended at the hearings by a lawyer instructed for the purpose. So the question arose whether an accused who deliberately avoids appearing in person remains entitled to "legal assistance of his own choosing " within the meaning of Article 6 para 3 (c).

This had in part been denied to the applicant on the strength of certain provisions of the French Code of Criminal Procedure and the pertinent case-law of the Court of Cassation.[19] The domestic Court of Appeal held as follows:

> "While a defendant summoned for an offence punishable, as in the instant case, by a term of imprisonment of less than two years may, by letter to the presiding judge, apply to be tried *inter partes* in his absence but represented by counsel pursuant to the first and second paragraphs of Art. 411 of the Code of Criminal Procedure, it is a principle, and is apparent from the general scheme of the Code of Criminal Procedure, that this is a right which does not apply where, as in Mr. Poitrimol's case, a warrant has been issued for the defendant's arrest and the defendant has absconded and is accordingly not entitled to instruct counsel to represent and defend him".

Again, when the applicant appealed to the Court of Cassation, on points of law, against the Court of Appeal's judgment, his appeal

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[19] Crim Piv. 29.10.1970, *Bulletin criminel* (Bull) no. 284; 5.5.1970, Bull no. 153.

was declared inadmissible on the ground that a convicted person who had not surrendered to a warrant of arrest issued against him was not entitled to instruct counsel to represent him and lodge an appeal on points of law on his behalf against his conviction.

In its judgment the European Court stated, however, that whilst it accepted that the legislature must be able to discourage unjustified absences, the suppression of the applicant's right to legal assistance in the Court of Appeal (irrespective of whether it was permissible in principle to punish such absences by ignoring that right) was disproportionate in the circumstances[20] and thus gave rise to a violation of article 6 (1). It also considered that the inadmissibility of the appeal on points of law, on grounds connected with the applicant's having absconded, also amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society.[21] This too gave rise to a violation.

Incidentally – and this was in fact invoked by the applicant in *Poitrimol* - Resolution 75 (11) of the Committee of Ministers of the Council of Europe "on the criteria governing proceedings held in the absence of the accused" includes the following in the nine "minimum rules" which member States were recommended to apply: " Where the accused is tried in his absence, evidence must be taken in the usual manner and the defence must have the right to intervene".

The principles in the *Poitrimol* judgment as to legal representation despite the accused's non-appearance were reaffirmed in two cases against the Netherlands, *Lala*[22] and *Palladoah*,[23] in which the European Court stated that the principle (of crucial importance for the fairness of the criminal justice system) that the accused be adequately defended prevailed. In the recent case of *Van Geyseghem v. Belgium*[24] (which also concerned an appeal) the European Court also reaffirmed the principle. The right of everyone charged with a criminal offence to be effectively

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[20] *Ibid*, para 35. See also *Guerin v. France*, judgment of 29.7.98.
[21] *Ibid*, para 38.
[22] Judgment of 22.9.94, Series A no. 297-A, p. 19, para. 33.
[23] Judgment of 22.9.94, Series A no. 297-B, p. 39, para. 40.
[24] Judgment of 21.1.99.

defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature, it was stated once more, has to be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance.

A case now pending before the European Court which, when decided, may also be of interest is that of *Haser v. Switzerland*, recently communicated under Article 6(1) and (3). The applicant, who had been sentenced *in absentia,* complained of having been denied the possibility of appealing on points of law to the Court of Cassation of the Canton of Turino on the ground that under cantonal law a person sentenced *in absentia* must, before lodging such an appeal, apply to have the judgment delivered in his absence set aside. Notwithstanding his absence at the trial, the applicant had been able to instruct the defence lawyer of his choice.[25]

From the European Court's jurisprudence itself it may be seen that trial *in absentia* is in certain circumstances permissible in various member States of the Council of Europe, including France, Belgium, the Netherlands, Italy, Switzerland, Greece and Turkey. In some countries (e.g. France), the accused is under an actual obligation to attend the trial, in others (e.g. the Netherlands) he is not. In the Maltese criminal system, on the other hand, trial *in absentia* remains in principle inadmissible. The rule is firmly established and is of course in principle a sound one.

It must be kept in mind, however, that in cases which have come before the European Court respondent governments have spelt out and stressed the possible obnoxious effects of abscondence on the course of justice. It will be recalled that some were also expressly referred to in the *Poitrimol* judgment and my late friend and colleague Louis-Edmond Pettiti in his dissenting opinion in that case pointed out that the ever-growing number of defendants who succeeded in eluding justice altogether in France was twenty to twenty-five per cent. In particular in many countries, as in Malta, abscondence does not suspend prescription. The problem does not at the present time appear to be a serious one in Malta. I do not know if smallness is an advantage in this respect. Perhaps it is.

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[25] Information Notes no. 10 on the Case Law of the Court, Sept 1999, p.10.

But with the increasing professionalism of organized crime and the vast resources which are often behind it, coupled with increased facilities for abscondence afforded by increased and more sophisticated means of communication the time may soon come when it may indeed become serious.

The pronouncements of the European Court have shown, however, that some relaxation of the rule of the necessary presence of the accused, subject of course to appropriate and adequate safeguards, may, if need be, be effected without coming to grief with the Convention at all. Again, from what has been stated above it would certainly not be difficult for the Maltese legislator to get even now some ideas (in the direction of unequivocal waiver of the right to be present, already permissible under the Constitution itself) in order to deal with the growing incidence of unjustified non-appearances in the Magistrates courts. These seem to be already posing a problem. Lastly the throwing out under Maltese law of an appeal by the person accused on the sole ground of his own absence before the appellate court when there is counsel actually present and ready to plead on his behalf is downright indefensible and should be done away with.

TORTURE AND ALLEGATIONS OF INHUMAN AND DEGRADING TREATMENTIN THE BASQUE REGION

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The "Torturaren Aurkako Taldea" (TAT), the Basque denomination for the Group against Torture, was founded in 1981 with the aim both of investigating torture and degrading treatment allegations occurring in places of detention and in penitentiary establishments, as well as that of raising awareness of torture in society. Later, in 1992, the Group became a legally recognized Non Governmental Organization, which now consists of Doctors in Medicine, Psychologists, Psychiatrists, Lawyers and other individuals with knowledge on the matter. It primarily provides medical care and legal assistance for victims of torture, arbitrary detentions, summary executions and other gross human rights violations. It addresses relevant cases to regional and international NGOs and Institutions. In particular it focuses its work on the Human Rights Committee sessions analyzing Spain, on the Committee against Torture meetings considering reports on Spain, and on supplying information to the Human Rights Commission Rapporteur on Torture and to the European Committee for the Prevention of Torture, among others. The Group's medical section has published some articles in "The Lancet" (1995), "Forensic Science International" (1995) and "Torture" (1997).

1. Introduction

Every person, irrespective of the causes that led him to be detained or imprisoned, has fundamental and inviolable rights as enshrined in the *International Agreement on Civil and Political Rights*,[1] *the Convention Against Torture and other Cruel, Inhuman*

[1] The International Agreement of Civil and Political Rights (adopted by the General Assembly of the United Nations by Resolution 2200 A (XXI) dated 16th December

and Degrading Treatment and Penalties[2] and in other instruments adopted within the framework of United Nations,[3] as well as the *European Convention for the Protection of the Fundamental Human Rights and Liberties*[4] *and the European Convention for the Prevention of Torture and other Inhuman and Degrading Treatment and Penalties*[5] adopted within the European regional framework. The Spanish State has ratified all these international agreements and declarations and therefore, as is established in the same *1978 Spanish Constitution,* it is necessary to refer to them when internal legislation on the matter needs to be interpreted.[6] Throughout this study, we shall attempt to analyse the present situation of Basque citizens detained by the Security Forces and Corps of the Spanish State and concerning those to whom the *"anti-terrorist legislation"* is being applied, as well as an analysis of the legal framework on the internal and the international levels. For this purpose, we shall concentrate on the full process to which a detainee in the Basque Country is subjected due to political reasons and the consequent

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1996 and in force since 23rd March 1973) was ratified by Spain on 13th April 1977 and came into force on 27th July of the same year.

[2] The Convention against Torture was adopted and opened for signature, ratification and adhesion by the United Nations General Assembly by Resolution 39/46 dated 10th December 1984, and in force since 26th June 1987. It was ratified by Spain on 20th November 1987.

[3] The Group of Principles for the Protection of all Persons subjected to any form of Arrest or Imprisonment (General Assembly Resolution 43/173 dated 9th December 1988), Principles of Medical Ethics applicable to the functions of medical personnel, especially of doctors, in the protection of prisoners or detainees against torture and other cruel, inhuman or degrading treatment and penalties (General Assembly Resolution 37/194 dated 18th December 1982), the Code of Behaviour for officers in charge of compliance with the law (General Assembly Resolution 34/169 dated 17th December 1979).

[4] The European Convention for the Protection of Human Rights (Rome, 4th November 1950) was ratified by Spain on 4th October 1979.

[5] The European Convention for the Prevention of Torture and other inhuman and degrading treatment and penalties (Strasbourg, 26th November 1987), was ratified by Spain on 2nd May 1989 and came into force on 1st September of the same year.

[6] Article 10.2 of the 1978 Constitution establishes that: "The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Hunan Rights and the international treaties and agreements thereon ratified by Spain".

accusations of belonging to or collaborating with an armed group, including the intervention of the Power of Justice and of the various participants in this process.

2. Arrest

Under this title we shall analyse what happens to a detainee in the Basque country for political reasons as from the first contact with the "Fuerzas y Cuerpos de Seguridad del Estado" - State Security Forces and Corps (as from now shortened to FCSE), his placing at the disposal of the courts, his declaration to the police and to the court, up to and including his entering prison and being released. (In many cases, the FCSE take it upon themselves to release individuals without taking the detainees to court to make their declarations, in spite of the fact that in such cases, the judges have authorized the application of the Anti-Terrorist Legislation).

2.1 A Person's Right To Liberty and Security

This fundamental right inherent to every person is found in Article 9 of the International Pact of Civil and Political Rights[7], in article 5 of the European Convention for the Protection of Fundamental Human Rights and Liberties[8], as well as, in accordance with those already mentioned, in various instruments

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[7] Article 9 of the International Pact of Civil and Political Rights:
1. "Every individual has the right for liberty and personal security. No-one can be deprived of his liberty, except for reasons established by law and according to procedures established therein".
2. "Every detained person shall be informed, upon arrest, of the reasons of such arrest and notified without delay of the accusation formulated against him".
3. "Every detained person or prisoner because of a criminal offence will be presented without delay to a judge or other official authorized by law to exercise judicial functions (...)"

[8] Article 5 of the European Convention on Human Rights:
1. "Every person has the right to liberty and security. No-one can be deprived of his liberty, except in the following cases and through legal means:
   a. If he has been detained to appear before the competent Judicial Authority, when there are plausible reasons to suspect that an infringement has been committed or when there are reasonable motives to consider the need to

of Spanish internal legislation. On this subject, Article 17, clause 1[9] of the 1978 Constitution is fundamental. This article remits to specific legislation the procedure and regulation of cases and the formalities to be adopted in relation to a person's arrest. However, taking the Constitution as our point of departure, we come across the possibility that certain persons or certain segments of the population may receive different treatment due to the fact that certain fundamental rights may be discarded in particular cases and with reference to determined persons. This is the constitutional basis for the application of legislation and for the existence of situations which we shall detail and analyze throughout this study. Specifically, we are here talking of article 55.1 of the 1978 Constitution.[10] The subsequent specific legislation that develops this constitutional mandate is the so-called "Ley de Enjuiciamiento

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impede the effecting of an infringement or the escape after effecting such an infringement.

2. "Every detainee must be informed, within the shortest time possible and in a language he understands, of reasons of his arrest and of all accusations levelled against him."
3. "Every detainee or prisoner, in the conditions prevailing in clause 1.c. of this Article, must be immediately presented before a judge or another magistrate capable at law to exercise judicial functions (...)

[9] Article 17.1 of the 1978 Constitution: "Every person has a right to freedom and security. Nobody may be deprived of his freedom except in accordance with the provisions of this Article and in the cases and in the manner provided by the law".

[10] Art.55.1 of the Constitution: "The rights recognized in Articles 17 and 18, clauses 2 and 3, articles 19 and 20, clause 1, sub-clauses a) and d) and clause 5, Articles 21 and 28, clause 2, and Article 37, clause 2, may be suspended when the proclamation of the state of emergency or siege (martial law) is decided upon under the terms provided in the Constitution. Clause 3 of Article 17 is excepted from the foregoing provisions in the event of the proclamation of a state of emergency.

An organic Law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the Courts and proper Parliamentary control the rights recognized in Articles 17, clause 2, and 18, clauses 2 and 3, may be suspended as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.

Unjustified or abusive use of the powers recognized in the foregoing organic law shall give rise to criminal liability inasmuch as it is a violation of the rights and liberties recognized by the law.

Criminal" - Law concerning the Institution of Criminal Indictment - (referred to as LECr) by means of which various legislative reforms took place after the promulgation of the 1978 Constitution. The specific articles concerning arrest and its formalities are 489, 490, 492 and 496 of the LECr[11], which limit the power of the judicial Police to proceed in an arrest without prior judicial authorization. However, article 492 allows a margin of action to the FCSE, solely on the basis of their own criteria, and it is in this context that massive arrests take place according to the free-will of the FCSE officers stationed in the Basque Country in charge of the so-called "Anti-terrorist Struggle"

In theory these dispositions reflect those instruments adopted at the international level on Human Rights but, in reality, in practically all the cases of arrest, we will find that such prescriptions are not always complied with thanks to this margin of evaluation conceded by law to the FCSE. What usually happens in the cases of persons about whom there is a vague suspicion[12] on

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[11] Art. 489 of the LECr: " No Spaniard or foreigner will be detained except in those cases and in the manner as established by law."

In Articles 490 and 492 of the LECr, the "closed list" of cases in which a person may be detained is established, with a loophole of freedom in Article 492, when "the Authority has enough rational motives to believe in the existence of facts with characteristics of a crime (Art. 492.4,1) and has enough reason as well to believe that the person it intends detaining took part in such a crime (Art.492.4.2)"

Article 496 of the LECr establishes that: "The individual, Authority or Judicial Police who detains a person in accordance with what is established in the previous Articles, must place him at liberty or give him up to the Judge nearest to the place where arrest took place within twenty-four hours following such arrest (...)".

[12] For a person in the Basque Country to be suspected of collaborating or belonging to ETA, it is enough that this person is active within independentist organizations or in social movements which disagree with the State policy. Being a friend of an imprisoned Basque militant, having crossed the Northern Basque country borders to visit exiled persons, participating in manifestations or other types of public activities.. are also sufficient reason to be marked as "suspects". Even dressing in a particular way changes young people into suspects (Plan ZEN - Northern Special Zone, prepared in 1983 as a government plan for counter-insurgence, in which means to be adopted were proposed to combat Basque dissidence). It may be enough as a sample that during the past 20 years, around 20.000 Basques (from a population of 2.500.000) have been detained as "suspects" in their relations with ETA by the FCSE, to whom the special anti-terrorist legislation was applied.

which least prejudices the prisoner or the detainee in his person, reputation and property. Non-compliance or violation of this disposition by the FCSE is so frequent that it has become routine since, in all arrests of citizens accused of belonging to or collaborating with armed bands, the FCSE show extreme violence and total lack of respect for the rights of the person they intend detaining as well as of those who live with him.

We feel it suitable to point out certain elements that are repeated systematically in these types of arrests. Most of the time, arrests take place between midnight and 7 a.m. when normally the population is asleep. The procedure is simply aimed at taking the person they want to detain by surprise, but it also adds the element of "terror" which is induced both in that person and in the people who live with him and generally in all his neighbourhood. When they proceed to enter the home of a person, the FCSE make use of extreme violence together with an impressive show of firearms of all types. At the very moment they enter the home, the FCSE usually use the person who opens the door (unless they have burst it open with explosives) as a human shield to protect themselves from possible confrontation with the rest of the occupants. There are frequent simultaneous blows and beatings inflicted both against the person they plan to detain as well as his allies, rough behaviour by the agents as well as insults, threats and duress against the person to be detained. To this, we must add the fact that the FCSE members who effect arrest normally present themselves with their face covered in hoods or cowls.Finally it must be pointed out that the searches in the homes are completely out of proportion in the way they are carried out. The term "razzia" (plundering raid) is sufficiently descriptive, and is frequently used by the persons who have undergone such searches and whose homes have been left in complete disarray.

It is therefore obvious that at the moment of arrest, the FCSE absolutely do not respect Article 520, clause 1 of the LECr, or articles 7[16] and 9 of the International Treaty on Civil and Political

[16] Article 7 of the Treaty: "Nobody shall be submitted to torture or to cruel, inhuman or degrading punishments or treatment."

Rights or Articles 3[17] and 5 of the European Convention; violation of the above articles takes place at the very first moment of contact between the detainee and the FCSE. An important element to note is that in practically all cases of arrest of Basque citizens who are somehow connected by the FCSE to ETA, the Court Authority does not intervene until the FCSE has communicated the fact of the arrest or a request for entry and registration. This means that there is no prior court control or "in situ" control of the events when arrest takes place. The violations of rights already mentioned remain forgotten by justice and consequently go by totally unpunished.

2.3 The Detainee's Rights

On examining the internal legislation of the Spanish State as well as International Law, we come across several dispositions, which guarantee minimum rights to a detainee. Among others, articles 17, clause 3 of the 1978 Constitution[18] and Article 520, clause 2 of the LECr[19] guarantee the right to a detainee to be informed without delay of the reasons of his arrest and of the

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[17] Article 3 of the Convention: "Nobody shall be submitted to torture or the inhuman or degrading punishments or treatment."

[18] Article 17.3 of the Constitution: "Any person arrested must be informed immediately, and in a manner understandable to him, of his rights and of the grounds of his arrest, and may not be compelled to make a statement. The arrest person shall be guaranteed the assistance of a lawyer during the police inquiries or judicial investigations, under the terms to be laid down by the law."

[19] Article 520.2 LECr: "Every arrested person or prisoner shall be informed, in a manner understandable to him, and immediately, of the reasons that have motivated his arrest, as well as of his corresponding rights, particularly of the following:

a) The right to remain silent and of not making a statement should he so wish, and not to answer any questions made to him, or to manifest that he will make a statement in the presence of a Judge.
b) The right not to make a statement against himself or not to declare his guilt.
c) The right to appoint a lawyer and to request his presence to help in the police and court requirements regarding statements and his intervention in all identity procedures to which he is subjected . If the detainee or prisoner does not appoint a lawyer, an appointment "ex ufficio" will be made.
d) The right to let a member of his family or any other person he so wishes about his arrest and the place where he is being kept at all times. Foreigners have a right, in the mentioned situation, to communicate with the Consular Office of their country.

charges levelled against him, to remain silent and not to make any statement, to inform a person of his choice of his arrest and the place where he is detained, as well as the right to appoint a lawyer to represent him both with the police and in Court. In the context of international legislation, Article 9 of the International Treaty of Civil and Political Rights (PIDCP) in clauses 2 and 3 states that every detained person shall be informed without delay of the grounds of his arrest and of the charges made against him, as well as his presentation, without delay, in court to a judge or other authorised officer possessing judicial functions. Article 10, clause 1 of the same Treaty establishes that every person deprived of his liberty has to be treated humanely and with respect for the inherent dignity of the human being. Article 5 of the European Convention for the Protection of Human Rights, in clause 5.2 establishes that the detainee has the right to be informed within the shortest time possible of the grounds of his arrest and of any charges formulated against him, while clause 5.3. establishes that the detained person will be taken to court, without delay, in the presence of a Judge. In its clause 6[20], the European Convention establishes minimum

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e) The right to be assisted freely through an interpreter, when the detainee is a foreigner who does not understand or speak Spanish.

f) The right to be examined by the Court doctor or his legal Deputy or, in his absence, by the medical officer of the institution he is in, or by any other officer of the State or of other Public Administrations.

[20] Article 6 of the Convention:

2. Every person accused of a violation is presumed innocent until his guilt has been legally declared.
3. Every accused person has, at least, the following rights:
   a) To be informed, in the least possible time, in a language which he can understand and in detail of the nature and reason of the accusation filed against him.
   b) To dispose of the time and of the facilities required to prepare his defense.
   c) To defend himself or to be assisted by a defence lawyer of his choice and, if he has no means to pay for him, he can be assisted freely by a lawyer "ex ufficio" when the interests of justice so require.
   d) To interrogate or to have interrogated the witnesses who declare against him and to interrogate the witnesses who declare in his favour under the same conditions prevailing for witnesses declaring against him.
   e) To be assisted freely by an interpreter, if he does not understand or talk the language used in court.

rights for persons accused of a crime, among which there is the right to be presumed innocent, the right to know the charge brought against him and the right to defend himself. Still within the international context, rule 92 of the collection of Minimal Rules for the Treatment of Prisoners[21] guarantees the immediate communication between the accused person and his family regarding the fact that he has been arrested.

