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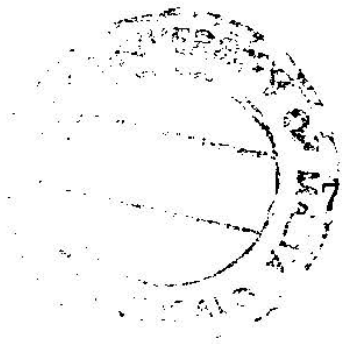

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In This Issue

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EDITORIAL

ISLAM AND DEMOCRACY

SALVO ANDÒ

To ask today if Islam is compatible with democracy means to confront a geo-political question before the theoretical one. If we think about incompatibility, we cannot refuse the theory of a "cultural struggle". The option for compatibility contains, however, within itself another question. Is it legitimate to use force in order to favour democratic evolution in Islamic countries? We cannot negate that in the past years this idea had found many followers; its most significant expression is in the politics of Bush junior. Now, however, this trend has been put into crisis by the recent evolution of the international situation. The opinion, put forward by the Bush administration, according to which the diffusion of peace and democracy in the world depends above all on the consolidation of an international order, based on the protection of human rights, guaranteed by the USA (and not by UN, presented, often, as a disarmed prophet) is belied by the facts. A war for "peace and rights" could be declared and won by the United States at any time, but it is far more difficult that a military victory could succeed and guarantee a peaceful solution to the problems that trouble many areas all over the world. Italy believes this, especially after the end of the right-of-centre government. Today Italy is convinced that occupying itself concretely with the Mediterranean is its primary duty. This strategy doesn't imply necessarily a conflict with the USA, but it tends to create strong and autonomous political relationships with the governments of the countries in the area. It is necessary, for a useful dialogue between Islam and the West, to pay attention to the arguments of countries of the southern side of the Mediterranean. If however, many countries

of the Mediterranean area lack confidence in USA, it is right that Europe, and, particularly, Italy, should try to restore faith on a different basis instead of that preferred in the past years by the USA. This also means direct involvement by Europe in the battle against terrorism, considering that terrorism is not only a problem in the West, but also in the Islamic countries.

One thing is certain. In the history of these countries, the radical Islamic groups have never had so much importance. But today, the moderate sectors seem to be weak in the social consideration. The humanitarian action, decided by the USA, to take arms in order to defend the rights and the security of the West, has strengthened Islamic extremists. If this is true, the opinion of people who claim a central role of Europe in the Mediterranean area seems to be more persuasive. The cultural flexibility of the Europeans could allow them to open important channels of communication; it could make the dialogue between the West and Islam easier.

The conflict between the West and Islam derives from many complex reasons. It is not useful for anybody to deal with this subject through too obvious solutions. It is not true that the whole Islamic world supports terrorists. It is not useful to reduce a "human war" to a neo-imperialistic campaign. But the instinct towards auto-conservation should suggest the United States to avoid a political and military display. The problems of underdevelopment cannot be solved through the weapons, but thanks to economic and technological aid. It is a significant fact that the hardest critics of the "promotion of democracy" through weaponry come from the ultra-conservatives like Hungtinton and from "realpolitikers" with a long experience like Kissinger. On the other hand, it seems to be clear that the approach of the Bush Administration to the fight against dictatorship is partisan and instrumental. It is sufficient to remember, on one hand, the old friendships of the United States with military and totalitarian regimes, and, on the other hand, the manipulation of facts and documents to produce proof against the "rogue countries" individualised one by one. The idea of realizing an institutional order based on the American superpower is yet another demonstration of the political weakness of the Bush Administration. Military success was used to hide also some failures in domestic policy. In this context, Europe could play a key role to confront the problems that emanate from the conflict between Islam and the West.

The first thing to do is to promote a universal culture of human

rights. The most difficult obstacle in this field is the conflict between two antithetical ideas of universality. The West is used to thinking about its Law as the only worthy of universality: the universality of rights coincides with the universality of reason. The West considers itself to be the only true exponent of the universality of reason, as its scientific and technological progress demonstrates. To this, Islam opposes its universality of "Sharia", the Law of direct divine derivation. In this prospect, the "Koran" is used as an instrument for civilisation, as the realisation of the presence of God in history. The Jihad becomes almost a service to mankind, and not only to God. If that is indeed the case, the relationship between the West and the East can not be resolved in terms of pure multi-culturalism and tolerance. In other words, multi-culturalism and tolerance are the necessary conditions, but they are also not sufficient for the realization of a universal culture of rights.