Going back once more to the internal legislation of the Spanish State, in 1988 the Spanish legislator introduced in the LECr, (by making use of the legislative technique of "bis" articles), some new dispositions which up to then, were found in a law outside the legislative body, namely the "anti-terrorist" Law, whose constitutional validity was questioned by the political parties until the Constitutional Court declared some of its articles unconstitutional.[22] These new "dispositions, in particular Articles 520 bis, and 527 LECr, restrict considerably the prisoner's rights previously mentioned for cases concerning "persons integrated or

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[21] Resolutions 663C (XXIV) dated 31-7-57 and 2076 (LXII) dated 13-5-77 of the United Nations Economic and Social Council.

[22] These articles come directly from the Organic Law 9/1984 dated 26th December, against the activities of armed bands and terrorist elements. That law, known as "anti-terrorist" presumed the existence of a special legislation which permitted the suspension of fundamental rights such as the inviolability of the home or the duration and conditions of the arrest period.

Following an appeal of unconstitutionality, the Constitutional Court, by decree dated 16th November 1987, declared null Article 13 which allowed the extension of arrest up to a maximum of 10 days, and unconstitutional Article 15.1 according to which the same Authority that decreed arrest to a person could also order solitary confinement ('incommunicado") of the same person.

After this sentence, Parliament approved, on 25th May 1988, the Organic Law of reform of the LECr, by which Articles 384, 520 bis, 527, 553 and others were introduced. In reality, these articles are an adaptation of the legislation to the requirements established by the constitutional text, but essentially, they maintain the decay of the same rights; this means that the legislation does not eliminate the "special status" of a certain group of persons, nor does it eliminate the possibility of extension of the period of arrest nor the solitary confinement ('incommunicado") of the detainee, although with certain formal arrangements, it reduces the maximum arrest period to 5 days and allows only the judicial Authority to extend this period as well as that of ordering solitary confinement ('incommunicado").

related to armed bands or terrorist individuals or rebels".[23] Among other things, there is the possibility of extending the period of arrest, usually a maximum of 72 hours, by a further 48 hours. Likewise, there is the possibility, by means of an authorization by a Judge, to proceed to complete solitary confinement ("incommunicado") of the detainee, thus eliminating the right of communication with his family both regarding his arrest and the place of such arrest, as well as his right to appoint his own lawyer. The FCSE may even place the detainee in solitary confinement ("incommunicado") by simply requesting such confinement to the Judge; the latter having to take a decision within 24 hours.[24] If we

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[23] Article 384 bis LECr is the point of reference for all the other articles of anti-terrorist legislation. In those articles, reference is made to detainees for crimes as contemplated in Article 384.bis, who are, according to this article "the persons integrating or related to armed groups or terrorist individuals or rebels."

[24] Article 520-bis LECr:

1. Every arrested person as an alleged participant in anyone of the crimes to which Article 334.bis refers will be placed at the disposal of the competent judge within seventy-two hours following his arrest. However, this can be extended by the time necessary to conduct proper investigations, up to a maximum of a further forty-eight hours, on condition that such an extension, requested by a motivated communication within the first forty-eight hours from arrest, is authorized by the judge during the following twenty-four hours. Both the authorization or the refusal shall be adopted by means of a motivated decree.
2. Once a person is arrested for reasons expressed in the previous clause, the judge may be requested to declare his solitary confinement ('incommunicado"), and he must give his decision on the matter, in a motivated decree within twenty-four hours. Once solitary confinement ('incommunicado") has been requested, the detainee will remain in solitary confinement ('incommunicado") without prejudicing his right to defense and to what is established in Articles 520 and 527, until the judge has issued the pertinent decree.
3. During arrest, the judge may, at any time, request information and know the detainee's situation, personally or by means of a delegated judge in the area in where the detainee is placed.

   To complement Article 520.bis, Article 527 establishes the suspension of various rights for persons to whom the previous article applies. These suspended rights are:

   a) In all cases, the lawyer is appointed "ex ufficio".
   b) The right to inform family or the Consular Office about arrest and the place where he is being kept, is lost.
   c) The right to communicate with the lawyer who will assist him in the police statement, is lost.

compare these latter regulations, especially Article 520.bis LECr, with a collection of international regulations, we observe that they are clearly contradictory. These international articles include, among others, Article 26 of the International Treaty of Civil and Political Rights (PIDCP)[25] and Article 14 of the European

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[25] Article 26 of the Treaty: " All persons are equal before the Law and have the right, without discrimination, to equal protection by the law. In this respect, the law shall prevent all discrimination and shall guarantee to all persons equal and effective protection against any discrimination for reasons of race, colour, sex, language, religion, political or any other opinions, national and social origins, economic status. birth or any other social condition".

It is interesting to consider the general commentary 18 (37) made by the Human Rights Committee concerning Article 26 of the Treaty:

1. Non-discrimination, together with equality before the law and equal protection by the law without any discrimination constitutes a basic and general principle concerning the protection of human rights. So, clause 1 of Article 2 of the International Treaty of Civil and Political Rights establishes the obligation of each Party State to respect and guarantee all individuals in their territory and subject to their jurisdiction, the rights recognized in the Treaty, without any distinction of race, colour, sex, language, religion, political or any other opinion, national or social origin, economic status, birth or any other social condition. By virtue of Article 26, not only are all persons equal before the law and have the right to equal protection by the law, but any discrimination by virtue of the law is prohibited, and it guarantees all persons equal and effective protection against any discrimination for reasons of race, colour, sex, language, religion, political or any other opinion, national or social origin, economic status, birth or any other social condition.
3. Because of its basic and general character, the principle of non-discrimination as well as that of equality before the law and of equal protection by the law are sometimes established expressly in articles related to determined categories of human rights. Clause 1 of Article 14 establishes that all persons are equal before the Tribunals and Courts of Justice and clause 3 of the same article states that during proceedings, every person accused of a crime shall have the right, on an equal footing, of the minimum guarantees enunciated in paragraphs a to 8 of this last clause. In an analogue manner, Article 25 considers the equality participation of all citizens in public life, without any of the distinctions mentioned in Article 2.
7. Although these conventions refer to only one type of discrimination, the Committee considers that the term "discrimination" as used in the Treaty, should be understood to refer to all distinction, exclusion, restriction or preference based on determined motives, such as race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition, and that have as an objective or as a

Convention[26] which declare that everyone is equal before the law and therefore, any difference made between persons who are integrated to or related with an armed group, terrorist individual or rebels and the rest of the population, contradicts this international maxim. This is still more blatant when such maxims of differentiation or discrimination are applied in a totally arbitrary manner, at the discretion of the FCSE, who simply need a public manifestation in order to label someone as a "suspect".

Likewise there is, within the international sphere, a collection of basic rules and regulations for the treatment of prisoners found in various agreements; these guarantee the minimal fundamental rights of a detainee and also provide guidelines for the behaviour both of the officers in charge of compliance with the law as well as of the medical and health officers[27], forcing them to respect the

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result, the annulling or reducing the recognition, enjoyment or exercise, in conditions of equality, the human rights and fundamental liberties of all persons.

12. Although Article 2 of the Treaty limits the scope of the rights to be protected against discrimination to those contemplated in PJCIO Article 26 does not establish this limitation. This means, Article 26 declares that all persons are equal before the law and have the right without discrimination to equal protection by the law for any of the motives there enumerated. In the Committee's judgment, Article 26 does not limit itself to repeat the guarantee already mentioned in Article 2, but it establishes an autonomous right on its own merits. It prohibits discrimination by right and by fact in any sphere subject to the norms and the protection of the public Authorities. Therefore, Article 26 refers to obligations imposed on the Party States concerning their laws and their application. Consequently, when a law is passed, a Party State must ensure the compliance of the requirements established in Article 26 inasmuch as the contents of such a law cannot be discriminatory. In other words, the application of the principle of non-discrimination of Article 26 is not limited to the spheres of rights enunciated in the Treaty.

[26] Article 14 of the Convention: "The enjoyment of rights and liberties recognized in this Convention have to be ensured without any distinction, especially for reasons of sex, race, colour, language, religion, political or other opinions, national or social origin, belonging to an ethnic minority, fortune, birth or any other social situation".

[27] Collection of Principles for the Protection of all Persons undergoing any form of Arrest or Imprisonment (General Assembly Resolution 43/173 dated 9th December 1988); Principles of medical ethics applicable to the function of medical personnel, especially doctors, in the protection of arrested persons or

rights of persons deprived of their liberty and to ensure that in no case are such rights violated. As a conclusion to this section concerning the rights of the detainee, it is important to draw attention to the fact that a distinction between categories of citizens is made simply on the basis of suspicions held by the police that somebody presumably belongs to or collaborates with ETA. There is a considerable number of the Basque population who because of their ideas are placed by the FCSE within such a category and to whom, consequently, this "anti-terrorist" legislation is applied with the approval and authorization of the law, the judges and the courts.

2.4 *Torture, inhuman and degrading treatment in barracks and detention centres; solitary confinement ('incommunicado") of detainees:*

By definition, the ban on torture and other cruel, inhuman or degrading treatment and punishments is included in the fundamental and inviolable rights of a person, giving it an absolute character; on the other hand, the dimension, frequency and intensity with which this prohibition is not respected during detentions of Basque citizens who have been related to the ETA organization by the FCSE, makes it necessary to dedicate a chapter to this subject separate from the rest of the rights of a detainee.[28]

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prisoners against torture and other cruel, inhuman or degrading treatment or punishments (General Assembly Resolution .37/194 dated 18th December 1982); Code of Behaviour for officers in charge of law compliance (General Assembly Resolution 34/169 dated 17th December 1979); European Convention for the Protection of Human Rights (Rome, 4th November 1950); European Convention for the Prevention of Torture and other Inhuman or Degrading Punishments or Treatment (26th November 1987).

[28] In 1992, 125 of 170 detainees through the application of the anti-terrorist legislation claimed they had suffered torture. In 1993, 68 out of 73 made the same claims. In 1994, the number of claims was 77 out of 85, in 1995 72 out of 79, in 1996, 54 out of 56. It is necessary to clarify that not all accusations are judicial since some persons only made the accusation publicly and/or when giving testimony to TAT (the Group Against Torture in the Basque Country). When we refer to detainees, in all the years we are talking about detainees or arrested persons in solitary confinement ('incommunicado") through the application of the "anti-terrorist" articles in the "Ley de Enjuiciamiento Criminal" - LEC.

Following the same line of thought used up to now, we shall first place ourselves within the legal framework that surrounds this fundamental right and we shall then analyse the reality that takes place in the detention centres, always basing ourselves on testimony by Basque citizens arrested under the anti-terrorist legislation. Under Spanish legislation, we consider Article 15 of the 1978 Constitution fundamental on the subject of torture. This article guarantees the life and physical integrity of persons, prohibiting torture and inhuman, cruel or degrading treatment; to this we must also add Articles 173 to 177 of the new Criminal Code, in force since 24th May 1996.[29] If we concentrate on international legislation, we find various rules within the International Treaty of Civil and Political Rights, as well as specific instruments against torture, such as the "Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment" as well as other rules of conduct for law enforcement officers and for medical and health officers, always with the aim of averting and avoiding torture and other cruel, inhuman or degrading treatment or punishment.

Before analyzing the subject, it is important to make reference to the international definition of the term "torture". For this purpose, we shall use the definition given in Article 1 of the United Nations Convention against Torture:

> "For the purposes of this present Convention, the term torture is understood to mean any act by which pain or grave suffering, whether physical or mental, is inflicted intentionally on a person with the intention of obtaining from him or from a third party information or a confession, to punish him for an act he has done or he is suspected of having done, or to intimidate or coerce that person or others, or for any other reason based on any type of discrimination, when such pain or suffering is

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[29] Article 15 of the Spanish Constitution: "All have the right to life and to physical and moral integrity, and may under no circumstances be subjected to torture or degrading punishment or treatment".

Articles 173 to 177 of the new Spanish Criminal Code, consider and punish torture as a crime, adapting its definition to the one found in the United Nations Convention against Torture.

> inflicted by a public officer or other person exercising a public function, at his instigation, or with his permission or acquiescence. Pain and suffering which are a consequence solely of legitimate sanctions, or which are inherent or incidental to such sanctions, shall not be considered as torture."

Likewise, Article 16 of the same Convention obliges all States-Party to prohibit, in any territory under their jurisdiction, other acts which constitute cruel, inhuman or degrading treatment or punishment which do not qualify as torture as defined in Article 1. The code of conduct for law enforcement officers (adopted by the United Nations General Assembly on 17-XII-1979 by Resolution 34/169) prohibits officers from inflicting acts of torture or inhuman or degrading treatment on anyone, and places on them the obligation to ensure the full protection of human rights of all persons under their custody. Finally, at United Nations level, there are also principles of medical ethics for health personnel[30] to ensure the protection of prisoners and detainees against torture and other cruel, inhuman and degrading treatment; this code of behaviour prohibits these persons from taking part directly or from knowingly collaborating either by hiding their existence or by direct participation.

Within the European regional framework, we come across the European Convention for the Protection of a Person's Fundamental Rights and Liberties and the European Convention for the Prevention of Torture. Article 3 of the European Convention establishes that: "Nobody shall be subjected to torture or to inhuman or degrading punishment or treatment." The European Court of Human Rights has enshrined in its legal code this right as "one of the fundamental values of the democratic societies that form the Council of Europe"[31] and considers, as does the European Commission for Human Rights, that this article imposes on the State the obligation to behave in such a way as to provide effective

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[30] Principles of Medical Ethics applicable to the functions of health personnel, especially doctors in the protection of prisoners and arrested persons against torture and other cruel, inhuman or degrading treatment.

[31] The Soering Decision dated 7th July 1989 (A No. 161 #88)

protection against situations which inevitably offer an objective danger of ill-treatment.[32]

On its part, the European Convention for the Prevention of Torture created the European Committee for the Prevention of Torture (CPT) as a preventive body against ill treatment. Its main function, based on the collaboration with States-Party, is to prevent torture, and to help States in complying with this commitment. The CPT does not, in principle, have a denouncing function. As is well-known, the CPT bases its work on the information and observations obtained though its members and collaborators; for this purpose, it visits the States- party to the Convention, on pre-established periodical occasions as well as on urgent or surprise visits in special situations. In these visits, the CPT examines the general conditions prevailing in the establishments visited and the attitude of the State Security Forces and other personnel involved with persons deprived of their liberty, as well as interviewing these arrested persons and examining the legal and administrative framework within which the arrests took place. Under this programme, the Spanish State has been visited on 4 occasions by delegations of the CPT.[33] The reports of the first three visits, containing the conclusions sent by the CPT to the Government drawn from the information obtained in its missions, were published by the Spanish Government in March 1996.

Already in the report of its first mission, the CPT reached the conclusion that "it is premature to conclude that torture has been eradicated" (paragraph 25), and this same conclusion is repeated in its second report. Perhaps, the most illustrative report is the one after the third visit, in June 1994.[34] The general conclusion of the CPT after this visit was that :

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[32] The Commission's Decision at request No. 10 479/83 Kirkwood c. United Kingdom (12th March 1984) and the Soering Sentence of the Court.

[33] The CPT performed two ordinary visits in April 1991 and in April 1994, and two extraordinary visits in June 1994 and in January 1997.

[34] This visit took place between 10th and 14th June, as a result of the mass arrest by the "Guardia Civil" in the Basque Provinces of Nafarroa and Gipuzkoa. The CPT is authorized by Article 7.2 of the Convention to carry out this type of visits; and as a basis of this latest one, the same CPT argues that "... the allegations received at the beginning of June of 1994 provided the opportunity

> "The accounts from the persons interviewed were plausible, detailed and not stereotyped, as opposed to the alleged direct orders they followed, as denounced by the Spanish Government".[35]

What was written in the CPT report concerning this third visit can serve as an example of the methods of torture habitually used by the FCSE in the Spanish State:

(i) The interviewed persons described *blows* received with an open hand on the head, testicles, back, abdomen and arms, and punches mainly to the stomach.[36]

(ii) The CPT members were able to verify the existence of *bruises and blemishes* compatible with their alleged treatment.[37]

(iii) *Electric shocks*: Certain persons saw the equipment with which these were applied, and their description coincides with certain equipment for this purpose which can be easily bought in many countries (paragraph 15, footnote). A person was noted to have a mark on his forehead totally compatible with his allegedly receiving electric shocks in that part of his body.[38]

In this report, the CPT notes that in many alleged types of torture, it is very difficult to obtain medical evidence, particularly if inflicted in an expert manner. They could, however, interview one person who was admitted to the Gipuzkoa hospital after undergoing a full examination in order to obtain proof of the marks she carried.[39] The CPT assessed the result of the medical tests: "The bruises which she was found with in hospital were clearly more extensive than those registered by the court doctor, although this could be explained because of her hemophilia. The blood analysis

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to check about the risk of torture and ill-treatment which may have been taking place" (paragraph 5). During its stay in the Spanish State, it interviewed eight Basque citizens arrested during the mentioned mass arrest, two of whom were free and six were in prison.

35 Paragraph 29 of the CPT report on its June 1994 visit.

36 Paragraph 13 of the CPT report on its June 1994 visit.

37 Paragraph 31 of the CPT report on its June 1994 visit.

38 Paragraph 31 (15?) of the CPT report on its June 1994 visit.

39 This person was María Encarnación Martínez, freed after 3 days of solitary confinement ('incommunicado") in quarters belonging to the "Guardia Civil".

reveals a high degree of CPK (of 24.988 IU/I, the normal level being between 20 and 160) which could have been caused only by a muscular contusion through ill-treatment or possibly by muscular exercises of exceptional severity. The former is the more logical explanation, an opinion also shared by the Internal Medicine Department of the hospital of Gipuzkoa - the case was referred to the competent Authorities.[40]

Although not included in the CPT report, one can learn from the tortured victims' testimony about the common practice of *asphyxia* sessions, either by immersion in water or through the covering of the head with plastic bags, the second method being the more common one. Detainees are also forced to *remain standing for several hours, to perform physical exercises and to remain awake. The psychological torture, including insults, threats, sexual harassment, humiliation ...*, are not to be overlooked. Everything described up to now takes place during the period of solitary confinement ("incommunicado") of prisoners, as it is within the power of the Judges of the National Court to authorize such solitary confinement ('incommunicado") or to extend his arrest.

3. The Placing Of The Arrested Person At The Disposal Of The Court Authority

We shall concentrate on two aspects in our analysis of the stage of proceedings we shall deal with in this section.

3.1 Characteristics of the proper Authority in matters of "terrorism": The "Audiencia Nacional" - National Court

The 1978 Spanish Constitution, in its Article 24, clause 2, recognizes among others the right of all persons to have access to the Ordinary Judge predetermined by law, to a public trial without undue delays and with full guarantees, and the presumption of innocence.[41] Likewise, Principle 5 of the Collection of Basic

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[40] Paragraphs 22 to 25 of the CPT report on its June 1994 visit.

[41] Art. 24 of the Constitution:

1. Every person has the right to obtain the effective protection of the Judges

Principles relating to the independence of the Judiciary[42] indicates that every person shall have the right to be judged by the Ordinary Courts of Justice in accordance with the legally established procedures. One can deduce from these two principles that the obvious Judge, namely the one presiding over the area where the crime has been committed, is the competent person to take cognizance of the case. Yet, in matters concerning "terrorism" or relations with armed groups, we find that all arrested persons are placed at the disposal of the Central Judge of Proceedings, of the Audiencia Nacional (National Court). In this manner, the constitutional mandate of the right for an Ordinary Judge predetermined by law is overlooked. We shall not dwell too long on this matter of the National Court, since it would require a much wider and deeper study because of its "special" nature and importance. We shall however point out its special nature (besides other types of crime such as organized drug-trafficking and fiscal crimes, it takes on exclusively all matters related to "terrorism") and its high degree of political influence.

3.2 Prior Investigating Procedures. Police Statement

Once a detainee is placed at the disposal of the Judge of the Central Court, the police report is submitted, together with the arrested person, to the judge; this report contains the statements of the detainee in the police quarters (remember that such statements are normally made when the detainee is in solitary confinement ("incommunicado") and the elements of proof which the

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and the Courts in the exercise of his legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the Ordinary Judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of the evidence pertinent to their defence: to not make self-incriminating statements; to not declare themselves guilty; and to the presumption of innocence.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

[42] Resolutions 42/32 dated 29-11-1995 and 40/46 dated 13-12-1985.

FCSE have collected. Also, prior to the start of proceedings the Judge first interviews the police officers who effected the "investigation", who forward all the details of the matter and give their opinions to the Judge, without giving the defence lawyers access to these "private conversations". However, a representative of the prosecuting officer is normally present at these interviews.[43] In all cases, the Judge of the Central Court bases himself on these police statements both when interrogating the detainee (in spite of his arguing from the very start that everything declared to the police is false and forced by torture and ill-treatment) and when deciding to remand him in provisional custody. At this stage we must point out that there are innumerable cases in which the detainees denounce in the Judge's presence that they have been subjected to torture and ill-treatment in the police quarters, as part of the FCSE's aim of obtaining self-incrimination, incrimination of third parties or simply information.

The 1978 Spanish Constitution in its Article 15, forbids torture, while in the international sphere, Article 15 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments establishes that no statement which is proven to have been made as a result of torture or of other cruel, inhuman or degrading treatment or punishment can be invoked as proof against the person involved or any other person in any proceedings. Even if it is true that in most cases it is difficult to "demonstrate" that torture or ill-treatment has been inflicted, due to the technical perfection reached by the interrogators or because in many cases, the torture is psychological, together with the fact that the arrested person has been left in solitary confinement ('incommunicado"), there are cases when it is evident that the detainee has been tortured and yet, even in these cases, the Judge takes the police reports into consideration when the detainee makes his statement and when he remands him in custody. His role is limited to the

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[43] Obviously, this is not established by law, but it happens in practically the majority of cases. We are able to assert this since as lawyers we have to wait when such statements are taken in the corridors of the National Court and observe helplessly as the Police officers enter the Judge's offices and remain there for a long time before the detainees re called to make their statements and we are allowed inside the offices.

interrogation of the detainee, always based on the police report and the elements of proof provided by the police.

3.3 Judicial Statement: Prerogatives of the Prosecution. The right of defence

The following is a description of the detainee's statement to the Judicial Authority, when the case takes place before the Judge of the Central Investigating Court (dependent on the Central Court). Once the decreed time has elapsed (the maximum period of detention - solitary confinement - *incommunicado* - is of 5 days in matters concerning terrorism) , the detained person is conducted to the National Court, in the presence of the Judge of the Investigating Court who will take his statement. According to what the detainee himself stated, he is never sure if he is really in the presence of a Judge, or if it is just a rigged situation by the FCSE members who have kept him in custody, especially when he has been denied all contact with the external world, with his family or with a lawyer he trusts. Furthermore, noteworthy is the fact that to aggravate the situation the detainees are constantly threatened that after their statement they will be taken back to the police quarters, with the threat of further "interrogations" should their statement not be according to the wishes of the interrogators or if they denounce them for torture. There have been several cases in which a detainee denounced torture while under the impression of being in the presence of a Judge, a Lawyer or a Legal Doctor, after which he was savagely beaten by the person he addressed (in reality an FCSE member). All this of course results in total insecurity when having to make a statement in the presence of a real judge.

On the other hand, the detainees with whom we are dealing in this paper are forbidden by the LECr to have any type of contact before making their statement to the Judge - not even with a lawyer designated by himself or by his family. This fact is particularly worrying since it is this first statement which will determine his being sent into custody and the future development of the court-case which may take place against that person.[44]

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[44] These statements are in most cases the fundamental proof to be used eventually in the cases against these persons in the National Court. They are considered valid in several condemning sentences, even in cases where torture was so

Finally, it is worth pointing out that while the Prosecution is fully aware of the various procedures which have taken place, both at police and at court level, the Defence for the detainee (lawyers designated by them or their families) are completely unaware of developments, including the police report up to the moment it is made public on requesting their statement. The Defence is unable to intervene before the detainee has delivered his statement, not even to pose some simple clarifying questions.

As a conclusion to this section, we shall point out two final matters. The first concerns the great number of detainees who, in spite of the conditions under which their statement is taken, denounce torture. Secondly, the absolute absence of concern by the judges to verify if, in reality, the police reports have been produced under torture or not. On some (very limited) occasions and on evidence that as a result of their being kept in solitary confinement ("*incommunicado*"), the detainees were not capable of making statements because of their physical condition (bruises ...) or their psychological state (hallucinations, moral collapse ...), judges have chosen to declare preventive custody of the detainee with a delay in making his statement in court until he is feeling better. What is more common and normal procedure is that judges completely ignore the state in which the detainee is found, in spite of evidence, and give their approval with the classical routine addition that he "is in the physical and psychological condition to make a statement" which is added by the court doctors of the National Court in the reports they issue to the judges before the statements are started.[45] What fails to be accomplished is a thorough investigation of what

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evident that it was impossible to ignore (as, for example, in the case already quoted concerning the Bizkaia Command or in that of the persons detained in 1994 for their alleged relation with the boundary apparatus of ETA): the National Court does not hesitate in considering such statements as fully valid and effected with all guarantees.

[45] On the behaviour of the court doctors of the National Court, it is interesting to quote the comments made by the CPT in its third report on the "ad hoc" visit in June 1994 to the Spanish State:

At the start of the part concerning medical reports, it states that "The court doctor observed recently made marks in a certain number of cases, but was of the opinion that they could have been caused by reasons other than ill-treatment (Inf. III, paragraph 19). "...within the context of this report, certain observations

really took place in the police quarters during the period of solitary confinement ("*incommunicado*"), in spite of the fact that in the later statement of the detainee, his condition (of body and mind) was a result of the tortures borne during those five days.

To end this section about the behaviour of the Judges of the Central Investigating Courts, it is interesting to recall the commentaries made by the CPT on the subject:

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are to be made concerning the role of the court doctors" (Inf. III, paragraph 36). The CPT members deduce from their visit certain "deficiencies" in the court doctors' behaviour: "Further medical tests in the Madrid I prison revealed wounds, in the case of two of the persons detained between 2nd and 7th June of 1994, which had not been noticed by the court doctors; in another case they were more extensive marks than those registered by the court doctors, while in a fourth case, the discrepancies concerning the extension of the wounds may have been caused by the poor means at the disposal of the court doctor." (Inf. III, paragraph 38).

In paragraph 39 of the III Report, the CPT recommends that the court reports should follow a more developed form at least in the following points:

i) Statements made by the detained person when relevant to the medical examination (including the description of the examined person, his state of health, as well as any alleged ill-treatment).
ii) The objective medical manifestations based on a thorough examination.
iii) The conclusions of the doctor, keeping in mind points i) and ii).

It considers necessary besides to note that: "... given the pressure that can be inflicted on the detainee, the court doctors should not accept immediately on face value his statements if these amount to having been treated well", adding that: "Special attention should be given to the psychological state of the detainee and more especially to changes in this state during the time of custody when the situation is evaluated." (Inf. III, paragraph 39).

On the other hand, Amnesty International mentions the following in its Commentary on the Periodic Fourth Report to the Spanish Government:
In April 1995, two officers of the National Police Corps were condemned for not having avoided the use of torture (since it was impossible to identify who had actually perpetrated such acts, the ones who registered the statement were condemned), namely that of electrical discharge on Iker Eguskizaga, who had been arrested in November 1983. In the conviction, the court detailed the unwarranted and unjustified delays of the authorities in the investigation of these facts, which were condemned by the court but which it considered eventually as attenuating circumstances for the two accused. In the conviction, the report of the court doctor to the case was described as "a clear example of what a medical report should not be". (from the Commentaries of AI to the Fourth Periodic Report - CCPR/C/79/Add.1 page 6).

> "In view of the cases examined during the "ad hoc" visit, the Judge of the Central Court did not recognise the existence of signs of violence on some detainees, being of the opinion that they resulted from the circumstances of the arrest rather than from intentional ill-treatment".[46]

With due respect to the judges, the CPT recommends that in cases of solitary confinement ("*incommunicado*"), they should ideally be present in order to help or to give direct information to the detainees (Article 520.bis, 3, of the Law of Institution of Criminal Proceedings - LEC). The CPT considers that regular and unannounced visits by the competent judge or the prosecution to places where detainees are kept, could contribute significantly towards the prevention of ill-treatment. Presently, according to information obtained during the second period visit, it resulted that such visits rarely take place." (Inf. II, Paragraphs 72 and 73). This was also confirmed in the AI Commentaries to the fourth periodic report on the Spanish State presented to the United Nations Committee of Human Rights (CCPR/C/79/Add.1) page 13, paragraph 2.

Another aspect of the court decisions which attracts the CPT's attention is the following: "According to information made available by the Spanish authorities, it would seem that the State Security Forces systematically request the solitary confinement ("*incommunicado*") of detainees in connection with terrorist activities and the judges systematically accede to this request" (Inf. II, paragraph 6.2) The request and concession of solitary confinement ("*incommunicado*") must be supported by a motivation but "... it seems that the reasons put forward for the judge to order solitary confinement ("*incommunicado*") tend to be brief and stereotyped and yet, it is always conceded for the maximum period of detention". The answer given by the Government flatly denies such a statement with the following facts:

- In 1994, of 119 detainees for "terrorism", 105 were placed in solitary confinement ("*incommunicado*").
- In 1995, of 133 persons, there were 129 placed in solitary confinement ("*incommunicado*").

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[46] Inf. III, paragraph 31.

Amnesty International confirms this statement in its commentaries on the fourth report of the Spanish Government dated April 1996. "...After a random study of requests for extension of the detention period, ...the only reason to justify detention in solitary confinement ("*incommunicado*"), which normally is given with such requests, is the reference to alleged connections of the person concerned to ETA without any further argument or additional proof. The extension of the detention period of persons in solitary confinement ("*incommunicado*") does not go further than using phrases such as: "...as it is considered necessary for the total clarification of the criminal acts in which the detainee/ person in solitary confinement ("*incommunicado*") may be involved". The AI report continues by saying it is difficult to understand how a judge can conclude a reasonable judgement on a decision of such importance just by relying on information of this kind. However, regardless of what is established by law, and as far as Amnesty International could verify, approval to such requests is invariably given merely through legalistic formulae such as: "having considered that the extension of detention has been proposed within the legal time limit and the reasons for such a measure is the need for a thorough investigation of the facts, it is deemed justified..."

"This means that the extension of detention in solitary confinement ("*incommunicado*") is conceded almost automatically, suggesting deficiencies in judicial control." These are the precise words of the conclusion reached by AI.

3.4 Warrant of Preventive custody

According to Article 503, LECr, when a punishment for a crime is higher than minor imprisonment, the Judge may decree preventive custody. If we take into consideration that the minimum punishment for crimes connected with "terrorist" activities is major imprisonment, the Judge can, in all cases, decree preventive custody for the detainee, something which happens in most cases. The only exceptions are the cases of those persons against whom, in view of the statements taken by the police or in court, it is absolutely impossible to make accusations. Consequently, as a general rule, in "terrorism" cases, every person against whom there is a slight indication of guilt, however small it may be, and even though his

participation in the crimes he allegedly committed has not been proven, is sent to prison on a preventive basis. On the other hand, Article 503 LECr establishes a maximum period of 4 years as the duration of preventive custody. Although the normal duration is 2 years, in cases to which Article 389 of the LECr refers, this can be extended by a further two years. Although the time of preventive custody for Basque political prisoners rarely reaches the maximum of 4 years, it is usual that around 2 to 3 years pass before they are brought to trial, and the general rule is that this process never lasts less than one year.

On this subject, Article 9.3 of the International Agreement on Civil and Political Rights establishes that every person detained due to a criminal transgression has the right either to be tried within a reasonable time or otherwise to be set free. At the same time, it establishes that preventive custody of persons awaiting trial should not be the general rule. Article 14.3.c) of the same Agreement states that after reaching trial, every person has the right to be judged without unwarranted delays. Although in these last articles, the maximum duration of preventive custody is not established, and only the right of being judged within a "reasonable limit of time" is stipulated, on the basis of real facts, we may state that as regards the Basque political prisoners the general rule is that such a situation of preventive custody lasts for an excessively long period ranging between 1 and 4 years.

On this matter, it is interesting to note the commentary made by the European Court of Human Rights regarding the delays in court cases. It specifically refers to the obligation of States, stating that "it is incumbent on the States ... to provide the appropriate means to the Courts, adapted to the objectives being sought, to allow them to comply with the requirements established in Article 6.1 of the Convention. In all cases, the court procedure is to be controlled by the Judge who will be responsible to ensure that the case is conducted rapidly."[47] In other words, the Court establishes that "if the crisis is lengthened and takes a structural characteristic, so much that the mitigating circumstances are not enough, the State

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[47] Martins Moreira against Portugal, sentence dated 26 November 1992, A No.249-B, # 23.

must take more efficient remedies to adapt to the requirements established in Article 6.1 of the Convention."[48]

In conclusion to this section, we wish to highlight the non-existence of the "presumption of innocence" concerning citizens detained due to their alleged connections with the ETA organization; that same presumption of innocence established as a right for all persons by Article 24.4 of the Spanish Constitution and Article 6.2 of the European Convention of Human Rights. On the basis of this right, all detainees have the right to be set free unless their participation in criminal acts is clearly evident or unless there are sufficient and reasonable indications to presume that that person will evade the course of justice. Consequently, being placed in preventive custody should be an exceptional measure, whereas the contrary is what is happening, namely preventive custody is the general rule for all persons connected by the FCSE to the ETA organization.

[48] Food Union Sanders against the Spanish State, sentence dated 7 July 1989, A No. 157, # 40.

HUMAN RIGHTS: UNIVERSAL RELEVANCE BUT LOCAL INTERPRETATION?

JOSEPH A FILLETTI

The author's central argument is that our perception of a universally recognised concept is in fact relative. Although certain values seem to transcend the various diversities between peoples, cultural differences do persist even in the area of human rights. Experience in Europe and elsewhere has shown that relative homogeneity of values within a group is less likely to create problems of relevance and interpretation than on a universal level. Nonetheless, the drafters of the European Convention on Human Rights, keeping in mind the diversity of the legal traditions of the Member States, left a measure of latitude or discretion for interpretative purposes. Is the 'exportation' of human rights a form of latter day cultural imperialism? What if the democratic process as understood and interpreted in the Western world is alien to a particular state or region? The author believes that the absence of an integrated European policy towards the Mediterranean in the past caused a backlash against Europe because a sharper divide between north and south was created. The Euro-Mediterranean Partnership, which commenced in Barcelona, should put an end to this but the social and cultural aspects of this process should be developed. It is vital to make multi-culturalism the starting-point for thinking about human rights and to develop a policy of inter-culturalism as one of the aims of the Euro-Med dialogue. Links should be found between the universalism of human rights and the diversified expression due to local perceptions.

1. Introduction

When the title of the subject we are about to discuss came to my knowledge for the first time, [1] it was drafted in the form

[1] A first draft of this article was originally printed as the opening address in the afternoon session of the Euro-Mediterranean Conference on Strengthening

of a statement. No question mark was appended at the end. So I set my mind thinking about its possible implications. I asked myself whether it asserts the obvious; whether it implies an approval of such a state of affairs in the present international scenario or whether it is critical of the fact that things have turned out the way they are now; whether it is meant to be axiomatic or deliberately concocted to elicit a dialectic upon the problems facing the recognition and the application of human rights today. Of course, the title in question-form would suggest that the general idea was the latter - namely that it calls for a general debate.

Most people in this field would readily agree that human rights are imbued with universal relevance. So much so that along the years, and more so after World War II and the proclamation of the UN Universal Declaration on Human Rights in 1948, these rights have been regaled with all sorts of impressive attributes: basic, fundamental, universal, immutable, inalienable and such like. Assuming that these attributes are true, one would logically expect that their global recognition and adoption should have presented no problems whatsoever. Everyone knows from experience that this assumption is wrong. If they are so basic and relevant to one and all, it stands to reason that their widespread implementation and harmonized interpretation should be a foregone conclusion. Wrong again! Why so? Well it has very much to do, I think, with the relativity theory. "Do not worry about difficulties in mathematics - Albert Einstein once told his students - I can assure you that mine are still greater!" We might indeed all share the same view that no one should be subjected to inhuman and degrading treatment but our idea of what actually constitutes an infringement thereof might differ. We all share the same idea or notion, hence its universality, but the way we perceive it is often different.

In other words, our perception of a universally recognised concept is a relative one. Our idea of its consistency, extent, significance and so on might not exactly tally. When we fail to agree as to the extent of its relevance, for a variety of reasons, then it comes as no surprise to discover that local interpretation too will sometimes

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Democracy and Respect for Human Rights, Wilton Park Special Conference, United Kingdom, May 10-12, 1998.

vary. The further we distance ourselves from the notion, and its relevance to us, the greater the probability of arriving at various conclusions by way of interpretation. As an object moves further away from us, its retinal image size begins to diminish. We know that in reality nothing has happened to the object itself. Nonetheless the illusion remains. In our case, however, the change in perception leads to real problems for the way it translates itself in practice. The perceptual change here is not an illusion but the reality of a given situation. If we perceive a right in a particular way, than our interpretation is bound to be conditioned.

2. The Perception Of Human Rights Is Conditioned

The first obstacle standing in the way of the universal relevance aspect lies therefore in the conditioning of our perception due to external pressure. Marcelino Orejo[2] summed it up as follows:

> "The perception of human rights is conditioned, in space and time, by a combination of historical, economic, social, cultural and religious factors. As a result, the actual substance of these rights will be defined in different ways, and the means of securing them will similarly vary. This diversity, reflecting the very nature of societies and of mankind's conceptions, raises a question: Is there a universal conception of human rights?"

No civilised person can possibly deny the existence of certain human values that seem to transcend the much diversity that divide mankind. After all, the fact that we all belong to the human race is a common bond that unites us. Human dignity, love of freedom, equality and justice for all are values that transcend differences in the same way that the abstract notions of good, beauty and truth do. They belong to humanity as a whole - a common heritage of mankind if you will. In principle, therefore, human rights should be the same for all. In reality, however, we know that this is not invariably so. Cultural differences around the world beget diversity.

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[2] Orejo M., Secretary-General of the Council of Europe, Opening Address Session, Colloquy on the Universality of Human Rights, Strasbourg, 17-19 April, 1989.

For example, which rights should qualify as basic and immutable and which should be regarded as secondary and open to different interpretation remains, of course, a matter of debate. Thus, it is not just a matter of a standard set of ideals but also very much a matter of different priorities, subjective value judgments and local interpretation. Many feel, for example, that racism is not adequately controlled under existing conventions and that a wider protection must be provided for. When rights appear in various conventions, there is then another factor to reckon with. Since the text of one treaty may well vary from that of another, differences in interpretation are in such cases inevitable. But for the moment I am more concerned with so-called conceptual diversities on account of cultural differences; taking 'culture' here in its broadest meaning. Torture is one practice that is today considered by many as a flagrant violation of human rights, but there are countries where torture is part and parcel of domestic law and is in fact institutionalised.

3. The European Experience And The European Convention On Human Rights

At the global level, a need has always been felt among men for a basic minimum of human rights' protection. As the emphasis on man's development increases, the unfolding potential of the human rights movement will correspondingly demand either a more extensive charter or more incisive and fine-tuned rules in addition to effective remedies by way of redress. Experience in Europe and elsewhere has shown that it is possible for a group of states belonging to one region and who share a common heritage of political traditions, political interaction, ideals, freedom and the rule of law, to set up a more effective system for the protection of human rights than appeared possible at global or universal level. Relative homogeneity of values within a group is less likely to create problems of relevance and interpretation.

Let us focus our attention for a while on the European Convention on Human Rights. The ECHR is clearly the product of a Western conception of human rights. In other words, it embodies and defines human rights principles from a Western perspective. For this reason, it lends itself easily to a structure in which Western society finds itself quite at home, in familiar surroundings.

It stands to reason that the Western ethos places great emphasis on values considered to be more important than others: political liberty, democracy, the rule of law, social and property rights. Had this not been the case, European states would have been faced with a set of contrived, alien precepts that might not have wholly fit in a European milieu and, as such, the entire exercise would have been self-defeating or only partly successful. For this reason, it would have been very difficult to provide an efficient and effective remedy in the case of proven violations of human rights treaty provisions. What I am saying is that in formulating principles of universal relevance, the actual rendition was conditioned by values held dear or cherished more than others in this part of the world. Hence, it would not be surprising were we to find out that non-European nations or societies feel that they do not view the same values from the same perspective nor share the same degree of enthusiasm as their western counterparts.

4. The Diversity Factor Within A Regional Framework

The 19th Colloquy on European Law held under the auspices of the Council of Europe in November 1989 chose to discuss the abuse of rights and equivalent concepts. One report in particular[3] examined the topic from the aspect of comparative law. The three rapporteurs inter alia commented as follows,

> "European States have very few points in common as regards the definition of abuse of rights, conditions of implementation, areas of application and, finally, legal effects. So few, in fact, that there are almost as many conceptions of abuse of rights as there are Member States of the Council of Europe. And that is not all: this diversity is further accentuated by the fact that, within most countries, there is no unanimous agreement as to the scope of the prohibition of abuse of rights, doctrinal disputes and contradictory judgments are commonplace."

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[3] This report was drafted on the basis of preliminary studies presented by Ms. Rieben A.S., Ms. Spirou C. and Verschraegen B., as well as by Ms Samuel A., Scientific assistants of the Swiss Institute of Comparative Law.

Naturally, if we examine the domestic laws of different countries on a comparative basis, we are bound to find contrasts and even conflicts. Indeed, this phenomenon has even flourished into a fully-fledged area of legal study known as the Conflict of Laws or, more euphemistically, Private International Law. But the interesting point to note is that during the same meeting, the concept of abuse of rights was also reviewed in relation to the ECHR. The question examined was whether the individual, in exercising those guarantees enshrined in the ECHR could abuse of them either vis-à-vis the community as a whole or vis-à-vis others.