The second thing to discuss is regarding the means to use in order to protect rights and democracy. If the Western idea about universality of rights is regarded as the only legitimate one, because it is founded on reason and progress, therefore we should agree to the idea of an imposition by military force of the liberal democracy and Human Rights. But this claim of the West is intolerable. In fact, it is within our own culture that there are not only doubts and aversion to Western cultural patterns, but also an opening towards "others", above all towards Islam. Dialogue and confrontation with others are essential parts of European culture. It therefore needs to take into account that in today's society it is not possible to establish an equivalence between "natural" rights of the West and universal rights. The imposition of one's own universality with force deprives our own claim of universality of its legal basis. We must not forget that, as Giuliano Amato observes, we are "the others for the others" or rather that it is our own culture of tolerance that forces us to confrnt others' claims of universality. We should not close our eyes to the profound differences between the West and the Islam; they are differences that derive from history. The Christian God became man with all the weaknesses that are peculiar to men, to become part of History; the Islamic God is pure will and absolute power. In Islam the relationship between man and his God is not thinkable in dialectic terms; that is to say, that God's word can not evolve or change, and, therefore, human nature is not crossed and guided by the processes of history. In Christianity, however, God's word becomes "flesh". It is,

therefore, history, evolution and progress. This means that man is substantially the protagonist of history: from this comes the building of concepts of laicism and democracy in a modern sense.

However, the recognition of such a difference does not legitimise the imposition of democracy nor the attempt to unify the world ideologically by the power of military arms. First of all, there is a significant convergence of the two religions concerning the central position of man, considered the masterpiece of creation. Secondly, as we have already said, in the West, democracy is a patient construction that moves above all by the achievement of an autonomous sphere of "politics" compared to the "religion", and of civil laws compared to religious law.

It is a question of understanding what should be the Islamic way for this process of secularization. The past demonstrates that in the Islamic context it is difficult to build a political structure in "lay" terms. Islamic regimes tend to give a literal interpretation (that is to say, not constitutional) of democracy, considered as the government of the majority. From here the paradoxical position expressed by Khatami - Iranian ex-president - and largely shared in the Islamic world, according to which in a country where the majority of people is Muslim, the construction of a religious State is legitimate. A position on which it is too easy to use irony, seeing that, according to principles already declared by the moderate Khatami, today a convinced fundamentalist such as Ahmadinejad is able to challenge the West as the legitimate representative of the Iranian people. The religious law (not the international law) guides Ahmadinejad. On the other hand, we should remember the experience of democracy-building in Afghanistan and Iraq, where constitutional strategies, that appear in some way connected to the European continental project - and particularly German - of the 1900s of the State as the protagonist of social integration processes, seem to be successful.

The interpretation of the State as an instrument for the realisation of extra political goals is incompatible with the supremacy of law and, in general, with constitutional culture. In this sense, the supremacy of Sharia is unacceptable. But the "active" State, or rather "protagonist" in social life based on a few essential values, if also open to criticism, is not extraneous to the constitutional tradition of the West. We could consider, however, as Bernard Lewis said in an interview (Corriere della Sera, 18 Sept, 2006), "the Islamic world has a traditional calling for a collegial decision together with