A number of rights laid down in the Convention and in the various Protocols thereto have been somewhat restricted in order to preserve or to accommodate other values deemed to be more important than the effective exercise of these rights. In theory, a proclaimed right can be exercised and can therefore be protected. Yet the exercise of such a right may endanger other rights considered as being of more fundamental value. Continuing to exercise that right in such circumstances would be tantamount to abusing it. The difficulty is knowing at what point we are faced with a possible abuse of rights. Moreover, the exercise in itself implies the taking of corrective or remedial action whereby a certain degree of limitation is allowed so as not to imperil a higher right. In a long line of judgments, the European Court of Human Rights and later the treaties of the European Community have elaborated those circumstances in which the exercise of a right may be limited. It is very difficult to supply a precise criterion, however, as the State authorities are often better placed than an international judge to determine whether and to what extent a right may be restricted,. The now well-established criterion is known as the "margin of appreciation". It is beyond the scope of my contribution to elaborate further on this norm. But from our standpoint, it remains a valid point because the application of this criterion leads us to the conclusion that national authorities are left with a certain degree of discretion to require the individual, as it were, to 'give up' the exercise of an inherent right. As Francois Ost (1988) puts it:

> "Such concepts as 'democratic society", "public order" and 'health and morality' obviously reflect 'social goals' which the individual must bear in mind when he demands observance of a fundamental right, but which are too abstract for him to know ab initio whether or not he is abusing his rights".

So the lesson to be learnt from what I have just reviewed is that the drafters of the Convention, fully aware of the diversity among the legal traditions of the Member States left a measure of latitude for interpretative purpose. So not only does there exist a relative perception of the intrinsic value of the right invoked, but allowances are made to interpret such right in the context of a number of formulated conditions or requirements.

5. Self-Imposed Limits On Human Rights Application

A cursory examination of the wording and contents of Article 10 of the ECHR, just to cite one example, would illustrate my point. It contains two paragraphs. The first paragraph, in turn, is divided into three statements starting solemnly with: "Everyone has the right to freedom of expression." Thus far, the wording is faultless. The second statement then goes on to spell out some added guarantees:

> "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The third statement is somewhat of a damper to what preceded it, but the nature of the guaranteed right nonetheless remains untarnished:

> "This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises."

This makes us suddenly aware that we are not living in a vacuum. It acts as a reminder that there are secondary rules and regulations that govern us from the cradle to the grave and sometimes even beyond. But it also paves the way for what lies in store in the second paragraph that follows. The latter in fact conditions this right in very wide terms and in a rather paternalistic way too,

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..."

The nature of these so-called formalities, conditions etc is quite

generic and extensive and include restrictions in the interest of national security, territorial integrity or public safety; for the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others; to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. I am not saying that these declared limitations are capricious or unnecessary but that they nevertheless condition to a marked extent the enjoyment or use of the proclaimed right and that they certainly leave a government unsympathetic to this right with a lot of room for manoeuvre.

6. The General Outlook Of The European Union On Human Rights Observance

The far-reaching ideas outlined by Jean Monnet, Robert Schumann and others in post-war Europe towards a closer unity among European States tended to take human rights principles for granted. After all, another European regional organisation had already by then taken up the initiative in the field. The fusion of the coal and steel industries, aspects of defence and the pooling of economic resources of the Benelux countries were of more immediate interest to the pioneers of the European Community. Of course, things have gone quite a long way since those formative years. At Maastricht, for example, formal political recognition was given to fundamental human rights by Article F(2) of the Treaty on European Unity:

> "The Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, as general principles of Community Law."

It is obvious that the TEU did not want to necessarily equate human rights either with the provisions of the ECHR or case law emanating from the European Court of Human Rights. Indeed Article L of the Treaty makes it clear that Article F(2) is not part of Community Law and, as such, is not justiciable by the European Court of Justice.

Did the Community, through its institutions, ever envisage the possibility of having two competing European Courts dealing with

the same human rights issues? Actually, the European Court of Justice initially seemed reluctant to develop human rights as a general principle of Community Law, let alone adopt the ECHR. In Stauder v. Ulm (1969), however, the notion was espoused. The case concerned the interpretation of the different language texts of a decision by the Commission. The liberal interpretation given by the Court to that decision avoided any possibility of breach of fundamental human rights, but the court established its acceptance of the concept by affirming that,

> "Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community Law and protected by the Court."

A more outright pronouncement is found in the Internationale Handelsgeselleschaft Case (1970), where the Court held that these rights are: "inspired by the Constitutional traditions common to the member states." In 1974, in Nold v. Commission, the Court reaffirmed that: "fundamental human rights form an integral part of the general principles of law, the observance of which they ensure." In Johnson v. Chief Constable of the RUC (1986), the Court did refer to the ECHR. The European Court of Justice, it affirmed, is not bound by this Convention though it conceded that: "the principles on which that Convention is based must be taken into consideration in Community Law." Therefore, the European Court of Justice only embraced international human rights treaties - notably the ECHR - upon which its own member states had collaborated - by way of supplying "guidelines" to be followed within the framework of Community Law.

This anomaly was touched upon in 1982 by the then German Federal Minister of Justice, Hans Jochen Vogel, who stated that,

> "A uniform application of the Convention, in the territories of all the States Party to the Convention requires, logically, also its application to acts of the European Communities. It would not make much sense if acts which, being subject to the binding effect of the Convention as acts of a State Party to the Convention, should be freed from this binding effect for the mere reason that, as a result of that State joining the European Community, they are no longer made

> on national level but by the organs of the Community.... It was not the intention of the Fathers of the European Community to create again a new space where the Convention does not apply."

Of course, there is a lot of truth in this but there is always the other side of the coin to consider.

7. The Politics of Human Rights

The open-ended approach adopted so far by the EU in relation to human rights criteria within the Union is not devoid of merit. While accepting existing treaties as guidelines, it leaves space to tap other sources thereby allowing itself space to formulate its own interpretations should this be necessary. Commenting upon the legal framework of human rights application, Pierre-Henri Imbert, a Council of Europe Director of Human Rights, pointed out that the attention we pay to rights, through declarations or conventions, may have caused us to lose sight of the very foundations of such rights and to concentrate only on affirmed rights. Individual rights seem to be degenerating into individualism. We hear much less talk of "freedoms" than of "rights". Hence our difficulty in "managing" problems of intolerance and exclusion. The gap has widened between progress achieved at international normative and institutional levels and the reality of national, regional and local everyday life, and the possible tendency on the part of some to turn the human rights machinery into an ersatz ideology by expecting it not only to protect the individual from state abuses and inadequacies but also to regulate all forms of social behaviour. The distinction between individual and collective rights on the basis of the principles of universality and indivisibility should be abandoned. Even here though, I feel that there is a reason for this shift in favour of so-called individualism. Firstly, the individual was always the main centre of attention; secondly, once human rights were identified, we then moved towards the ideal or essential abstraction of these rights, namely, human dignity. Now human dignity cannot simply be dismissed as a collective right for it resides in each and every one of us.

In January 1998, the European Union sent three junior foreign ministers as her representatives to Algeria in order to meet the

Algerian Prime-Minister and Foreign Minister as well as members of the opposition parties and newspaper editors. The mission's leader, British Foreign Office Secretary of State, Mr. Derek Fatchett, said in a statement that the EU regretted that Algeria had again rejected a UN human rights probe but was pleased that the Algerian Foreign Minister had agreed to visit London to continue discussing the Algerian conflict[4]. Mr. Fatchett said that the EU meant the dialogue with Europe would be pursued, despite Algeria's firm rejection of any kind of outside interference in what it insists is not a civil war but a struggle to defeat Islamic fundamentalist terrorism.

We are not here concerned with the present state of affairs in Algeria. This news item is a typical involvement by the EU in matters concerning human rights outside the Union. The question is: why the emphasis on probing human rights elsewhere, beyond Europe? Is the EU really concerned about human rights violations out of a genuine humanitarian sense of solidarity with that people or is it rather perturbed in case things might get out of hand in that country with an effect on other interests? Why this urge, this impulse to go beyond simple fact-finding towards a more interventionist approach? Lest I be misunderstood - I am not critical of any approach that would somehow alleviate the sufferings of innocent people. I am just posing a number of questions to try to get to the root of the matter: why does the EU or, for that matter any other nation, concern themselves with extra-territorial issues involving human rights violations? Is it human solidarity, the protection of private interests, or the fear of the spread of integralist fundamentalism? There are other aspects to this scenario. Why should certain states or governments perceive a threat to their own stability if they were to open their doors, as it were, to a general and widespread recognition and application of human rights? If fundamental freedoms and human rights are so basic to mankind, so universal in their relevance, why is it that we have to develop strategies to put them on a sound footing wherever needed? Is there such a thing as the politics of human rights?

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[4] Sant A., Prime Minister of Malta, Closing statement, Euro-Mediterranean Conference, Valletta, April, 16, 1997.

One might well probably answer that in the absence of a pluralist democracy, human rights principles need to be established first and foremost. But what if the democratic process as understood and interpreted in the Western Hemisphere is alien or not part of the political fabric of this or that state, this or that region? And assuming that powerful regional organisations like the EU and others genuinely want to foster among such nations a greater respect towards human rights, and the would-be recipient is as yet unconvinced, is there some sort of a price to pay in order to implement the policy? Must human rights be negotiated or bartered like a material commodity?

8. The Euro-Med Process and Human Rights Concerns

If reconciling human rights attitudes within one region presents some problems, then it is even more likely that reconciling standards between one region and another is going to create greater problems both from the point of view of relevance as well as local interpretation. The EU has by now fully realised, one hopes, that instability in the Mediterranean region can possibly have a destabilising effect on Europe itself. In the absence of integrated European action towards the Mediterranean basin in the past decades, the Member States of the EC were left free to mould their own policies as dictated by their respective national interests. This 'laissez-faire' policy has created a backlash against Europe because it gradually developed into a sharper divide between north and south. The new phase in Euro-Med relations, launched in part with the Euro-Mediterranean Partnership in Barcelona will hopefully put an end to uncoordinated national initiatives and weld the economic and political aspects of Europe's policy in the region. In other words, the action policy would thus represent the whole of the Union and not only those Member States with interests in the Mediterranean. But economic and political aspects should be developed in conjunction with the social and cultural aspects as well for it is in the latter aspects that the human dimension is at its most complete.

In his closing statement at the Euro-Med Ministerial Conference held in Valletta three years ago, the then Maltese Prime Minister *inter alia* stated that:

> "Results are measured by expectation, but also with realism.... Fundamentally, the Euro-Med Partnership is the product of the recognition that in spite of manifest difficulties, there are more unifying than divisive elements in the rich, cultural, political and geographical diversities of the Mediterranean region...."

After highlighting that there is a sensitive linkage between progress in the Barcelona process and the evolution of the Middle-East peace process, he continued by saying that:

> "We attach particular importance to the initiatives, which bring the Barcelona process closer to the individual citizens in our respective countries. We (also) welcome the importance given to the initiatives for co-operation and inter-action between peoples of different cultures and religions. As at Barcelona, again here (in Malta) the Partners have reaffirmed their firm commitment to the promotion of human rights and fundamental freedoms and to the fight against the various manifestations of international crime. Our ultimate aim is for a wider partnership of peoples rather than one exclusively restricted to Governments."

To a large extent, these ideas converge with the views expressed by our former Shadow Minister for Foreign Affairs who also spoke out in favour of a greater emphasis on the social, cultural and human dimension. The objective is to develop human resources, promote understanding between cultures and exchanges within civil society. In this context of decentralised co-operation, the emphasis is placed on education, training of young people, culture and the media, migrant population groups and health. We have to evolve in the Mediterranean region a 'people to people' approach.

9. Increased Emphasis on Fundamental Social Rights

Without in any way minimising the universal relevance of human rights provisions, it is fairly obvious that in the more advanced and developed countries, alleged violations are increasingly becoming more particular and specious. Individual complaints nowadays concern an ever-broadening range of specific and particular issues

like the use of corporal punishment, the confinement of mental patients, the detention of vagrants, telephone tapping, the status of transsexuals, laws on homosexual activities, professional and military discipline, the closed-shop within the ambit of trade union activity. Then there is another category involving more serious human rights violations involving prisoners' rights, access to the courts, custody and care of children, freedom of the media, immigration, deportation, and extradition. Admittedly, these rights, in addition to those higher fundamental rights like the right to life, can never be by-passed but it should be realised that other rights, which to us might appear of lesser import, can mean more to others - if only because they are more immediately or realistically realisable. Within the framework of the European Social Charter, we might well include such broader issues as the work environment, the rights of children, the conditions of migrant workers and their families.

It is vital to make multi-culturalism the starting-point for thinking about human rights and develop a policy of inter-culturalism as one of the central aims of the Euro-Med dialogue. The main goal is that of establishing a kind of public area of thinking and discussion enabling links to be found between the universal relevance of human rights and the diversified expression due to local perceptions. If need be, the goals of democracy should be redefined through this dynamic interaction. A reassessment should be made of the principle that should guide the choice of objectives in the field of human rights, in the context of geographical and social considerations. I believe that while taking into consideration local conditions, even at the risk of losing some of the momentum on human rights monitoring, greater emphasis should be laid on fundamental social and cultural rights. Respect for human rights cannot develop satisfactorily, and their universal relevance would therefore recede, unless the would-be recipients are ready to participate in this process. A working balance should ideally be struck between those principles stemming from a common European identity on the one hand and the diversity and "otherness" aspects that originate from non-European sources on the other.

10. Conclusion

Human rights philosophy must take ideological and cultural relativity into account. It must proceed upon the model that these

rights have to be realised within a pluralistic framework. What I am trying to say is that whereas these values are universal, we must not forget that there are different, not to say contrasting, conceptions of how to implement and interpret such rights. Ideological and cultural homogeneity might be a perfect model within a particular world region or group of nations but this does not always apply to other regions. Human rights must proceed from the basis of ideological pluralism. In this sense, quite ironically perhaps, any initiative coming from a regional body concerning the development of human rights must adopt a global approach. Diversity will continue to exist in form and expression, but this is to be expected. Indeed, it should be accepted and not frowned upon because the resulting grand mosaic within the universal fold can only result in enriching the totality of human society.

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THE UNIVERSAL CHARACTER OF HUMAN RIGHTS AND MEDITERRANEAN REGIONALIZATION[1]

MILENA MODICA

The article focuses on these investigations:

1. Which objectives are addressed by the regionalization of human rights in relation to their universal character in an area like the Mediterranean?
2. Which major chapters regarding human rights should be incorporated into the planned process of legal infra-Mediterranean convergence?
3. How are we to build an international framework purposely set up for countries which belong to different international zones or regions?

To these investigations the author responds that the regionalization of human rights has been justified in preference to universalism on the basis of practicality. Rights are more easily guaranteed at the regional rather than at the global level. The real and effective application of human rights, which by their very nature cannot allow exclusions or restrictions of any kind, can only be promoted by identifying and enforcing the core chapters concerning human rights which are shared by all countries. There is an urgent need to identify an appropriate forum in which the question of the affirmation and effective application of human rights can become an integral part of the reciprocal commitments signed by the Mediterranean states, as well as an area of mutual control.

1. Introduction

At the beginning of the third millennium the protection of human rights is not only achieving unanimous consensus all over the world but in the development of international relations it has

[1] This article is a reworking of a paper read by the same author at the international meeting on "Mediterraneo Terzo Millennio", organized by the President's Office of the Sicilian Regional Authority and by COMEN (Mediterranean Conference) at Palermo, Castello Utveggio, 11 – 13 November 1998.

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unprecedentedly taken pride of place. This fact is certainly encouraging to all those who work in the field of human rights or support them, but it still does not solve the often disheartening problems concerning their operative legal framework or of their global application. International treaties of a universal or regional character have still not been ratified by many states, even though they are members of the UN, or else they are actually ignored, left unapplied or severely restricted by a variety of repressive political regimes.

While on the political plane, states seem to be finding it more difficult to maintain an indifferent attitude to the internationalization and globalization of human rights, on the institutional and juridical level the path to their effective application and protection seems to be tortuous and fraught with obstacles. From the legal perspective, especially, their protection clashes with conceptual suspicions nurtured about the international legal system[2] by countries whose culture and civilization are alien to traditionally Western principles and juridical concepts. Furthermore, there are objective difficulties which hinder the harmonious and coherent reception of these principles by national legislatures, as well as the deficiencies of control mechanisms of the legal or "quasi-legal" type on a universal level and the almost total lack of these same mechanisms in the Mediterranean region.

I believe it is proper to set off by observing how the legal aspect of human rights, together with the socio-cultural aspect, has been rather neglected by the processes geared towards infra-Mediterranean common action, and lately from those launched by the European Union starting with the Euro-Mediterranean Conference held in Barcelona in 1995[3]. This is not so much to

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[2] On the debate about the cultural inevitability of human rights, invoked by some people to relativize them, see *L'Islam e il dibattito sui diritti dell'uomo*, Andrea Pacini (ed.), "Dossier Mondo Islamico 5", Ed. Fondazione Giovanni Agnelli, Torino, 1998.

[3] One must remember that of the three cornerstones or *volet* of the final document of the conference (Barcelona, 27-28 November 1995), wherein the 15 member states of the EU and the 12 third world countries pledged to establish a global Euro-Mediterranean partnership, the third one, the "Partnership in the social, cultural and human fields" does not mention human rights in its text, nor any

underline the political difficulties that hinder full inclusion, as to focus attention on their fundamental importance for achieving any kind of Mediterranean integration. In other words the assumption on which this contribution is based and will develop is that one cannot build a stable and developed area without establishing principles of freedom and fundamental rights which can be shared by all the Mediterranean countries and which can be enjoyed by all their populations. The "new frontier" of the respect for and effective protection of human rights in the Mediterranean as the foundation for coexistence and integration constitutes today's newest and most challenging task that local and international political figures have to take up. The way in which this challenge will be tackled will have a conclusive influence on the chances that the countries on the southern coast of the Mediterranean will have to win their battle against every type of integralism as well as against the dangers of a dramatic authoritarian isolation of their political systems, and to contribute in this way to the evolution of the concept of democracy, placing it within reach of the populations which have developed outside Western culture.

The following reflections of a legal nature on the universality of human rights compared to the hypothetical and ever more strongly desired Mediterranean regionalization, although they are related to strictly political aspects, derive from the need to clarify a number of crucial problems that keep coming up when discussing the process of concerted action or integration in the Mediterranean area that also concerns the human rights issue.

For this aim the present paper shall investigate:

(1) Which objectives are addressed by the regionalization of human rights in relation to their universal character, in an area like the Mediterranean which is far from homogeneous from a legal perspective.
(2) Which major topics or chapters regarding human rights should be incorporated into the planned process of legal infra-

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formula of compromise which had however been adopted, with many difficulties, in the Helsinki document way back in 1975, in the process of the CSCE and the East-West Cooperation agreement, in which the third title named "Cooperation in humanitarian and other sectors".

Mediterranean convergence; and lastly (albeit only briefly, considering the complexity and vastness of the problem and its possible solutions)

(3) How to build, and before all else imagine, an international framework suitable for countries which are situated in a well-defined geographical area which does not, however, exist as a political entity.

2. The relationship between universalism and Mediterranean regionalism in human rights

First of all I feel that I must stress how a possible convergence on a number of fundamental principles regarding human rights which can be shared by the countries on the shores of the Mediterranean automatically implies questioning the relationship between universalism and regionalism of human rights. One must seriously ask what the objectives of a regionalization of human rights in an exclusively Mediterranean environment should be.

When the *Universal Declaration of Human Rights* was adopted on the 10th December 1948, just over fifty years ago, the universalism of human rights was effectively affirmed. It has already been authoritatively pointed out that this universalism is subjective, and not objective or absolute. Since 1948 the international community was endowed with a decalogue of rights which are in principle valid for all humanity, which today comprises almost six billion people, notwithstanding that it is impossible (and this was already clear then) to anchor them all to an ontological foundation which could be considered valid by the different cultures, civilizations, and ideologies, or to deduce them by means of a logical-rational process from an untouchable and aprioristic human nature. The foundation can only rest on the factual evidence that the fifty-year-old Universal Declaration exists today, and on the *consensu omnium gentium* that it has obtained about its own validity and that of the values it contains. Therefore these values are shared in actual fact and not only in principle[4]. It is precisely this trend that

[4] Here I fully accept the school of thought which besides defining universality as an inter-subjective datum, tackles the problem of the foundation instead of ignoring

promoted the idea that universalism, being an inter-subjective datum, cannot recognize frontiers, nor differences or discriminations of any kind between the geographical zones of the world or between countries that belong to different geographical areas.

The Universal Declaration itself, which is defined in its Preamble as: "*a common ideal to be reached by all peoples and nations through education and teaching [...] and by means of progressive measures of a national and international character*," has generated the grand legal structure of human rights, a great system of protection which is summarized in the *International Bill of Human Rights* which usually is seen as comprising the Universal Declaration and the two Pacts with the attached Protocols which in 1966 helped to give juridical force to the principles which are only proclaimed in the Declaration. That Preamble also generated the grand juridical structures which consist of the regional systems for the protection of human rights. Regionalization of human rights has been justified in preference to universalism on the grounds of their application, which is better guaranteed at sub-regional level than in a universal context, and the old conflict between regionalism and universalism has been solved in practice by entrusting to the one the application and supervision, to the other the juridical definition of human rights, the so-called *standard setting* which can only be universal.[5]

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it by historicizing it, anchoring it to the hard and tragic objectivity of historical experience, which is in a position to reveal to us that the catastrophes that humanity has gone through in its history and still goes through are precisely a direct consequence of the non-observance of the basic principles of freedom and human rights. See particularly Norberto Bobbio, *L'età dei diritti*, Einaudi, Torino, 1990; Antonio Cassese, *I diritti umani nel mondo contemporaneo*, Laterza, Bari, 1994; and in part Gregorio Peces-Barba, *Teoria dei diritti fondamentali*, Giuffré, Milano, 1993. A partly different interpretation of the problem of the foundation can be found in Franco Viola, *Diritti dell'uomo, diritto naturale, etica contemporanea*, Torino, 1989; in Francesco D'Agostino, *Filosofia del diritto*, Giappichelli, Torino, 1996; as well as in the teachings of the Catholic school which are based on the so-called personalistic theory or "principle of personality" whose founder may be Sergio Cotta (see especially his *Diritto, persona, mondo umano*, Giappichelli, Torino, 1989).

[5] See Claudio Zanghi, *La protezione internazionale dei diritti dell'uomo*, Presidenza del Consiglio dei ministri, 1979, pp. 91-99; and "Protezione internazionale dei diritti dell'uomo", in *Digesto*, IV ed., vol. XII Pubblico, UTET, 1997, pp. 150-201.

Besides the more well-known Latin-American and African regional systems, a special system has been established for the Arab world, prepared by the *League of Arab States* (L.A.S.)[6] from 1968 by the creation within the same organization of a *Permanent Arab Commission for Human Rights*, formulated during the First World Conference on human rights held in Teheran by the United Nations in the same year, in collaboration with, or at least under the auspices of, the specialized organs of the United Nations. From then on a series of juridical instruments concerning human rights were initiated (the first systematic project of the Arab League dates back to 1971), which were followed by drafts of the *Organization of the Islamic Conference* (O.I.C.)[7] or those written under its patronage

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[6] The most important organization of the Arab world was founded by the Pact of Cairo on the 22nd March 1945, that is a few months before the United Nations Organization. Its membership actually comprises 22 Arab-Muslim states (the Republic of Comore joined in November 1993) and includes the Palestinian National Authority (called the "State of Palestine" by the League). Its headquarters had been moved to Tunis for more than ten years but returned to Cairo in 1991.

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For a complete list see the bibliographical section in Paolo Ungari and Milena Modica (eds.), *Per una convergenza mediterranea sui diritti dell'uomo*, vol. I, Le Carte delle organizzazioni araba, islamica e africana, Euroma, Roma, 1998, pp. 109-120.

[7] The O.I.C. was founded by the first Conference of the Kings and Heads of States and Government in Rabat 1969 by 26 Muslim countries. However only after a

such as the *Universal declaration of human rights in Islam* of the *European Islamic Council*, as well as the documents belonging to the African continent which produced the *African Bill of human rights and peoples' rights*[8] as well as other documents made by Research Institutes and Centres or scholars' associations, among which the most active is the Istituto Superiore di Scienze Criminali of Syracuse whose head is Prof. Cherif Bassiouni.[9] The majority of

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Secretariat and other permanent structures were set up, in 1970-71, the third conference of Ministers of Foreign Affairs adopted the Treaty of institution of the Organization on the 4th March 1972, and this became effective after the sixth ratification in January 1973. The O.I.C. presently embraces 52 Islamic states of Africa, Europe (Albania) and Asia (including the 22 states of the Arab League), apart from a variable number of observers and invited participants at the summit conferences. The permanent headquarters of the O.I.C. and its innumerable specialized organizations (except for ISESCO, which is parallel to the UNESCO, and has its official address in Rabat) is Jeddah in Saudi Arabia, the country which has the uncontested leadership of the Organization. Its principal organs are: the *Conference of Kings and Heads of State and Government* which meets every three years, the *Conference of Ministers of Foreign Affairs* which meets every year), and the *General Secretariat*. For the relative bibliography see P. Ungari and M. Modica, *op.cit.*, p.109 ff.

[8] This was adopted unanimously by the XVIIIth Conference of Heads of State and Government of the *Organization of African Unity* (O.A.U.) which met on the 27th June 1981 in Nairobi (Kenya). Better known as the *Banjul Bill*, after the city in Gambia where the two sessions of the Conference of Ministers of Justice of the O.A.U. was held and during which the definitive project was finalized, it came into force in October 1986, three months after the 26th ratification instrument was deposited, or rather (as prescribed by article 63) "with the ratification or the acceptance by the absolute majority of the member states of the O.A.U." which were then 50 states. The *African Bill of Human Rights and of Peoples' Rights* constitutes the largest regional system for the protection of human rights within the United Nations, having been ratified by 51 states out of the 53 making up the whole continent (54 if one counts the Saharouhi Arab Democratic Republic) excluding Eritrea and Ethiopia alone.

[9] A *Bill of Human Rights and of Peoples' Rights of the Arab World* has been drafted by a committee of 76 experts in Muslim law who met at the Institute from the 5th to the 12th December 1986 under the chairmanship of the Lebanese jurist Cherif Bassiouni, but it does not enjoy official recognition up to now. During the meetings in plenary session and in the committees, account was taken of the instruments on human rights of the United Nations, the Council of Europe, the Organization of American States, the Organization of African Unity as well as, particularly, of the LAS and OIC projects. The Bill as drafted stands out for its

these texts are commonly called "Bills" but a second look will show that they are texts that are different in character and different in content. Some are actually conventions, veritable agreements regulated by international law, others are simply declarations of principle, (as those of the O.I.C. usually are,) intended primarily to clarify the import and the extent of human rights in a specifically Islamic context rather than to establish binding legal obligations.[10]

Besides texts of infra-regional significance, whether official or not, and the more authoritative contributions of research bodies, one must not forget other types of documents which have an extraordinary political and social importance. These often give legal weight to principles concerning the observance and protection of human rights and when adopted by Mediterranean Non-Governmental Organizations (NGOs) like the various Human Rights Leagues or professional associations of magistrates, lawyers, journalists, etc., constitute parameters of behaviour and action which are binding for all the members. Although their binding nature is limited to the respective organizations, their adoption often has practical repercussions that concern civil society, as well as government policy. They also serve to increase awareness of such matters within civil society.

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systematic structure and completeness, and although it was intended as a conventional instrument at the disposal of the Arab states which would have wanted to sign a proper agreement as well as of the LAS directly in a period when it had abandoned all its projects on the matter, today it is still admirable when compared to the official texts which were finally adopted. Besides, it is the only project which provides for the institution of a Commission of human rights which has the legal capacity to take cognizance of violations brought to its attention by member states as well as by individuals or organizations.

[10] For a chronological analysis of the various projects see section II of the study by P. Ungari and M. Modica, *op. cit.*, pp. 99-106 where general information with brief comments and relative bibliographical references of the sources are given for every text. For a very recent juridical analysis of the most important texts see Maurice Borrmans, "Convergenze e divergenze tra la Dichiarazione Universale dei Diritti dell'Uomo del 1948 e le recenti Dichiarazioni dei Diritti dell'Uomo nell'Islam", a paper read at the international seminar on "Diritti dell'Uomo e profili etnico-religiosi: una prospettiva globale" (Human Rights and ethnic and religious profiles: a global perspective), Università Cattolica del Sacro Cuore, Milan, 3-4 December 1988 (by the author's kind permission).

In the Mediterranean basin therefore there is a multitude of legal texts on the protection of human rights. Besides those which have just been mentioned, one must name the international conventions of a general character drafted by the United Nations which have been ratified by many Mediterranean countries on both the northern and the southern shores, as well as those concerning the European continent, starting from the smaller Europe of 15 countries and moving on to the 41 members of the Council of Europe, all of whom have ratified (or are in the process of ratifying) the *European Convention of Human Rights and Fundamental Freedoms* and have automatically recognized the jurisdictional competence of the new Court[11]. Finally one must mention the more than 50 participants of the Organization for Security and Cooperation in Europe (O.S.C.E.).

Because of the mixed legal systems of the countries of the Southern Mediterranean, problems obviously arise concerning their integration and coherence with international Conventions of a universal nature, although these have been ratified by many of these countries. With respect to the first question regarding the objectives of Mediterranean regionalization, the problem may be considered from the point of view of the identification of a possible juridical harmonization of the various texts, or rather of the underlying values, since by merely taking into account or passively accepting such a multiplicity of 'competing' "Bills" will only lead to a confirmation of the theory of those who believe that there is irreconcilable incompatibility between the different legal cultures and of the different theories and methods of application of human rights. On the one hand one notes that, in spite of the sharp increase in documents and conventions for the protection of human rights, in actual fact one cannot say that there has been any improvement in their protection, nor a decrease in their violations. In his introductory speech at the 2nd World Conference on Human Rights in Vienna in 1993, the Secretary General of the UN, Boutros Boutros Ghali stated that at present it is not so urgent to define new rights as much as to adopt the existent documents and apply

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[11] Established by Protocol n. 11, which entered into force on the 1st of November 1998.

them effectively. The Final Declaration of the said Conference, which was not free of controversy about the real universality of human rights, notably raised by the delegates from Asia and the Middle East, strongly stressed the *universality, indivisibility, interdependence and interconnection* of all human rights. On the other hand, however, the non-adherence or diffident approach of the Arabo-Islamic countries to the instruments of international protection not only expressed reserves of a political nature but also emphasized the cultural difficulty of accepting juridical concepts which are seen as the result of the historical and political experience of the West.

What is necessary, therefore, is not the production of new declarations or conventions to the already complex panorama of juridical instruments which exist in the Mediterranean basin, nor the division of human rights into "Islamic", "African", or "European" types, but the identification of topics and principles which in the meantime could form a hard core, albeit a small one, around which Mediterranean convergence on human rights could be built. For this purpose one must point out that the contrasting current views on the subject do not present essential divergences in principle, with respect to the main issues. No present Mediterranean culture today questions the right to life, the prohibition of slavery and torture or other inhuman or degrading treatment or punishment, the inalienable equality of all human beings, whatever the differences between them, the freedom of thought, expression and communication by all the means that are available today, to mention only a few.

All these documents, and in particular the African Bill, (which is the only Convention concerning the States of the southern shores which is in vigore today) do not simply bring about the mere acceptance of the principles ratified by the Universal Declaration but they actually tend to produce elaborations on these principles in the light of the culture and traditions which are typical of their own specific region. However, with regard to this question and to the arguments raised by those who fear that this road may harm the uniformity of the definition of human rights some degree of flexibility should be left for autochtonous and autonomous elaboration, so long as these are absolutely in conformity with the principles of the *International Bill of Human Rights* and never in conflict with them. Consequently one must avoid drafts that, under

false pretexts, are nothing more than negations of those principles or else seriously reduce their scope.

3. Limitations and obstacles to the full integration of Human Rights in the process of infra-Mediterranean convergence

The problem of what topics should be included in the process of Mediterranean convergence has up to now been generally tackled in a narrow perspective which only admitted topics of a specific Mediterranean interest. This attitude was formed essentially from two factors carried over from the past which continue to reinforce a perception of the Mediterranean which is today limiting or at least arguable.

In fact on the one hand dialogue and the first forms of cooperation were prompted by the need to tackle problems of common interest that concern the whole region through collaboration. On the other hand the paradigm of non-interference in the internal affairs of each state and the political instability of the region which is the epicentre of international controversies (the Lockerbie case, the Israeli-Palestinian conflict, the Algerian crisis and the Western Sahara question), has for many years fostered a fragmentary kind of cooperation which is wary of intruding into sensitive areas or of upsetting delicate balances.

As a consequence, dialogue on human rights has been adversely affected. It has been generally ignored by international tribunals and relegated to a dialogue between religions. When it has been taken up in academic circles, at universities or research centres, it has focused on those "chapters" of human rights which are deemed to possess a specific meaning and value in the Mediterranean context, like those touching sustainable development, migratory flows and the environment.[12] This attitude, however, does not give sufficient consideration to the fact that perceptions on the problems

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[12] This is Zanghi's point of view, particularly in his introduction, "Presentazione della Conferenza" in C. Zanghi, L. Pannella, R. La Rosa (eds.) *I Diritti dell'uomo nel Mediterraneo*, Atti della Conferenza Mediterranea sui diritti dell'uomo, Taormina, 12-15 March 1993, Giappichelli Editore, Torino, n.d., pp. 35-42.

that affect both the northern and southern shores can diverge significantly according to the various priorities and interests, and that therefore, rather than constituting a basis for agreement on which legal convergence of principles could be built, it in fact results in disputes and misunderstandings.

A viewpoint which comprises the real and effective application of human rights, which by their very nature cannot allow exclusions or restrictions of any kind can only be promoted by the inclusion of all the important areas concerning human rights which have been previously recalled as examples, and which are shared, or at least could be shared, by all countries. The different degrees or yardsticks of their application actually derive, ultimately, not only from social and political factors, but also from practices and standards determined by state or economic interests that are hardly disguised by both sides, on the pretext of specific views and different legal systems. If we keep avoiding critical examination of these specific elements on the pretext that they have in fact been denied by statements of principle upholding the indivisibility and the uniformity of human rights, or if we keep ignoring them because they dent their universality, we shall actually be embracing them and consolidating them.

In order to overcome the various misunderstandings that keep circulating around the two shores of the Mediterranean when problems concerning the observance of human rights and fundamental freedoms arise, it is necessary to adopt an all-embracing approach. This approach will make it possible to tackle topics on which it is easier and more realistic to have a common vision and common principles (although these must never be taken for granted), as well as more sensitive areas on which divergent views abound. In a gradually evolving perspective it should be possible to ultimately overcome the knottiest problems that are still unsolved today, even if their extent is already different to what it used to be in the past. This is particularly true of the legal equality between the sexes; women's rights and the rights of the child, religious freedom (but only so far as changing religion is concerned). These topics must not be left out, passed over or side-lined. On the contrary they deserve to be discussed openly and frankly and a conceptional analysis of them should take place in order to eliminate the many misunderstandings, mystifications and distorted habits that have tended to multiply.

4. The actual prospects of establishing a Conference on Security and Cooperation in the Mediterranean.

The process for concerted action and cooperation in various sectors and on various levels, including institutional ones, between the Mediterranean coastal states has undergone a slow but undeniable evolution. However it is still difficult to achieve its concrete implementation.[13] While in the recent past this process was seen from the viewpoint of a "moderate Arab partnership", which could stem the flow of migrants towards the Northern shores and resist radical Islamism (these objectives were presented as being of common interest), nowadays attention is focused on a kind of partnership (which is often as "global"), in the sense that due consideration is taken of the problems and priorities of both the northern and southern shores, without sacrificing the individual's rights to live in an area that guarantees freedom and the observance of fundamental human rights. Attention has finally been given to this last topic within relationships for cooperation, both in the economic and financial sectors as well as those of security and peace. However one must add that an appropriate institutional and political framework which could unite all the countries bordering the Mediterranean in dealing with issues and problems which concern them does not exist. The absence of an appropriate headquarters where an effective political will for concerted action, which would include human rights, could be nurtured and the incoherent fragmentation of the general or regional strategies and initiatives undertaken by the principal international organizations in this direction, seem to be the main obstacle to Mediterranean integration based on the protection and observance of human rights and fundamental freedoms.

It is enough to reflect that East-West détente, the progressive

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[13] The idea of the Mediterranean as a "lake of peace" is both ancient and modern since it is a classical idealistic image which has been revived in the form of a new international and interregional political project which is often attempted in different ways. Cfr. K. Josephides, "Géopolitique d'une coexistance, l'avenir des relations Europe-Maghreb", in M.L. Dumas (ed.), *La Méditerranée Occidentale: sécurité et coopération*, Paris, Fondation pour les études de défense nationale, 1992.

crumbling of the Iron Curtain and the democratization of the East European countries, have been greatly simplified, and in a certain sense guided, by the existence of a pre-planned framework for concerted political action. The setting-up of the Conference for Security and Cooperation in Europe (CSCE), nowadays the OSCE, in 1975 turned out to be particularly useful in introducing the theme of human dimension, first by means of the prudentless ambitious title on "humanitarian questions" and then, from 1989 onwards, of "human rights", and progressively making it an important hobbyhorse in the process of rapprochement with the Soviet Union and its satellite states.[14]

With regards to the Mediterranean, although proposals, initiatives and strategies are not lacking, particularly from the European Union, these tend to develop unilaterally and only in specific cases are they complementary, while more often than not they overlap in mutual exclusion or create useless duplication. On the one hand there are the strategies of the Council of Europe, the European Union and, in part, the Organization for Security and Cooperation in Europe (OSCE),[15] as well as those of NATO and

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[14] For a critical analysis of the similarities and differences between the two processes, the oriental and the Mediterranean ones, see Nadji Safir, "Se l'Europa non rispetta i Musulmani ...", *Limes. Mediterraneo, l'Arabia vicina*, n. 2, aprile-giugno 1994, pp. 69-80.

[15] In the Final Act of Helsinki, 1st August 1975, the 35 participating states, though recognizing the importance of the Mediterranean region in the context of world security and peace, did not move further than the level of good intentions: to promote good relations among neighbours; increase mutual trust; encourage cooperation in the economic, scientific, technical and environment sectors; maintain and increase contacts and dialogue started off by the CSCE with non-participating Mediterranean states. See Giovanni Barberini, *Dalla CSCE alla OSCE. Testi e documenti*, Edizioni Scientifiche Italiane, Napoli, 1995, pp. 62-64. Over and above the initial but steady opposition of the United States (which, although it is outside the European framework, was involved in the CSCE process together with Canada, from its inception and with full rights), the European states themselves, by giving priority to the building of the "common European House", formed by one history and by shared cultures which, although different, can become homogeneous at least with regard to values and traditions, have remained till now reluctant to widen the OSCE to include also the Mediterranean countries. The six Mediterranean countries present at the Conference since its inception (Algeria, Egypt, Israel, Morocco, Siria and Tunisia)

WEO on the military and strategic plane, on the other hand there are Organizations like the Maghreb Arab Union, the Organization of African Unity,[16] the OCI and the LSA. Up to the present concerted action is not only lacking between the two parties, but neither is there any, (apart from a few rare exceptions), within each of the said groups.

For these reasons there is an urgent need to identify an appropriate forum where the question of the affirmation and effective application of human rights can become an integral part of the reciprocal commitments entered into by the Mediterranean states, as well as becoming, at a later stage, an object of mutual control. Besides being included in the agenda of a political forum where all the Mediterranean states would be represented, human rights could in this way finally benefit from institutionalized control mechanisms which no state could disregard by putting forward various arguments, the most typical of which are being those highlighting Western desire for hegemony in the guise of a new form of colonialism based on the exportation and imposition of alien legal standards.[17]

Besides, the institution of procedures of control, of commitments reciprocally undertaken would be the first step to achieve legal

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were called "non-participants", precisely so that they could be excluded from any form of commitment or declaration of will among the parties, even regarding matters which concern exclusively the Mediterranean. The observer status, rather *sui generis* considering the possibility of presenting written as well as oral contributions, that they still keep within the OSCE process was at first intended to be a transitory phase which would later have led, in conformity with the developments of the OSCE system, to their full and effective participation. But it is inevitable to point out that this has remained a mere intention, albeit with some partial and restricted exceptions.

[16] The OAU was instituted by the Conference that in Addis Abeba (Ethiopia) in May 1963 gathered the Heads of State and of Government of the 32 African countries which were then independent, and presently includes all the states of the continent with the exception of Morocco, which left the Organization in 1984 following the admission of the Arab Democratic Republic of Saharoui. Its permanent headquarters is in Addis Abeba.

[17] See, particularly, P. Ungari, "Una conferenza per la Sicurezza e la Cooperazione nel Mediterraneo: la concretezza di una suggestione", in *Atti del convegno "Monitor Europa-Africa 1992. Il richiamo di Cartagine*, Associazione idea-cultura, 1993, pp. 105-108.

protection of human rights, bridging the gap which today seems to be, in the light of the European experience, one of the most serious failings in the system of the protection of human rights set up by the mechanisms of the southern shore which generally simply establish weak commissions mainly entrusted with tasks of promotion and popularization. In truth, the recent adoption by the Conference of Heads of State and Government of the OAU on the 9th June 1998 of an additional Protocol to the *African Convention for the Rights of Man and Peoples* which sets up a Court to complement the African Commission for human rights in its task of protection seems to augur well. However, such an organ, when it starts functioning[18], will simply stress the fragmentation of the mechanisms and the forms of protection that concern the Mediterranean, since the African Court will have continental jurisdiction, and will then only include the African Mediterranean countries.

[18] The Protocol (the Document has not been published yet, but we have been kindly provided with a copy by the Italian Embassy in Ethiopia) for its entry into force sets out the achievement of fifteen ratifications. Out of 30 signatories, up to now only Senegal has deposited, on the 30th October 1998, its ratification instruments.

EMPOWERING NGO'S TO PREVENT TORTURE IN SOUTH-EASTERN EUROPE

AUDREY VOGEL

This article sets forth the papers which were presented during the fourth workshop organised by the Association for the Prevention of Torture (APT), jointly with the Greek Medical Rehabilitation Centre for Torture Victims, and held in Athens in October 1999. The worksop was entitled : "NGO empowerment in preventing torture in South-Eastern Europe." It addressed more particularly the following themes: visiting places of detention, NGOs and international monitoring mechanisms, bringing cases to court and redressing victims of torture. In the Balkan region the Albanian Helsinki Committee, the Bulgarian Helsinki Committee, the Moldavian Helsinki Committee, the Greek Research and Support Centre for victims of maltreatment and social exclusion, and the Romanian Helsinki Committee already have access to places of detention ; as they have negotiated a monitoring programme with the public authorities. The papers presented were prepared by the NGOs in view of the Athens workshop. The papers describe the monitoring efforts of these NGOs, the way these NGOs carry out visits to places of detention, the obstacles encountered in this task, as well as the possibilities of coordination with other national or international monitoring institutions, such as the Council of Europe, the European Committee for the Prevention of Torture (CPT) and the UN Human Rights Committee.