strong hostilities toward political centralism". With reference to this feature of the Islamic culture we should believe that it is possible to build an Islamic pattern for constitutionalism. If, in the West, one started by protesting at religious authoritarianism in order to arrive at political pluralism, why should not a contrary way verify itself in Islam? From this point of view, the constitutional experiment in Iraq seems to be interesting; there is a clear federalist option, and also the Islamic tradition is "one" of the sources of the law, and not the base of it. Meanwhile, there is also an important role of the State as factor of integration. If this line should have success, we could start to speak about an Islamic way toward constitutionalism. At this point, it is necessary to consider another problem. We cannot negate the existing link between Islam and underdevelopment. But the delay in the economic and technological development in Islamic countries is not only due to a religious question. Naturally the conflict of Islam with modernity has had a negative effect on development process. However, this conflict is in part understandable also as a reaction to the undisputed hegemony of a developmental model based on the centrality of the middle class. The Middle class turned out to be an important element for the capitalist transformation. In this way, we can understand why Islam, at this time, could become the point of reference for those who, with the end of communism, are against the undisputed dominion of the Liberal-capitalistic model, that, having produced enormous transformations especially in the last few years, with the globalisation processes, maintains intact its own hinges of ethics: individualism, profit as a value and the clear separation between the public and private sectors. It is also important not give Islam too static a representation. Islam, to use a geological metaphor, is an active volcano. It is a universe in continuous evolution. This dynamism can interconnect with the growing dynamism of Western culture, where today a few traditional values of modernity, such as laicism and secularization, tend to be criticized because of dogmatic connotations that have been assumed during the course of the 1900s.

Islam has already demonstrated its internal "realistic tendency" and ability to limit the weight of the written rule, in order to give more space to a law open to growing social innovations. As some scholars have observed, on the Islamic side there has been a subversive re-elaboration of various modern juridical western concepts. Experts in Islamic law have demonstrated an ability to question the bond of loyalty with Islamic tradition when it comes to submitting

the world to the will of the divine law, accepting behaviours condemned by the Koran (that does not permit the massacre of women and children by means of attempts on the civilian population) or to allow the Islamic people to live in the West and to proletarate by accepting the laws of their host countries.

We should try to see if today this ideological flexibility can be seen positively or if realism in the interpretation of the "Book" can be used to build an Islamic way for constitutionalism and democracy.

Besides, the unity of the Umma appears anachronistic in front of the exodus of millions of Muslims to live in the West, accepting its rules and life styles, and freeing themselves from the constraints set by the mythical people of the mosques. The crisis of the Umma, caused by the Muslims in the West, may bring about a change of mind regarding the same concept of an Islamic nation, traditionally founded on a religious element that prevails over the political one. It is through the breach of a monolithic system of the Umma that a true civil Islamic society can arise, as Turkish experience demonstrates.

Those Muslims who come to the West are not only searching for material well-being, but also for freedom and emancipation. If there is an integration in the circuits of our democracy, Islam of the West may have a certain influence on the evolution of Islam of the south of the Mediterranean. To build democracy means to engage the Western State to promote a democratic culture between Islamic people that live in our countries, trying to make them understand that "western" and "Christian" are two very different concepts. But, that at the same time, we cannot ignore the fact that Christian values permeate. We stern society and institutions. In other words, we should try to profit by past European experience, particularly in France and United Kingdom. Both "republican" and "communitarian" patterns have demonstrated their own limits. We could think, for example, about the revolt in the "Banlieue", the phenomenon of "Londonistan" and the attacks of the 7th of July. Also in this case, Italy is engaged in the search of innovative solutions, able to favour integration and the meeting between cultures, offering to the "other", at the same time, the best of the heritage of European civil and legal culture (important initiatives have been taken in order to guarantee social rights of immigrants).

Finally, the issue of the compatibility between Islam and democracy should be interpreted in a dynamic manner. We are not in front of

two unalterable entities on an historical and semantic level. The construction of an Islamic way for a constitutional democracy demands an effort not only to the Islamic world, that should rethink its own relationship with modernity, but also to the western culture, that should recover some elements of substantial democracy (based also on the solidarity) typical of the European tradition. In this context we should avoid the domination of the "Single point of view" on the neo-liberalist globalization following the end of the Cold War.

ARTICLES

THE MALTESE CRIME OF ESPIONAGE AND THE NULLUM CRIMEN SINE LEGE CERTA MAXIM: COMPLEMENTARY OR CONFLICTING?

KEVIN AQUILINA

This paper analyses the crime of espionage from the perspective of the *nullum crimen sine lege certa* principle of human rights law. It argues that this crime - contained in only one provision of the Maltese Official Secrets Act - is so wide that several thousand different permutations of the completed offence can be contemplated and this without including those situations where the crime is considered from the viewpoint of a preparatory act, an attempt, a conspiracy, or an incitement to commit the said crime. Moreover, this still does not take on board article 3(2) and article 5 of the Act which further extend the provision's already extensive purport. This ambiguity in the proper construction of the provision under consideration runs counter both to article 39(8) of the Constitution of Malta and to Article 7 of the European Convention of Human Rights. Hence legislative measures need to be taken to ensure that the crime of espionage is defined with circumspection so as not to violate the *nullum crimen* human rights maxim.

1. Introduction

This paper studies the crime of espionage in Maltese Criminal Law from the viewpoint of the *nullum crimen sine lege certa* principle of Human Rights Law. The central question which this paper posits is whether the crime of espionage in Maltese Criminal Law is compatible with the human rights principle of legality. In this sense, the writing of this paper has been triggered off by the need to

establish with certainty whether the crime of espionage is human rights compliant from the viewpoint of the principle of legality and, should this not be the case, where are the incongruities found.

The applicable provision in the Constitution of Malta (hereinafter 'the Constitution'), the European Convention of Human Rights and Fundamental Freedoms (hereinafter 'the Convention') and the Maltese Official Secrets Act (hereinafter 'the Act') are first set out. Then this paper defines what is the *nullum crimen sine lege certa* principle and moves on to study the constitutive ingredients of the crime of espionage and how these have been interpreted in the leading British case on the subject. Subsequently article 3(1) of the Act is analysed in the light of the Constitutional and Conventional provisions to establish to what extent does that article contravene article 39(8) of the Constitution and Article 7 of the Convention especially in so far as the ambiguity of this provision under consideration is concerned.

In so far as Maltese law is concerned, the *nullum crimen* principle of legality in Criminal Law is contained in the Constitution of Malta and the European Convention Act. Although the Act does not contain provisions which directly contravene these two principles, the formulation and/or construction of article 3(1) of the Act might lead to an infringement of the *nullum crimen* maxim as will be explained in this paper.

Article 39 (8) of the Constitution provides that:

> *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.*

Article 7 of the European Convention on Human Rights and Fundamental Freedoms reads as follows:

> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 3 (1) of the Official Secrets Act states as follows:

3. (1) If any person for any purpose prejudicial to the safety or interests of the State -

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or
(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or
(c) obtains, collects, records, or publishes or communicates to any other person any secret official code word or password or sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy,

he shall be liable, on conviction, to imprisonment for any term not less than three years and not exceeding seven years.

An analysis of article 3(1)(a) of the Act indicates that there are 5 separate offences created by that provision. Article 3(1)(b) contains 24 different offences whilst article 3(1)(c) creates 270 diverse offences. In all, the provision establishes 299 distinct offences. If all the combinations were to be considered together, there is the potential to commit 32,400 different offences.[1] That is the maximum amount of offences a single person can commit under article 3(1) in the completed form. But this calculation does not include preparatory acts, attempted offences, conspiracies to commit an offence under

[1] 5 x 24 x 270 = 32,400.

article 3(1) or incitement to commit such an offence as the provision under review refers only to the completed offence. If more than one perpetrator were to be involved the number of offences - whether completed, attempted, conspired, incited or preparatory - will have to be multiplied by the number of perpetrators. Mathematically, the number of offences which article 3(1) of the Act creates is - to say the least - astronomical. Undoubtedly the main problem here lies in a multiplicity of offences contained in one single provision that gives rise to legal uncertainty.

It is argued that this crime does not meet one of the ingredients of these principles as laid down by the European Court of Human Rights, that of forseeability, due to its ambiguity in certain parts thereof which makes the provision unclear and hence in breach of the principle of legality. The crime of espionage as it obtains in article 3(1) of the Maltese Official Secrets Act is also studied from a comparative perspective that takes into consideration British and Canadian case law which has interpreted the constitutive ingredients of this crime.

2. The *Nullum Crimen Sine Lege* Human Rights Principle

The *nullum crimen sine lege* rule implies that no crime exists unless there is a law which provides for the creation of such offence. Such offence may be contained in an enactment as is the case of the Act and, for instance in England, in the Common Law.[2] In Malta where no common law exists, a person may be punished only when the conduct in question is clearly considered by law to be punishable. It must therefore correspond to the statutory definition of the offence charged and must also satisfy the requirements of the general principles of criminal law (e.g. in *dubio pro reo*). The judge is thus deprived of all creative capacity in this sphere. He may never complete the criminal law by introducing new crimes constituted by novel elements. The judge is not there to fill up the *lacunae* of the legislature.