1. Introduction

The Association for the Prevention of Torture (APT) is an international Geneva-based NGO. Founded in 1977 by Jean Jacques Gautier, its mandate is to prevent torture and ill treatment. To this end, it seeks to reinforce and promote control mechanisms, such as visits to places of detention. The idea of the founder was simple. As torture often happens in closed places, preventing it would entail the creation of an independent international body empowered to visit places of detention. The APT was therefore created and given

the task of putting this idea into action. As a result, the European Convention for the Prevention of Torture (ECPT) was adopted by the Council of Europe. This Convention establishes the European Committee for the Prevention of Torture (CPT), a Committee able to go at any time to any state party to the Convention in order to visit any place of detention. In order to raise awareness about the CPT, the APT has already organised four sub-regional seminars on the prevention of torture in Europe. The first one was held in Onati, Spain, in April 1997 for Southern Europe. At the time, the Acts of this seminar were published in a previous issue of the Mediterranean Journal of Human Rights (Vol.2 no.3). The second one took place in September 1997 in London for Northern European countries, while the third one, covering Central Europe, was hosted in Budapest, Hungary, in June 1998.

A fourth workshop was held in Athens on 21 and 22 October 1999. It was organised jointly with the Greek Medical Rehabilitation Centre for Torture Victims. The objective of this last workshop was the empowerment of national NGOs on the preventive impact of international, European and national mechanisms dealing with torture. The workshop gathered 44 NGO representatives from 9 countries of the Balkan region: Albania, Bulgaria, Croatia, Greece, Macedonia, Moldova, Romania, Turkey and Yugoslavia. The workshop addressed more particularly the impact on the prevention of torture of the following four themes: visiting places of detention; NGOs and international monitoring mechanisms; bringing cases to court and redressing victims of torture. During the workshop particular emphasis was put on experience developed by national NGOs in visiting places of detention. Such visits by national NGOs are a new trend and they are crucial as they complement regional and international visiting mechanisms in reducing the risks of torture and ill treatment while in detention. Within its mandate, the APT seeks to promote existing national visiting mechanisms and encourages the creation of such mechanisms at the national level.

In that respect, and as we see it a necessity to promote this kind of monitoring, the APT is trying to set up a three-year project in view to encourage national NGOs to visit places of detention. This entails the creation of a guide, which would then lead to harmonising methods of visits. In the Balkan region, the following NGOs already have access to places of detention as they have negotiated a monitoring programme with the public authorities: The

Albanian Helsinki Committee, the Bulgarian Helsinki Committee, the Moldavian Helsinki Committee, the Greek Research and Support Centre for victims of maltreatment and social exclusion (RCTVI), and the Romanian Helsinki Committee. The papers presented below were prepared by these NGOs in view of the Athens workshop. The following papers describe the way these NGOs carry out visits to places of detention, the effectiveness and the obstacles encountered in this task as well as the possibilities existing, in their view, of exchanges with other national or international visiting mechanisms such as the CPT. In conclusion, I would like to stress on the fact that this workshop provided an opportunity for the NGOs of the region present to exchange experiences, to compare situations in the different countries concerned, and to learn from one another. The participants all took a very active part in the discussions, which were fruitful.

2. Visiting places of detention – a point of view by the Romanian Helsinki Committee (APADOR – CH) – Contribution by Manuela Stefanescu, Chair

APADOR-CH (The Association for the Protection of Human Rights in Romania – the Helsinki Committee), better known as the Romanian Helsinki Committee, is a non-governmental non-profit organisation, legally established in March 1990. The concerns and activities of the association regard civil and political rights.

2.1 Background

After December 1989, when Ceaucescu's regime was violently overthrown, the new authorities took measures to improve the living standard of the population, one of the lowest in the former communist countries from Central and Eastern Europe. A particular emphasis was laid upon human rights. As Ceausescu's regime used to rule by terror and abuse, any reference to the international human rights documents ratified by Romania in that field (the two UN Covenants, the Helsinki Act) was forbidden with very few exceptions such as: the right to work, to education, to have a family. Consequently, after December 1989, Romania ratified, all the basic international documents on human rights.

Apart from many guarantees in terms of human rights, the new

Romanian Constitution – adopted by the Constituent Assembly on 21st November 1991 and approved by national referendum on 8th December 1991 – contains two very important articles: art.11 par. 2 which reads that "Treaties ratified by the Parliament according to law are part of national law" (emphasis added) and art.20, which lays down as follows:

> "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is party to";
> "(2) Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence."

In theory, these two articles are a powerful weapon for all those who believe in the democratisation of the country and who have started a relentless battle to change both the legal framework, in order to make it consistent with international standards, as well as the people's mentality with regard to respect for human rights. In practice, it turned out that the concept of a "double standard" (one for the western world and a different one for the Romanians) as well as that of "non-interference in a country's domestic affairs" was hard to die. After a delay of nearly 3 years, Romania was admitted as a full member of the Council of Europe in the fall of 1993. The Romanian Parliament ratified the European Convention on the protection of human rights and fundamental freedoms and all the additional protocols in June 1994.

2.2 Contribution of APADOR-CH to the work of the international monitoring mechanisms

A first remark is that since the end of 1992 APADOR-CH has started working systematically, on the basis of projects, abandoning the hectic and naïve idea of being capable to deal with all the problems stemming from non-respect of all human rights in all fields. As already shown, the association now concentrates on civil and political rights. A second remark is that at the beginning of 1995 Romania ratified the European Convention on the Prevention

of Torture, a powerful instrument successfully used by the association to monitor conditions of detention especially in police lock-ups and prisons. The CPT paid its first visit to Romania in September-October 1995. Unfortunately, due to repeated delays on behalf of the Romanian Government – partially justified by the change brought about by the November 1996 elections – the CPT report on Romania was made public only in the beginning of 1998. Although the detention conditions had somewhat changed, most of the final conclusions and recommendations of the CPT were still valid. The second visit of the CPT took place in 1999. APADOR-CH awaits the report. The association regularly sends its reports about alleged police abuses and prison conditions to the CPT. It should be mentioned that each fact-finding mission undertaken by the association is finalised by a report, which is a public document available to the respective Romanian authorities, to the media and to all international monitoring bodies (governmental and non-governmental) interested in the matter.

Another monitoring body APADOR-CH collaborates with is the Human Rights Directorate of the Council of Europe. The association sends the annual reports to it (which includes summaries of all the reports prepared over one year on various cases) as well as any additional information the Directorate might ask for.Within the United Nations, APADOR-CH was asked in 1999 by a member of the Human Rights Committee in Geneva to comment on the Government's periodical report on the observance of the International Covenant on Civil and Political Rights (ICCPR). The association contributed to the analysis of the United Nations Human Rights Committee with information which was not included in the Government's report and suggestions for questions during the hearing. It should be mentioned here that APADOR-CH learned about the hearing during which the report of the Romanian Government would be discussed by the United Nations Human Rights Committee from outside sources, not from the Romanian Government itself. In the spring of 1999, the UN Special Rapporteur on Torture visited Romania. His office asked APADOR-CH to provide him with information prior to his coming to Bucharest. The association did so and is now awaiting results, or at least echoes, of the visit by the UN Special Rapporteur.

The frustrating part about the collaboration between NGOs – such as APADOR-CH – and the monitoring mechanisms is that a

human rights group would never know the impact of and what use the respective international mechanism would make of the information provided. Moreover, the Romanian Government has solicited the opinion of such mechanisms on various draft laws it prepared. As the human rights groups were not aware of the reactions from such mechanisms, it has happened that their criticism at provisions in the draft bills were met with the official answer that "the Council of Europe (or the CPT, or the UN Human Rights Committee) did agree with our views". And there is no way to check it.

2.3 Using the recommendations of international monitoring mechanisms

The recommendations of the international monitoring mechanisms are a very useful tool for NGOs dealing in human rights. As shown above, APADOR-CH has used recommendations of the Council of Europe to try to amend some national laws. The association, which is constantly concerned with detention conditions, in particular with regard to police lock-ups and prisons, has had an excellent support from the CPT's report on Romania, even if it was released two years and a half after the actual visit. 99% of the conclusions and recommendations of the CPT perfectly fit APADOR-CH's findings. This increased the association's credibility in the eyes of the Romanian officials, though the association would be still considered by some as a "traitor of the nation". It should be mentioned that since October 1998, APADOR-CH is the only human rights group which got the approval to visit police lock-ups, a thing not to be dreamed of before. To the date, the representatives of APADOR-CH has paid 13 visits to police lock-ups. In 1995, an inmate sentenced to 18 years in prison sent a complaint to the European Human Rights Commission alleging violation of arts. 5, 6 and 8 of the European Convention of Human Rights. The Commission retained only art. 8 (right to privacy of correspondence) and the European Court ruled that Romania had violated art. 8 of the Convention in its decision of 1999. Before the European Court passed the decision, the Ministry of Justice – under which the Prisons' Directorate is placed -, issued in January 1999, an Order forbidding the opening of the inmates' correspondence, which was the rule until that time. APADOR-CH made a point of checking the

application of this Order, as well as of repeating to every prison official the decision of the European Court.

APADOR-CH also frequently quoted from the CPT report about detention conditions in Romania. Following this, it must be said that in some prisons, despite the persistent overcrowding, detention conditions are slowly improving. The Prisons Directorate (under the Ministry of Justice) is probably the best example of a State authority that goes ahead with modernisation despite the lack of appropriate laws. It is also worth mentioning that conditions in police lock-ups are also improving at a slower rate than in prisons, as they under a much more conservative Ministry (the Ministry of Interior). However, APADOR-CH believes that this is a progress and that it is due – among other things – to the persistence with which the association has pointed out the deficiencies and quoted the findings and the conclusions of the CPT's report. APADOR-CH has also signalled that the rules and regulations on police lock-ups were issued in the communist regime (Instructions no.0410/1974), that they are still in force and, to the association's knowledge, the problem of modifying them is only now being debated.

APADOR-CH has also used decisions of the European Court relating to freedom of expression, in particular in the cases of Romanian journalists accused of insult, defamation, or offence against the authorities, all of which are considered crimes and judged according to the provisions of the Criminal Code. The association has conducted a campaign to convince Parliament to decriminalise these charges, believing that civil liabilities should be the best and only compensation for the alleged victims. APADOR-CH has constantly used the recommendations and conclusions of the Council of Europe, the CPT, the UN Human Rights Committee, etc. while discussing with the Romanian officials or with the members of the Parliament. The association also used those official documents in its reports to the Romanian authorities and the international bodies. As a conclusion, although there is a frustrating aspect in the relationship between the international monitoring mechanisms and the national NGOs, the former's conclusions and recommendations are an excellent tool for the latter in their struggle for the democratisation of their respective countries. At least, this is the case for Romania.

3. Visiting places of detention – The experience of the Bulgarian Helsinki Committee

Presentation by Yonko Grozev

Working with the Bulgarian Helsinki Committee (BHC) for the last five years, I have been involved in some of the monitoring efforts of the Committee. In this presentation I would like to draw on the experience of the BHC as a whole in monitoring detention facilities and describe where and why we have been successful and where and why we have failed. There had been one clear example of successful intervention, of which I will talk a bit later, and which is also quite telling about the necessity of co-operation on the national and international level.

3.1 Experience and results in inspecting police stations

Ill-treatment of detained individuals is one of the hot human rights issues in Bulgaria. Evidence collected not only by the BHC, but also by other NGOs, indicates that this phenomenon is widespread, particularly during the first hours of police detention. Cases of ill treatment by prison wardens also occur. The monitoring activities of the BHC and other local groups with respect to police brutality during the first 24 hours of detention have been largely unsuccessful in changing the overall picture. Although the issue has been raised on many different occasions, there has been no appropriate action by the authorities to address the problem. For many years, the press also neglected the problem, although recently there has been signs of change in attitude. One of the reasons why the monitoring efforts of our Committee have not been very effective is our limited access to detention centres. Under Bulgarian law after being arrested by the police criminal suspects may be kept for 24 hours on the premises of the police departments. This is the "24 hours Police arrest". If the suspect is detained on remand, then he or she is moved to the premises of the investigation detention centres. This is the "investigation detention". Once formal investigation is over, 4-5 months on the average, even if the person is not convicted, he or she will be moved to a prison. Monitors of the BHC have had unlimited access to prisons, access to the police cells only after a three day prior warning, and no access to the investigation detention facilities.

As a result of the access to prisons we have been able to interview

victims of torture and get a more or less precise picture of the overall problem. According to one survey carried out in early 1999, roughly half of the prisons' inmates complained that during the police detention physical force had been used against them. Most commonly this is to extract confessions, but sometimes it is a form of punishment. Individual cases of ill treatment have been reported throughout the years by different human rights groups. Despite all those reports, there has been hardly any improvement. Because of the limited access to police detention facilities, where ill treatment usually takes place, and no access to the investigation detention facilities, monitoring was limited to fact finding on the basis of testimony by the victim. At such a late time there rarely are visible injuries making litigation possible. Thus, monitoring has not been combined with any further "enforcement", but has to rely instead on raising public awareness, which in turn puts pressure on the police authorities to change their policies.

The authorities are well aware of this fact. This is why they have not given us, or any other human rights group access to the investigation detention facilities. And the three days prior warning for access to the police cells has made these visits very much of a "theatre". The BHC had been allowed access to investigation detention facilities only recently. However, since there was a pending investigation, we were not allowed to talk to the inmates. As I already said, as fact-finding is done only several months after the fact, no meaningful evidence of ill treatment that could stand in court can be collected. For this reason, one of the effective tools of preventing ill treatment, which is litigation, can not be widely used. Changes in public opinion has been slow to take place, and thus there is not much pressure on the authorities to reform the system of internal investigation of allegations of ill treatment. The system remains largely confidential, with police officers doing the investigation, reports on their findings never being made public. Thus, despite the wide scope of the problem of ill treatment of detainees during police arrest, monitoring has only just started to change public attitudes.

3.2 The BHC's experience in monitoring prisons

In the case of ill treatment of prisoners within the prisons, however, the BHC has been more successful. This had been due to the limited number of prisons - there are twelve high security

prisons and a bit more than twice that number of other prison facilities - and the easy access we have had. We have also experienced an example of good co-ordination with the Council of Europe Committee on the Prevention of Torture (CPT). This experience is quite telling, and for that reason I would like to share it with you, as a "success" example.

A few of the prisons in Bulgaria are famous for being "tough" on the inmates. One of them, the Bourgas prison is the most notorious in that respect. As the prison population is not very large and prisoners are transferred through different prisons, this was a well-known fact, both among inmates and the administration. Because of the personal influence of the Bourgas prison Director however, there haven't been any changes for many years. During one of his regular visits to the Bourgas prison in 1998, the monitor of the Helsinki Committee witnessed victims of ill treatment with injuries on their bodies that were still fresh. Complaints had been so numerous and the evidence so convincing, that we decided to immediately notify the head of the prison administration, a liberal person, open to human rights concerns. His attitude was actually the reason why the Committee had unlimited access to the prison facilities in the first place. In this particular case his reaction was highly inadequate, however. Instead of launching an independent investigation, he sent the complaints to the Director of the Bourgas prison. This of course, put the individuals who had complained at a higher risk and was also a lesson for the BHC to be more careful in protecting the identity of individuals where revealing their identity could expose them to a higher risk of ill treatment. Our next step was to address the public. In November 1998 the Helsinki Committee gave a press conference where, besides overall problems in the prisons, it noted documented cases of ill treatment in the Bourgas prison. The news was "sexy", so they were widely published by the press. The Ministry of Justice immediately launched its own investigation and soon reported that all the allegations of the BHC were false and/or grossly exaggerated. Later, I had a chance to learn how exactly this investigation of the Ministry of Justice was carried out: Prisoners who had complained were called to a separate room, where the investigation team was waiting. In the presence of prison administration they were asked questions like "Is it true that you have complained of being ill-treated?"! Which leads us to the conclusion that prison administration could also make use of some fact-finding training.

3.3 The CPT visit in Bulgaria

In the spring of 1999 the CPT had its regular visit to Bulgaria. In a preliminary meeting with members of the BHC, concerns as to cases of ill treatment in the Bourgas prison were shared. The CPT visited the Bourgas prison, and soon afterwards the Government received a preliminary list of concerns of the CPT, that according to the CPT needed urgent attention and action by the Government. Among them was also the situation in the Bourgas prison. Soon afterwards the director and the deputy director of the prison were replaced. Several months later an independent fact finding mission was organised by the Government headed by a criminal law professor and two human rights activists. Its findings were that after the change of the Director and the deputy the environment in the prison had changed substantially. One of the prison inmates even noted that "This is no longer the same prison". In conclusion, I think that the positive effect of this case has not only been with respect to the Bourgas prison. It will inevitably have an effect on the overall response of the authorities to reports of human rights groups and human rights concerns in general.

4. Places of detention through the eyes of the Greek Research and Support Centre for Victims of Maltreatment and Social Exclusion (RCTVI)

Presentation by Alexandros Pappas and Nikolaos Bilanakis, Social workers at RCTVI

Almost two or three times a year, a division of RCTVI composed of a Social Worker, a translator and a lawyer is checking the places where persons are deprived of their freedom, places such as illegal-immigrants camps, prisons, detention areas in police stations. The division's purpose is to see if there are deficiencies and violations of Human Rights. After each visit RCTVI prepares a report which is then sent to all international organisations interested in this particular topic. This activity started after a general confirmation - from the mass media and personal denunciations - concerning brutal human rights violations taking place in the Prefecture of Ioannina as well as in other places in Greece. Due to its particular location - neighbouring with Albania - our region is a gate for the entrance of immigrants and illegal immigrants from the neighbour

country. As a result there are many cases of human rights violations and ill treatment of illegal immigrants, whether they were detained until taken back to the borders, or held in prison. We have witnessed a decline in the use of ill-treatment and we believe that our intervention and continual "harassment" of public authorities, as well as our productive and useful collaboration with the authorities in charge, have made this possible.

The basic results of our division's visit to different places of detention in the Prefecture of Ioannina can be summed up in the following points:

- Places where living is not possible (no cleaning facilities, no heating at all, absence of beds or chairs, very bad structuring of the places.)
- Places where there is no communication facilities (phone)
- Often, the rights and obligations of the detainees are not visible (on walls, etc).

In conclusion, I would like to point out the presence of the CPT in Greece not long ago. CPT members met with the RCTVI's visiting division.

5. Visiting places of detention in Moldova

Presentation by Stefan Uritu, Chair of the Moldovan Helsinki Committee (MHC)

5.1 Background

Moldova's penitentiary system fell within the sphere of competence of the Ministry of Internal Affairs, supervised by the Prosecutor's Office, until Moldova's ratification of the European Convention of Human Rights in 1997. Before then, the majority of attempts of the MHC to have access to places of detention failed, even though its purposes were rather concrete – to verify the information given by a certain prisoner or by his legal representative. At this sage we verified the cases, gathered information usually through letters or through former prisoners' statements. When authorities refused to allow the MHC to supervise the human rights situation in penitentiaries, this was seen as an attempt to hide the reality. For example, if the author of the

complaint declared that he had been tortured and the authorities denied the MHC representatives the right to examine the case and didn't give a logical explanation for the refusal, then we would declare that the authorities were in favour of torture and were not trying to put a stop to it. The information gathered was extremely useful for the purposes of the discussion between the representatives of the MHC and international and regional organisations that visited the Republic of Moldova. I'd like to mention that Moldova, when adhering to the Council of Europe in 1995, undertook certain obligations that were to be implemented within three years. An agreement was made between the MHC and the Council of Europe to systematically exchange information on that subject. Being close to the population, the MHC tried to influence the authorities to promote human rights and democracy, in order to eradicate torture and ill treatment. NGOs are a big help to the international human rights organisations as regards torture cases.

5.2 Prison monitoring by the MHC

In 1996, the Penitentiary System was placed under the competence of the Ministry of Justice. The MHC immediately declared that it would be closely monitoring this change. By the end of 1996 and during the year of 1997 the MHC had made many visits in prisons. We needed to demonstrate that we had well-prepared personnel, that we understood the realities very well, and that we were not involved politically. A great contribution was brought by certain members of the MHC, as some of them had been in detention places before and therefore knew all the details concerning penitentiary authorities trying to hide cases of human rights violations. We needed personnel knowledgeable in psychology and "negotiation practice" in order to gain the trust of the prisoners and for them to be sincere when talking about the penitentiary administration. On the other hand, the penitentiary administration had to be sure that all we wanted was to help improve their work conditions and living conditions.