The legislature alone can establish the constitutive ingredients of

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[2] For a discussion of the Common Law within the context of the *nullum crimen sine lege* maxim, *vide* Glanville Williams, *Criminal Law: The General Part*, London, Stevens and Sons Ltd., 1961, second edition, pp. 592-600.

a criminal offence whilst it is the judiciary alone which applies the punishments contemplated in the provisions of a law to an offender. This implies that a penalty cannot be inflicted by analogy. Indeed, in the case of a *lacunae* in a criminal statute the judge has no other option but to acquit the accused person.

Both the *nullum crimen* and the *nulla poena sine lege* principles bring certainty within the criminal law: a person knows beforehand that a particular conduct is considered to be reprehensible by the State and, if committed, is punished accordingly. The ingredients of the criminal offence consequently have to be defined with precision so that everybody knows what is expected of him/her.

The Irish Supreme Court's decision in *King v. Attorney General*[3] concerned the construction of a vague and indefinite provision of the Vagrancy Act 1824. Section 4 thereof established the offence of 'loitering with intent' and applied to every 'suspected person or reputed thief' proved to have been frequenting, or loitering in, various public places 'with intent to commit a felony'. No overt act was necessary to prove that intent as it could be inferred from the circumstances and the accused's previous convictions (similar to the first part of article 3(2) of the Act which can also be criticised on this ground). The Supreme Court unanimously held that such a provision was untenable as -

> *... the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature... so out of keeping with the basic concept inherent in our legal system that a man may walk about in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling uncon-*

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[3] [1981] I.R. 233.

> *stitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.*

The Court consequently held that the offence under examination, both in its essential ingredients and the mode of proof of its commission, violated Article 38.1 and Article 40.4.1 of the Irish Constitution.[4]

Van Dijk and Van Hoof note that the legal certainty aimed at by the two maxims requires that Parliament formulates criminal offences clearly and unambiguously and that such laws are applied by the courts in a restrictive fashion. They opine that this 'requirement serves to avoid that a criminal conviction is based on a legal norm of which the person concerned could not, or at least need not, have been aware beforehand.'[5]

Although there are quite a number of Maltese cases which deal with the interpretation and application of these two principles, these deal mainly with the non-retroactivity of the criminal law aspect of these principles except for one case - that of *Il-Pulizija v. Capt. Joseph E. Agius.*[6] In this judgment the Court held as follows:

> *Normally there is no difficulty, if the diction of the law permits, to include things which were not included in the law when it was made. Naturally, in the case of a criminal statute, the maxim nullum crimen sine lege is of fundamental importance and, therefore, the law's interpreter should not make good by supplementing the defect in the law's diction or try to twist its text or else exclude the benefit of doubt where there is ambiguity. But where none of these hurdles et similia exist, by way of principle the old law may include other things which fall within the mischief which the statute intended to cure.*[7]

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[4] Article 38. 1 provides that 'No person shall be tried on any criminal charge save in due course of Law' whilst Article 40.4.1. provides that 'No citizen shall be deprived of his personal liberty save in accordance with Law'.

[5] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Netherlands, Kluwer Law and Taxation Publishers, 1990, p. 359.

[6] Criminal Court (Appeal Competence), 14 March 1959 in *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XLIII, Pt IV, 1959, pp. 1008-1015 at p. 1011-2.

[7] Author's Translation.

Numerous are the cases decided by the European Court of Human Rights and the reports drawn up by the European Commission of Human Rights on the principle of legality. Noteworthy about this case law is that two ingredients of Article 7, paragraph 1, of the Convention are identified: those of accessibility and foreseeability. As to the latter ingredient, the European Court of Human Rights held that:

> *The Court recalls that the scope of the notion of forseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 26, para 68). A law may still satisfy the requirement of forseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A, no. 316-B, p. 71, para 37).*[8]

That the Court can resort to judicial interpretation of a criminal statute has been made abundantly clear in its case law:

> *However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant develop-*

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[8] *Cantoni v. France*, 22 October 1996, paragraph 35, p. 13.

ment is consistent with the essence of the offence and could reasonably be foreseen.[9]

Thus, the European Court of Human Rights applies a twofold criterion - accessibility and foreseeability - in order to determine whether the national law is in breach of the Conventional provision. Nevertheless, this article is focusing only on the aspect of the principle of legality, that is, whether the crime of espionage in article 3 of the Act is ambiguous to such extent that it contravenes the foreseeability criterion of the Strasbourg jurisprudence.

3. Article 3(1) of the Official Secrets Act

It is incumbent at this stage to analyse article 3(1) of the Act from the perspective of the *nullum crimen* maxim. Article 3(1) concerns the offence of spying and has, in a U.K. case, been extended also to cover cases of sabotage.[10] It is modelled on section 1 of the U.K. Official Secrets Act 1911 as amended by the U.K. Official Secrets Act 1920. All breaches of article 3(1) of the Act are crimes as can be seen from the penalty attached to it, namely, imprisonment for any term from three to seven years.

Article 3(1) of the Act provides that 'any person' may commit the crimes therein contemplated. In other words, this provision applies not only to Maltese citizens as defined in Chapter III of the Constitution of Malta and the Maltese Citizenship Act[11] but also to permanent residents as defined in article 7 of the Immigration Act[12] as well as to any foreigner, whatever his nationality, domicile or place of residence. In order that there may be an offence committed under this article, there must be a wrongful intention in the person committing the acts prohibited in paragraphs (a) to (c) of article 3(1), amounting to 'a purpose prejudicial to the safety or interests of the State'. The latter words, it has been held in *Chandler v. D.P.P.*, were considered by the House of Lords to involve a subjective test. Indeed,

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[9] *S[1].W. v The United Kingdom*, 27 October 1995, paragraph 36, p. 11 and *C[1].R. v The United Kingdom*, 27 October 1995, paragraph 34, p. 10.

[10] *Chandler v. D.P.P.* [1962] 3 All ER 155.

[11] Chapter 188 of the Laws of Malta.

[12] Chapter 217 of the Laws of Malta.

the court opined that these words are not directed to the actual or potential effect of the defendant's action but to his or her intention.[13]

3.1. The Interpretation of Article 3 in the Chandler v. D.P.P. Judgment

In *Chandler v. D.P.P.*[14] the House of Lords held that if a person enters an airfield which comes within the definition of a 'prohibited place' with the purpose of obstructing or interfering with the operational activities of that airfield, then s/he can be convicted of an offence against section 1(1) of the U.K. Official Secrets Act, 1911 (being the equivalent section to article 3(1) of the Act) even though s/he had no intention of spying. The fact that his/her motive for wishing to interfere was to persuade the U.K. Government to change its policy on nuclear weapons was held to be immaterial. The House of Lords also held that a person accused under this section cannot bring evidence to prove his/her interference was not prejudicial because the maintenance of the base itself was prejudicial to the safety and interests of the State. This follows, it was held, from the rule that the disposition and order of the armed forces are within the exclusive prerogative of the Crown, and cannot be challenged in the courts.[15]

This case has to be analysed in greater depth as the construction given by the House of Lords to section 1 of the U.K. Official Secrets Act 1911 might potentially conflict with the *nullum crimen* maxim of criminal law.

The appellants were charged with conspiracy to commit and to incite others to commit an offence under section 1 of the U.K. Official Secrets Act 1911, in terms of which it was a felony *inter alia* to enter any prohibited place for any purpose prejudicial to the safety or interests of the State. The appellants all admitted responsibility for organising a demonstration at Wethersfield R.A.F. station, the declared intention of the demonstration being to enter the station and ground all aircraft and demanded the reclaiming of the base for civilian purposes.