On the first day of the visit at the "Pruncul" Penitentiary, our team was accompanied by the penitentiary's chief and by a member of the Prosecutor's Office. We noticed that some places were cleaned-up in a hurry. Although we had received many complaints prior to

our visit, during the interviews with the prisoners, most of them declared that the conditions were rather good, as well as food and relations with the penitentiary's personnel. You could say that those people who lived in such conditions (overpopulated spaces, illnesses, nutrition other than the one recommended by the UN), seemed to be the happiest people in the world. But one of the prisoners approached us and whispered secretively: " the prisoners are afraid of the administration..." Then we gave our business cards, a few brochures about human rights and a set of "Victims Guides", elaborated by the MHC and used as a guide on lodging complaints to the European Court of Human Rights. We encouraged these 200 prisoners to make complaints to the MHC, because our main purpose is to support them and to defend their rights. We told the authorities that if the living conditions of the prisoners who made complaints were to deteriorate, the authorities would be asked to bring evidence that this had no connection with the prisoners' complaints. We tried to make the conversations confidential, but the authorities didn't let it happen. We gathered all the 43 prisoners who had asked for a meeting. Some of them told us some things that the authorities couldn't deny.

As a result of the first visits concerning the cases of the human rights violations that we made public (see http:// chdom.ngo.moldnet.md) we understood that a good preparation was necessary to make an efficient visit. It was good that foreign specialists, members of US Peace Corps and a student from Denmark, were included in the documentation team. The results were discussed on 4 to 7 September 1997 during a seminar organised by the International Helsinki Federation as part of IHF-TACIS: Human Rights program, Fundamental Freedoms and Democratic Institutions in Belarus, Moldova and Ukraine, Which gathered, as participants, NGO representatives, persons in charge of penitentiary institutions, prosecutors and experts from the countries with a lot of experience. In the course of the year 1998 we received access to penitentiaries that are now under the competence of the Ministry of Internal Affairs or of the General Prosecutor's Office. We were able to give information on the situation in all the penitentiaries. We concentrated only on Chishinau, Baltsi and Rezina. This is where we discovered cases of electroshock therapy usage, as well as gas masks and others. We also discovered cases where persons were detained even though the

warrant's term was over. Administrative arrest is usually used in penal offences. The report was sent to the CPT, which undertook its first visit in Moldova in 1998.

5.3 The case of political prisoners in Moldova

People are also declared missing or imprisoned for political motives. For instance, I could mention the case of those 4 political prisoners, known as "Ilascu group", that have been savaged by dogs, in May 1999. Two of them; Ivantoc and Ilascu have been beaten and tortured physically and psychologically. As a result they went on hunger strike, asking for a visit from an independent commission to measure the facts; but neither the Red Cross nor other organisations were admitted. Another prisoner who was lucky enough to escape detention told us that he was held in detention for two weeks, kept in a cellar used by agricultural workers from a kolkhoz. There were another 16 men that were retained on the bases of the 222 decree of Igor Smirnof –the President of the self-proclaimed "Dnestrian Moldavian Republic" (DMR). All of them were blamed for fighting against the DMR and were beaten as a result. In conclusion, I would like to mention that the international instruments ratified by Moldova are not applicable on the territory of the DMR.

6. Visiting places of detention: the Albanian experience

Presentation by the Albanian Helsinki Committee[1]

The Albanian Helsinki Committee (AHC), formerly the Forum for the Defence of Human Rights and Fundamental Freedoms, was founded in December 1990. The AHC monitoring group is composed of 15 people, 8 students and 7 experts (lawyers, medical doctors and social workers). The Forum's main mission was the release of all political prisoners who were still in jail from before 1990. Today, the AHC is devoted to the protection and promotion of human rights

[1] The following information is based on a leaflet prepared by the Albanian Helsinki Committee in presenting its monitoring programme.

in general. Prison conditions remain however an important topic on the agenda of the AHC. Therefore, the AHC has recently developed a long-term monitoring programme of prison and pre-detention site conditions in Albania (1999-2001).

6.1 The objectives and framework of the programme

This programme aims at improving the conditions of prisons and pre-detention sites in Albania, at strengthening detainees' rights, but also at increasing transparency and accountability in the field of criminal procedures as well as increasing the overall respect for the dignity of detained persons. The AHC programme entails three years of sustained monitoring of as many prisons and pre-detention sites as possible as well as professional reporting and analysis of the findings of monitoring efforts. It is aimed at raising awareness about the law on the rights and duties of prisoners and the international standards with respect to the rights and duties of prisoners and detainees.

6.2 Activmities carried out

So far, the AHC has undertaken training of monitor groups about methods and techniques prison visiting, training of monitor groups in national and international laws governing prison and pre-detention site conditions. A first round of visits was made (44 places of detention in total). A seminar on "International and national legislation on the treatment and the rights of the prisoners and people in detention".

6.3 Future activities

A second round of visits is planned to prisons and pre-detention sites. Furthermore, four quarterly publications and an annual publication on the results of the monitoring activities will be distributed to all State organs and NGOs interested and concerned. The AHC also hopes to have soon an emergency line open to complaints about conditions in prisons and pre-detention sites.

WORKSHOP REPORT

"THE INTERCULTURAL DIMENSION OF HUMAN RIGHTS"

A Summer Training Course - organised by the Mediterranean Academy for Diplomatic Studies

LISA LOMBARDI

This summer training course was convened between the 17th and the 28th of July 2000. As the title suggests this was not a conference consisting in a series of lectures but rather a training course where input from the participants (16 in all) played a vital role in the overall success of this event.

I was particularly pleased by the professional layout of the course structure. The topics chosen were both interesting and unusual and some of them even controversial. The fact that some of the participants were also lecturing was also an unusual feature and the situation lent itself to various heated debates between lecturers and participants which resulted in a very healthy atmosphere of discussion where everyone's input was welcome. The participants varied from diplomats to analysts to journalists and advocates to mention but a few. Thus the ensemble was a melting pot not only of various cultures and political and religious beliefs but also of perspective as each person contributed according to their personal work experiences in the field of human rights. The list of speakers was just as diverse with a panel which ranged from *H.R.H. Princess Wijdan Ali* in her capacity as the Vice President of the Jordan Institute of Diplomacy to *Karim Ghezraoui,* Human Rights Officer for the UN (OHCR) amongst nine other professors, advocates and other academics.

This report is an account based on my own perceptions as a participant to the training course. First of all, I must say that it

was the very title of the conference that attracted my attention. I think that the training course succeeded in delivering an intensive course on the notion of human rights and their relationship with various cultures. A basic knowledge of human rights was all that was required, since the course was very intensive and the lecturers gave a general overview of the United Nations Charter on Human Rights as well as specific lectures on the European Convention on Human Rights (Dr. T. Azzopardi) and other specific lectures which dealt with the African and Arab Charter (Professor Khadija Elmadmad).

I was very interested in the ongoing controversy which kept cropping up in various discussions throughout the entire conference, regarding the universality of otherwise of human rights. In this regard, opinions differed greatly. There were those who firmly adhered to the idea that human rights and the values they purport to promote are not only intrinsically part of the human make-up but more importantly that they are universal. Whilst there were those who claimed that there is no such thing as an absolute set of values and that the human rights present in the UN Charter are not as absolute as they are proclaimed to be; particularly because there are those who regard them as a manifestation of the ideology and values of the Western world which are being imposed on the rest of the world.

Wa'el Kheir, a lecturer at various universities in Lebanon, gave a total of four lectures which were divided into two main parts the first on International Law and Human Rights and the second on Regionalism. Mr. Kheir is an avid believer in the universality of human rights and he stressed that the UN Declaration differed from all other international law documents since it speaks about the dignity of man. Mr. Kheir went on to explain that "...as a document, its greatest achievement was that of giving a legal value to concepts which prior to its existence belonged solely to the realm of philosophy." The declaration concretised these values in terms of law and it created rights based on these values, constantly bearing in mind the intrinsic nature of such rights. It is for these reasons that according to Mr. Kheir human rights are universal, because they are so basic and intrinsic in man since they preserve every human beings' dignity.

It was fascinating to then hear the other side of the story, when H.R.H. Princess Wijdan Ali gave her key-note lecture. H.R.H spoke

about the division between the North and the South in the Mediterranean basin and she highlighted the differences in the application of human rights by comparing for instance the violations in France to those in Turkey and showing how the nature of the violations varies from country to country and from one culture to the next. The Princess spoke about the relationship between religion and human rights and in particular she gave an overview of the relationship between Islam and human rights. The Princess criticised the universality of the Charter and she expressed her view that human rights as we know them are not as universal as we make them out to be, especially because one must keep in mind that most of the signatories to the Charter now were not even represented when the Charter was being drawn up. On the other hand she mentioned how significant the Charter was in emphasizing the dignity of human beings at large and that it is important to keep in mind that human rights are in this sense universal, since the only qualification required for one to be entitled to them is being human. The Princess commented that something needs to be done to address the issue of the uniform application of human rights, not solely on an internal level but in particular when states relate to one another. Yet she stressed that the question is not whether there exists a relationship between Islam and human rights or between human rights and Christianity or Judaism but rather the emphasis should be shifted to recruiting symbols of human rights by making full use of a state's cultural repertoire. Thus rather than alienating the culture of the state and introducing human rights as a distinct and separate concept, one could integrate human rights within an already existing system.

Other interesting areas which were dealt with included a discussion on the Rights of Refugees and Current Issues (Professor Vera Gowlland-Debbas), A Committee Simulation Exercise (Lucienne Attard), Media, Civil Society and Human Rights (Emad Omar), Racism, Xenophobia in Europe (Mounir Belayachi), Humanitarian Intervention- A role for the OSCE (Captain David Attard), Humanitarian Law and Intervention (Pierre-Yves Fux) and Development Aid (Felix Meier).

BOOK REVIEWS

The Hague Convention on International Child Abduction:
Baeumont and Mcleavy:
Oxford University Press: 1999:
pp 332

LORNA CACHIA

To any student of, or indeed, any reader interested in international child abduction, this book provides a wealth of information from both the social and the legal points of view. The introduction gives an excellent delineation of the ground covered by the Convention on International Child Abduction. It explains what in reality amounts to "abduction" and this is especially helpful for a better appreciation of the framework of the Convention itself. Moreover, it also looks at the origins and nature of international child abduction in such a way as to bring out the real nature of the problem. The introduction also acquaints the reader with the structure and method of the book.

The subject is then looked at from the sociological point of view, by examining the constitutive elements of international child abduction. This is a particularly useful approach. If one is to grasp the notion of international child abduction in its entirety, an overview of its key elements is of paramount importance. The sociological analysis is as exhaustive as it is succinct. This chapter is especially helpful since it quashes any preconceived stereotypes the reader might have with regard to the subject. One way in which this is done is by including a meticulous description detailing the work done prior to the actual drafting of the Convention.

The aims of the Convention are also carefully dealt with in a separate chapter. The chapter discusses both the stated and the unwritten aims and the extent to which they are met in the drafting of the Convention. Later chapters focus on the substantive provisions, which are discussed in great detail. Each of these chapters contains excellent bibliographical references, which guide the reader to further research on the matter. The Convention is not treated in isolation, but in the wider context of private international law.

Hence in discussing, for instance, habitual residence as adopted in the Convention, there is no attempt to isolate it from

the problems faced in private international law with regard to such concepts as multiple habitual residence and whether the intent to habitually reside is enough to establish habitual residence. Besides, the Convention is also examined in relation to other international instruments dealing with the issues.

Another significant feature of this book is that it includes a wide range of cases from many different legal systems relating to the Convention. Moreover, it also incorporates various cases, which even though they fall within the scope of private international law, are not directly related to the Convention. In conclusion, this text should be a standard reference work in regards to the Hague Convention on International Child Abduction.

The EU and Human Rights: Edited by Philip Alston with Mara Bustelo and James Heenan; Oxford University Press; 1999; Pp 946

LORNA CACHIA

This book is a volume of essays which provides a very wide and comprehensive survey on the relation which the EU has with Human Rights. This relationship is analysed from a wide spectrum of points of view: legal, political, social, cultural, regional, statistical, philosophical, institutional. This provides a very faithful reflection of the situation which prevails in the EU. The picture portrayed by the book is one which will enable the reader to fully understand and appreciate the interaction which exists at present between human rights and the EU. Each chapter of the book is a separate essay and the chapters are then grouped together under a common headline. Each chapter can stand as a complete work on its own. It can be either read in isolation and hence focusing solely on a particular topic or else it can be read in relation to and in the light of the other chapters in the same group. Each essay of the book is very well researched. Each chapter contains a vast number of references which can also be used, if the reader so desires, to even delve deeper into the subject. However, this does not mean that any of the chapters is shallow in ideas or in discussion and argument. But anyone who would like to research any topic in the book will find that each chapter is an excellent introduction which will serve to give a comprehensive

overview of the subject matter being treated. Each essay is also very well written with valid arguments supported by a good number of references.

Mainly Human Rights:
Studies in Honour of J.J.Cremona,
Busuttil, Salvino (ed.), 320 pp. Malta: Fondation Internationale Malte 1999.

DAVID E ZAMMIT

The sheer diversity of the contributions to this *Festschrift* reflects the versatile character of the man it honours. Drafter of Malta's Independence Constitution, internationally acclaimed scholar, Chief Justice and Vice President of the European Court of Human Rights as well as Chairman of CERD at the United Nations; these are only some of the roles John Cremona has occupied in the course of his long and distinguished career. In this volume, several of his international colleagues have collaborated to produce a high-powered scholarly work, which is a fitting tribute to one of the great Maltese jurists of the twentieth century. In it a European colleague also refers to him as "one of the great Strasbourg judges." It comprises twenty-four papers, in English and French, addressing various legal issues. These are 'mainly human rights', but also deal with such matters as the role of the jury system, constitutional drafting, the relationship between international and municipal legal systems, environmental law and legal philosophy.

John Cremona's international reputation is indelibly linked to the European Court of Human Rights (henceforth: 'the Court'); on which he served as a judge for twenty-seven years and to which he was twice elected to the post of Vice-President. These were the years in which the Court evolved from a hazy political ideal, into what is generally regarded as the most effective international organ for the enforcement of human rights standards. Consequently, it is appropriate that most of the papers in this volume relate to this court or to the European Convention on Human Rights (ECHR) under which it was established. They are a uniquely authoritative guide, the contributors' names reading like a 'Who's Who' of judges and other personalities associated with the Court. One advantage of having contributions from 'insiders' is

that they provide rare insights into the informal working practices of institutions. Thus the paper by Rudolf Bernhardt –a former Court president– explores the role of comparative law research in the Court's deliberations. He shows how its interpretative activity leads it to explore and contrast different legal systems and argues that there is a need for more comparative legal research when applying the European Convention.

The experience possessed by the authors equips them to give comprehensive and historically grounded accounts of the control organs established under the Convention, the nature of the Court's jurisdiction and the various special procedures involved, such as the inter-state application contemplated under article 24 of the Convention. Particularly noteworthy is the paper by Carlo Russo, a former minister in Italy and judge of the Court, which examines the drafting history of the European Convention. Russo, who participated in many of the events he describes, provides a fascinating account of the tortuous political processes of consensus building, conflict and compromise, which accompanied the drafting of the Convention. His account illustrates the ability of legal history to reveal the contingent and negotiated character of legal texts. Rolv Ryssdal, a former President of the Court, also highlights the evolution in the Court's role and caseload over the past few decades. This has enhanced the importance of its judgements within the domestic legal systems of state parties to the Convention, creating tensions between national and international law, addressed in other papers.

Various contributors review the Court's case law. Most of them focus on cases invoking Article 6 of the Convention, which contains the basic procedural guarantees of a fair trial in civil and criminal proceedings. Thus one author seeks to investigate that 'unreasonable delay', pending the delivery of the final judgement in a trial, which constitutes a violation of the Convention. In addition, through a rigorously argued and intellectually stimulating analysis, former Commission President Stefan Trechsel seeks to define the precise scope of the right of the person accused of a criminal offence to be informed of the nature of the accusation levelled against him. Finally there are two papers which explore the guarantees of judicial in-

dependence and impartiality during a trial. One of these is co-authored by Alphonse Spielmann, a former judge of the Court. He tackles Article 6 from the perspective of the judgements of the courts of Luxembourg, given that Luxembourg applies Monist doctrines of international law. The other paper is contributed by Claudio Zanghi and is an original analysis of the extent to which the structure of the new Single European Court of Human Rights itself conforms to the requirements of Article 6. He concludes that in fact it does not, since in his view, the requirement of judicial impartiality is not strictly observed in the composition of the Court.

It is no coincidence that so much scholarly attention is paid to Article 6, since it is one of the most frequently invoked legal provisions before the Court. However this concern with the minutiae of due process also indicates how streamlined and comprehensive the judicial protection afforded by the Convention has become, belying complaints about the vague and programmatic character of human rights norms. One of the strengths of this book is that it allows the reader to assess the progress achieved under this court by examining the experience of comparable institutions. Thus other papers focus on the Committee on the Elimination of Racial Discrimination (CERD) established under the International Convention for the Elimination of Racial Discrimination (ICERD). Michael Banton, who like John Cremona himself is a former chairman of this committee, reviews its performance. An interesting feature of ICERD is that, like the European Convention, it grants individuals a right of direct petition to the Committee. Yet Manfred Nowak opines that this is a 'forgotten procedure', relating this neglect to the lack of test cases in which the Committee would have pronounced bold judgements sanctioning particular respon-dent governments. The effectiveness of the system set up under the ECHR is further underlined by contributions which examine the functioning of the EFTA court and outline the American regional system for human rights protection.

These comparisons indicate that international human rights enforcement is heavily dependent on such extra-legal factors as political will and the level of socio-economic development. This might lead some to assert the relative unimportance of legal texts and institutions. Strangely enough, this stand is most strongly refuted by the

contributor who is most critical of the level of compliance with human rights charters. I am referring to R.W. Rideout's brilliant analysis of the subtle manoeuvres through which international labour standards have been undermined in the United Kingdom, substantially reducing the effective protection given to basic political rights. He shows how this attack on labour standards was facilitated by the way in which these standards were given legal effect in the U.K. Thus, for instance, a fundamental freedom to strike was never unequivocally affirmed within the British legal system, which opted instead to grant strikers a legal immunity from prosecution. This made it easier to attack the protection given to strikers on the grounds that it is an unjustified privilege, which distorts the operation of the free market. Similarly he argues that the division between civil/political rights and socio-economic ones has transformed rights of the former category into empty statements devoid of real social and economic significance. Instead he insists that the interdependence of these two categories of rights should be acknowledged. It is better to have carefully drafted legislation protecting both sets of rights, while permitting clearly defined exemptions on economic grounds, than to have charters of basic principles, which are irrelevant in practice.

Rideout's paper has been discussed at some length because it raises important issues. Firstly, it is clear that attacks on human rights are nowadays as likely to come from neo-conservatives as from radical Marxists. Secondly, he shows how the wording of legal texts can have a very profound effect on the level of protection given to human rights. Finally, he makes a strong case for acknowledging the inter-dependence of different classes of human rights. Other contributors echo these points. Thus, Alexandre Kiss argues that environmental rights should be incorporated into the system of protection of human rights. Similarly, Nicolas Valticos, another former judge of the European Court of Human Rights, makes the abolition of the distinction between civil and social rights the centrepiece of a thoughtful article on the need to re-write existing rights charters to cater for current global realities.

One aspect of the contemporary situation is the globalisation of human rights consciousness. The effects of this type of globalisation are stressed in the paper by Kader Asmal, a

Cabinet Minister in South Africa and one of the drafters of the first post-apartheid Constitution in that country. He describes the constitution-making process in detail, showing how the different characteristics of this interim constitution reflect compromises between different political groupings and highlighting the role of international concern in spurring this process. This implies that we are moving towards a world where a broader conception of the role of human rights and a growing international preoccupation with them increasingly affects the policies of national governments. These changes will require a new type of legal scholarship, which is both empirically informed and theoretically rich. This is the main conclusion reached by Andrew Phang, in a paper which explores the rationale of the jury system. Phang's approach is deeply analytical. He mercilessly exposes the conceptual contradictions involved in maintaining a belief in jury equity while upholding the distinction between fact and law. Displaying a wide familiarity with various schools of jurisprudence, he successively considers and demolishes different justifications for the jury system, finally concluding that it is impossible, on purely theoretical grounds, to justify the retention or abolition of this institution. Instead he places his faith in empirical research into local cultural contexts, stressing that while the jury system is disliked in many Eastern countries, John Cremona himself observed that it enjoys broad support in Malta.

Many of the contributions to this volume also suffer from a lack of attention to cultural context and a neglect of empirical research. Other deficiencies, relatively minor in nature, relate not so much to the content of the contributions as to the way in which they are presented. One problem is that there is little effort to bring out the overlaps and connections between the different papers. This could have been achieved by dividing the book into sections and classifying related papers in the same section. Alternatively, an editorial introduction at the beginning could have discussed the various papers and tried to contextualise them. However, contributions to such *Festschrifts* are normally disposed in alphabetic order, and in any case this should not be allowed to obscure the substantial merits of this publication. This is one of the few local publications which can confidently be expected to attract an international audience.

ملتقى حول تفويض المنظمات غير الحكومية لمنع التعذيب في أوروبا الجنوبية الشرقية. ٢١-٢٢ اكتوبر (تشرين الأول) ١٩٩٩، أثينا، اليونان.

اودري فوغل

يقدم المقال الدراسات المطروحة خلال الملتقى الرابع المنظم من قبل جمعية منع التعذيب بالاشتراك مع المركز اليونانى للاصلاح الطبي لضحايا التعذيب والمنعقد بأثينا في أكتوبر (تشرين الأول) ١٩٩٩ بعنوان "تفويض المنظمات غير الحكومية لمنع التعذيب في أوروبا الجنوبية الشرقية". وعالج الملتقى على وجه التخصيص: زيارة مراكز الاعتقال واليات المراقبة التابعة للمنظمات غير الحكومية والدولية وضرورة اللجوء الى المحكمة فيما يخصّ قضايا تتعلق بالتعذيب وتعويض ضحايا التعذيب. وفي منطقة البلقان يمكن لكل من الهيئات التالية زيارة مراكز الاعتقال وذلك عقب مناقشة برنامج مراقبة مع السلطات العامة المحلية: لجنة هيلسنكي الألبانية و لجنة هيلسنكي البلغارية ولجنة هيلسنكي المولدافية والمركز اليوناني للبحث والدعم الخاص بضحايا سوء المعاملة والاقصاء الاجتماعي ولجنة هيلسنكي الرومانية. وأعدت المنظمات غير الحكومية هذه الدراسات خصيصا لملتقى أثينا، وتصف هذه الدراسات جهود المراقبة التى تقوم بها المنظمات غير الحكومية وكيفية القيام بالزيارات الى مراكز الاعتقال والعقبات المترتبة على مثل هذه الزيارات بالاضافة الى قضية امكانيات التنسيق بين هيئات مراقبة وطنية ودولية أخرى مثل مجلس أوروبا واللجنة الأوروبية لمنع التعذيب ولجنة الأمم المتحدة لحقوق الانسان.

الطابع الكونـي لحقوق الانسان واقليمية البحر المتوسط

ميلينا موديكـا

يركز المقال على التساؤلات التالية:

١. ما هى الأهداف التـي تعالجها اقليمية حقوق الانسان فيما يتعلق بطابعها الكوني وفي منطقة مثل البحر الابيض المتوسط؟

٢. ما هى البنود الرئيسية حول حقوق الانسان التى يجب ادراجها في عملية التقارب القانوني بين الدول المتوسطية؟

٣. كيف يمكن انشاء اطار دولي يقام خصيصا لدول تنتمي الى أقاليم دولية مختلفة.

ويجيب الكاتب على هذه التساؤلات كالاتـي: أن اقليمية حقوق الانسان مبررة من المنطلق أنها مبدأ مفضّل على فكرة كـونيـة هذه الحقوق وذلك من الناحية العملية اذ أنه يمكن تأمينها بطريقة أفضل على المستوى دون الاقليمي وليس على المستوى الكوني.

ان التطبيق الحقيقي والفعال لحقوق الانسان، تلك الحقوق التى من طبيعتها لا تقبل بأية استثناءات أو تقييدات من أي نوع، لا يتأتـى الا عبر ادراج كافة البنود الجوهرية المتعلقة بحقوق الانسان والتى تشارك فيها كافة الدول. هذا وثمة حاجة ملحّة الى ايجاد منتدى مناسب حيث تصبح قضية تأكيد حقوق الانسان وتطبيقها الفعّـال جزءا لا يتجزأ من التعهدات المتبادلة الموقعة من قبل دول البحر المتوسط بل تكون منطقة تخضـع للمراقبة المشتركة.

أيضا. ولقد دلّت الخبرة في أوروبا وفي غيرها من الدول على أن التجانس النسبي للقيم ضمن مجموعة ما قد يؤدي ال عدد أقل من مشاكل تتعلق بالموضوعية وبالتفسير منها على الصعيد الكوني. ومع ذلك فالمسؤولون عن صياغة الميثاق الاوروبي لحقوق الانسان، وعيا منهم لتنوّع التقاليد القانونية للدول الاعضاء، تركوا مجالا كافيا للاستنساب سدا لحاجات التفسير. أما "تصدير" حقوق الانسان فهل يشكّل نوعا عصريا من الامبريالية الثقافية؟ وماذا يحدث اذا كانت العملية الديمقراطية بمفهومها الغربي غريبة عن دولة أو منطقة ما؟ ويعتقد الكاتب أن عدم وجود سياسة أوروبية موحّدة تجاه منطقة البحر المتوسط قد أدى في الماضي الى حركة ارتجاعية ضد أوروبا نتيجة خلق حد فاصل وصارم بين الشمال والجنوب. ومن المتوقع أن تضع الشراكة الاوروبية ـ المتوسطية التى برزغت في برشللونا حدّا لهذه الظاهرة، غير أنه يجب تطوير الجوانب الاجتماعية والثقافية لهذه العملية. ومن الضروري أن تُكرّس فكرة التعددية الثقافية كنقطة الانطلاق في معالجة حقوق الانسان، بل يجب تطوير سياسة تهدف الى تشجيع التبادل الثقافي في الحوار الاوروبي ـ المتوسطي. ولا بد من ايجاد الصلات بين كونية حقوق الانسان والتعبير المتنوّع الناتج عن الادراك المحلي.

حقوق المعتقلين السياسيين الباسك الانسانية

اينيجو الكورو واستير اجيرّ

هذا البحث بقلم عضوين في المنظمة الباسكية "المجموعة ضد التعذيب". ويقدم البحث تحليلا مفصلا للاجراءات المتخذة من طرف قوات الأمن الاسبانية حينما تعتقل مواطنين من الباسك لأسباب سياسية. ويتسائل البحث ما اذا كانت القوانين الاسبانية وبخاصة الاجراءات الجنائية المتّبعة في مثل هذه الحالات توافق الاحكام الدولية المختلفة التى من شأنها ضمان حقوق الانسان الاساسية، ولا سيما تلك المتعلقة بعدم استخدام التعذيب وأية معاملة غير انسانية ومذلّة أخرى، علما بأن الدولة الاسبانية من بين الأطراف المعترفة بهذه الاحكام. ويشير البحث الى عدد من الحالات أُختراقت فيها حقوق المعتقلين الباسك الانسانية ابان اعتقالهم من قبل الشرطة وقوات الأمن الاسبانية، كما يصف أنواع التعذيب المزعومة التى تعرض لها هؤلاء الاشخاص المعتقلون.

حقوق الانسان: بين موضوعية الكونية والتفسير المحلي

القاضي ج. ا. فيلليتي

ترتكز حجة الكاتب الاساسية على أن ادراكنا لمبدأ كوني هو في الحقيقة ادراك نسبي. ورغم أن بعض القيم يبدو أنها تتخطى شتى التنوعات بين الشعوب، غير أن تأثير الاختلافات الثقافية يشمل مجال حقوق الانسان

للمسخ أن يدعم الهوية غير المؤكدة والغامضة والمتزعزعة. وختاما، فالمسخ كثيرا ما عبارة عن علاج رخيص يريح الاختلالات العقلية المستمرة التى يعاني منها المواطن العادي في عهدنا هذا.

حضور المتّهَم في الاجراءات الجنائية: مالطا وستراسبورغ

الاستاذ ج.ج. كريمونا

يأخذ المقال بعين الاعتبار الصرامة التى يتصف بها المبدأ العام المتعلق بضرورة حضور المتّهَم خلال اجراءات محاكمته طبقا للقانون المالطي (مع العواقب المترتبة على ذلك) مُبرزا الفرق بين هذه الحالة والحالة الناتجة عن تعديل لبعض الشروط تم تبنيه مؤخرا والمتصف بتوان خطير فيما يتعلق بمحاكمة بعض "القضايا الطفيفة" أمام مأموري العدل. كما يؤخذ مبدأ حضور المتّهَم بعين الاعتبار من ناحية الدستور المالطي. ثم يتم تقييم الوضع المتطور هذا في ضوء الخلفية القانونية العامة لدى المحكمة الأوروبية لحقوق الانسان وما تنصّ عليه في هذا الخصوص. وفي اطار هذا القانون يتطرق المقالُ، ببعض التفصيل، الى قضية امكانية ازالة حق المتّهَم للحضور، ومشكلة الفرار تجنبا للاعتقال وامكانية اجراء، في بعض الحالات، محاكمات في غياب المتهمين والاحتياطات الضرورية التى يجب اتخاذها.

مجرمون ومسوخ وحقوق الانسان ـ هل تشمل حقوق الانسان المسوخ أيضا؟

فرانكو سيدوتي

ان فكرة المسخ كشخص شرير يفتقر الى الشعور الانساني ومحرّم من أية حقوق عبارة عن اختراع حديث العهد للمخيلة الجماعية. فالاضطراب في مفهوم الاجرام و مفهوم المسخ اسطورة مثالية للأزمنة الصاخبة التى نعيشها. ويبدأ المسخ في الثقافة الغربية التقليدية مغامرته كمخلوق هائل يتسم بفهم محسن في كتب مونتان الشهيرة ويقدّم فرصة التقدّس للكاهن جيوسيبي كوتولينغو، ويعاني من اشجان الحب في خرافات ماري شيللي وميل بروكس ويصفه بودلار بأنه "رقيق". كما كان المسخ من بين معلّمي برونو بتيلهايم نظرا لأنه كان نافعا في خرافات الأطفال لأعدادهم للخبرات المخيفة التى عليهم أن يواجهوها حين يصبحوا كبارا. ومع الأسف فان مسوخ الماضى قد انقرضت كما تدلّ، وبدقة، التحليلات حول المجازر الخاصة التابعة لأشنع القاتلين. هذا ويواصل أولاد الظلام وأولاد النور صراعهم في غسق التيقّنات القديمة، بينما تعترض "أديان شيطانية" جديدة على بقاء ومعنى الأنظمة الديمقراطية. ولسوء حظنا فاننا لم نزل في حاجة الى المسوخ لاطمئناننا، ذلك أن المسخ عبارة عن الغريب والدخيل بين ظهرانينا وقد تساعدنا غرابته الجذرية على تحديد أنفسنا. ولذا فيمكن

التقنية والسياسة وحقوق الانسان

تأملات عشية الالفية الجديدة حول بعض جوانب العولمة.

تشيرو سبايلو

ان العولمة تغيّر حاليا نماذج السياسة العالمية. وتمرّ مبادئ "السيادة" والدولة القومية بأزمة تؤدي الى عواقب ملحوظة فيما يخص سياسات حقوق الانسان. ومن الواضح أنه لا يوجد أي انسجام وتناسق بين الشخص الذي يتخذ القرار والاطار المتأثر بذلك القرار. ويمكن وصف هذا الوضع بأنه أزمة أولوية السياسة في ظلّ أولوية التقنية. وفي حالة تجسّم مثل هذه الازمة فستؤدي الى نهاية اية سياسة لحقوق الانسان. ولذا فيتحتم علينا أن نتفهم تطوّر ومصير التقنية والى أي مدى تخضع كل من السياسة ومصير الانسان للهيكل النظري والقانوني للدولة القومية ولمبدأ السيادة. وهنا تكمن مشكلة سياسية و فلسفية يتطلب حلّها البحث عن جذور الفكر الغربي. وبالفعل فان عملية العولمة في صورتها الحالية والمتمثلة في تطوّر التقنية قد تؤدي، بعكس أسوأ التوقعات، الى اضعاف مبدأ السيادة القضائية الاقليمية وتعزيز مبدأ "المسؤولية". ومبدأ المسؤولية هذا قد يفتح المجال أمام سياسة جديدة لحقوق الانسان، تلك السياسة التي لم تعد تخضع لنموذج الدولة القومية ولم تعد محدودة بمبدأ السيادة.

ورق" الى مؤسسات فعالة. وحظيت هذه الجهود بدعم عدد كبير من المنظمات بين الحكومية وغير الحكومية. كما يركز هذا المقال على بعض المشاكل التمهيدية التى لا بد من ايجاد حل لها بغية المضي قدما نحو انشاء المحكمة. وتتعلق هذه المشاكل أولا: بتحسين النص الرسمي وصياغته في كافة اللغات الرسمية للامم المتحدة وثانيا: صياغة الالات الاضافية مثل احكام الاجراءات المعمول بها والشهادة. وتتسم هتان المشكلتان بطبيعتها الفنية وتتطلب بالدرجة الاولى حلول قانونية. غير أن المشكلة الثالثة في عملية المصادقة تتسم بطابعها سياسي. ولا شك أن كل هذه المشاكل بحدّ ذاتها تؤثّر في عملية انشاء المحكمة الجنائية الدولية ولذا فلا بد من معالجتها على نحو مستقل. ويختم الكاتب مقاله مشيرا الى أنه من المتوقع أن يدخل القانون التشريعي حيز التنفيذ في أواخر عام ٢٠٠٢ بعد الحصول على ستين مصادقة. ولقد أوصت عدة منظمات بين حكومية الدول الاعضاء فيها أن تصادق على القانون غير أن هذه الجهود ليست كافية لضمان تدشين أعمال المحكمة ولا بد من اهتمام الرأي العام الدولي للضغط على البرلمانات الدولية وعلى الحكومات للمصادقة على القانون التشريعي في أقرب وقت ممكن.

فكرة المواطنة في الثقافة العربية الاسلامية

شكري مني

هل بالامكان أن نتحدث عن مواطنة متجدرة في الثقافة العربية الاسلامية وفي الأفكار والممارسات؟ وكيف يمكن أن نفهم نموذج المواطنة العربية ضمن سياق التحول الديمقراطي العالمي؟ من هم "الفاعلون" الذين يساهمون في بثّ روح المواطنة داخل المجتمعات العربية؟ ما هي أهم التحديات التى يجب رفعها للمضي قدما بالمسار الديمقراطي؟ ونهدف من وراء هذا العمل أن نساهم في الاجابة عن هذه الأسئلة.

العدالة الجنائية الدولية: الخطوة التالية ـ لا هاي

ازيكيا باولو ربالي

يحلل هذا المقال بالتفصيل قانون روما التشريعي للمحكمة الجنائية الدولية وهي الية من شأنها أن تؤسس هيئة قضائية دولية دائمة تشمل دائرة اختصاصها الاشخاص الذين يرتكبون أخطر الجرائم ضد المجموعة الدولية ككل، مثل جريمة الابادة الجماعية وجرائم الحرب والجرائم ضد الانسانية. والطريق المؤدية الى تنفيذ قانون روما التشريعي وتأسيس محكمة فعالة طويلة وغير مؤكدة. وفور تبني هذا القانون التشريعي بادر البرلمانيون الوطنيون والدبلوماسيون والامم المتحدة الى بذل الجهود الرامية الى ترجمة المحكمة الجنائية الدولية من "مؤسسة على

توزيع الدخل والتماسك الاجتماعى والتنمية القابلة للمساندة: نموذج اقتصاد المشاركة

ا. ب. ديليبا

لا يُخصّص لتوزيع الدخل أي دور مميز يعكس الوعي الاجتماعى لدى أصحاب عناصر الانتاج، أي الأرض واليد العاملة والرأسمال، في النماذج الاقتصادية للانتاج. وتميّز النظريةُ الاقتصادية بين الدخل الناتج عن عوامل الانتاج والدخل الناتج عن الأشخاص. وتجمع هذه النظرية بين الاثنين عبر نظام اعادة التوزيع لميزانية الحكومة. ويقوم نموذج اقتصاد المشاركة، والمتعلق بالتفاعل الاجتماعي، بمعالجة هذه "الفجوة" في التحليل الاقتصادي. ويرتكز النموذج على فكرة النمو المشترك، أي أن جميع الأطراف ذات صلة بالانتاج والاستهلاك لسلعة من السلع يُتوقع أن تستفيد من نمو تلك السلعة. ويناقش هذا المقال فكرة اتصال نموذج المشاركة هذا بالحريات الشخصية التى جاهد المفكرون الليبراليون من أجلها وأن هذا النموذج ينسجم مع الأفكار الجوهرية حول النمو الاقتصادي القابل للمساندة. ويمكن لتحقيق رؤية النموذج أن يتعايش مع نظام انتاج رأسمال، مع أن هذا النموذج يمدّ فكرة خلق الثروة لتتخطى المصلحة الشخصية البحتة التابعة للرأسماليين والعمّال.

جاء ليضمن احترام القيم الديمقراطية ومبادئ حقوق الانسان. غير أن الكاتب يعتقد أن مثل هذا التدخل يرتكز على مبادئ قانونية غير واضحة، بل قد تخلو من أي أساس. ومبادرة الحكومات الأوروبية لم يسبق لها مثيل، ذلك أنها منعت عمليا تشكيل حكومة ضمّت حزب يفتقر الى تعاطف أهم الأحزاب الأوروبية معه. هذا ومن المعترف به الان أن بعض الامتيازات المقصورة على الدولة والتى كانت تُعتبر حتى الحرب العالمية الثانية حقوقا غير منتقصة تنبثق عن سيادة الدولة، تفقد شرعيتها اذا أدت الى انتهاك حقوق انسانية اساسية. غير أن الادعاء أن تشكيل حكومة تضمّ حزب هايدر يشكّل في حد ذاته انتهاكا لحقوق الانسان لا يكاد يكون منصفا. وبالاضافة الى ذلك فللنمسا اطار تشريعي حقيقي وفعال متميز بين دول الاتحاد الاوروبي يمنع اية حكومة أو أغلبية سياسية من ارتكاب أية أعمال تُضعف حقوق الانسان. هذا وتدخّل حكومات الاتحاد الاوروبي يمثل سابقة خطيرة لأنه لم تُقدّم قط على الصعيد الأوروبي أية انتقادات حول اشتراك حزب هايدر في الانتخابات. ويتضح من مواقف الحكومات الاوروبية أن الاشتراك في الحكومة يتطلب ايفاء مستلزمات تفوق تلك المتعلقة باشغال كرسي في البرلمان. ان "التدخّل الديمقراطي" الذى مارسته حكومات الاتحاد الاوروبي في هذا الحدث السياسي النمساوي يبدو أنه تعسّف خطير وغير مبرر.

مجوعة قوانين مدنية لأوروبا: من الكثرة الى الوحدة

جويدو ألبا

تقوم فكرة "مجموعة قوانين مدنية لأوروبا" بناء على مبادرة عدد من المعلمين من دول مختلفة (المانيا والداغارك وهولاندا وفرنسا وايطاليا واسبانيا والبرتغال) بغية سنّ قواعد مشتركة للقانون الخاص، الأمر الذي قد يسفر عن تعزيز حقوق المواطنين الأوروبيين. هذا و لقد أعدّت اللجنة المسؤولة عن صياغة مجموعة القوانين الأوروبية النص المتعلق ببنود قانون العقود وتقوم حاليا باعداد بنود الاعادة الملكية والاغناء غير العادل والدفع غير المستحق والعقود الخاصة والخدمات ونقل الملكية والسندات المالية. ويناقش الكاتب أصول هذه المبادرة وأهدافها بالاضافة الى الانتقاد الموجه الى فكرة توحيد القانون المدني في المجموعة الأوروبية.

التدخل الديمقراطي : قضية هايدر

سالفو أندو

يعلّق المقال مفصلا على المضامين القانونية لردة فعل عدد من دول الاتحاد الأوروبي عقب تأليف حكومة نمساوية تضمنت حزب هايدر وهو حزب لا يحظى بالشعبية السياسية لدى أهم الأحزاب الاوروبية. وزعمت حكومات الاتحاد الأوروبي أن السبب وراء تدخّلها في الحياة السياسية النمساوية

السياسة والسيادة والعولمة

جورجو ريبوفا

يعالج هذا المقال الأثر الذى قد يكون للعولمة على سيادة الدولة وعلى السياسة. وفي عهد العولمة قد يلجأ قادة أيه دولة قومية السياسيون الى اختيارات قد تؤثر في أناس ليس بذمتهم والعكس صحيح كذلك، أي أن تُدعى حكومة وطنية للمثول أمام محكمة دولية ما بسبب حالات نشأت ضمن نطاق سلطتها الوطنية. ولذا فقضايا تتعلق بالعدالة لم تعد تنشأ في اطار العلاقة بين الدولة ومواطنيها فقط. هذا ويركز الكاتب اهتمامه على بلاده ايطاليا حيث تقوم السياسة الايطالية على مبدأ الدولة القومية. ويعالج المقال العواقب التكنولوجية و الاقتصادية فقط الناجمة عن العولمة دون التطرق الى ماهيتها السياسية الأساسية. وقضية بينوتشيه تسلط الضوء على أزمة نموذج السيادة الوطنية ومسؤولياتنا الجديدة. ولذا فالمجوعة الأوروبية كحقيقة سياسية لا تنجم فقط عن مجموعة ارادات الدول الأعضاء فيها. ويناقش المقال امكانية التعايش بين المرونة واللين في العلاقات الدولية من جهة والسيادة الوطنية من جهة أخرى، بشرط أن يُدعم كل ذلك بأفراد وأحزاب وحركات وتيارات فكرية وسياسية فعالة. وايطاليا محرومة تاريخيا من هذه المراجع القوية، الأمر الذي يجعلها عرضة لخطر التبخر في عهد العولمة. هذا وقوة أوروبا كامنة في هوياتها السياسية القوية وفي تراث خبراتها وقدراتها و قيمها وذكرياتها بل وفي اسطوراتها الخرافية ورموزها.

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