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[13] *Chandler v. D.P.P.* [1962] 3 All ER 155.
[14] *Ibid.* p. 142.
[15] *Ibid.*

Appellants appreciated that what they were doing was unlawful and that they ran the risk of prosecution under the U.K. Official Secrets Act. However, they claimed that their purpose was not prejudicial to the safety or interests of the State since their main object was to publicise the dangers of nuclear weapons. Accordingly the appellants wished to call evidence as to the desirability of the Government's policy of maintaining nuclear weapons and the dangers inherent in the policy, and of the matters on which their own actions and beliefs were founded. At the trial, Havers J. refused to allow counsel for the defence to call evidence either as to the defendant's belief that their acts were beneficial to the State, or to show that their purpose was not in fact prejudicial to the safety or interests of the State. Furthermore, the jury was directed that it was no defence that obstruction of the base would in the long run be beneficial to the State. A prosecution witness, Air Commodore Magill, gave evidence that interference with the ability of aircraft to take off was prejudicial to the safety or interests of the State. The appellants having been convicted, appealed to the Court of Criminal Appeal, which affirmed their convictions.

Lord Parker C.J. in delivering the judgement of the Court, had no difficulties in holding that the mischief aimed at by the Act was not limited to espionage or to the collection and disclosure of secret information. As section 3(c) refers to 'damage' done to a prohibited place, and section 3(d) provides that a place may be declared a prohibited place on the ground that 'the destruction or obstruction thereof, or interference therewith, would be useful to an enemy' it was clear that the Act was not limited to spying.[16]

Moreover, the Lord Chief Justice also rejected the argument that it was necessary to prove that the defendants intended to prejudice the safety or interests of the State. If Parliament had considered it necessary to prove an intent to prejudice, it would have been easy to include such a provision in the Act -

> *Once the proposed act is ascertained, as it was here, the only remaining question is whether that act is in fact prejudicial to the safety or interests of the State. On that issue the defendants' own state of mind as to the intent*

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[16] [1962] 3 W.L.R. 700.

> *with which the act was to be performed is quite irrelevant and we think that the judge was right in ruling out cross-examination and evidence on that matter.*[17]

In conclusion, the Lord Chief Justice pointed out that it was open to the defence to show that the acts proposed would not prejudice the operational effectiveness of the airfield. However, the appellants could not produce such evidence once their purpose was to immobilise the aeroplanes.

Leave to appeal to the House of Lords having being granted on the ground that the question of public importance was the proper construction of the words 'for any purpose prejudicial to the safety or interests of the State', the appellants again argued that the Act did not cover their non-violent civil disobedience. The House of Lords however dismissed their appeal thereby confirming the convictions.

The House of Lords considered whether section 1 applied only to spying or even to other offences. The object and origin of side notes was clearly explained by Lord Reid:

> *In my view side notes cannot be used as an aid to construction. They are mere catch-words and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament. Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side note. In that event I have reason to believe that alteration is made by the appropriate officer of the House - no doubt in consultation with the draftsman. So side notes can not be said to be enacted in the same sense as the long title or any part of the body of the Act. Moreover it is impossible to suppose that the section does not apply to sabotage and what was intended to be done in this was a kind of temporary sabotage.*[18]

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[17] *Ibid.*

[18] [1962] 3 All ER 145, 146.

3.2. Observations on the Chandler Judgment

A number of observations need to be made on the *Chandler* judgement. First, it must be pointed out that no similar charge as that preferred against Mr. Chandler and the other five accused could be preferred in Malta under the Act due to the fact that the said Act does not contemplate a conspiracy to commit any offence under the Act. On the other hand, it is possible to prefer such a charge under the general offence of conspiracy as contained in the Criminal Code.[19] This notwithstanding, the Chandler judgement is still important for a proper construction of article 3(1) of the Act as the House of Lords has authoritatively interpreted the expression 'any purpose prejudicial to the safety or interests of the State' in the opening part of section 1(1) of the U.K. 1911 Act. Unfortunately, the Maltese Criminal Court has avoided in the three cases prosecuted under article 3(1) of the Act to define these words.[20]

Secondly, the House of Lords in the *Chandler* case has extended section 1 of the U.K. 1911 Act to include sabotage apart from spying. However, although the term 'sabotage' was used by their Lordships, no exact definition of the term was afforded contrary to the definition of spying given by Lord Radcliffe.[21] On the other hand, it seems clear from the judgement that amongst the constitutive elements of sabotage their Lordships included obstruction, interference, damage or destruction.

Donald Thompson has criticised this interpretation given by the House of Lords. He contends that by analysing the legislative history of section 1, it will be observed that the said section was not intended to cover sabotage.[22] If his construction of the provision is correct then the decision violates the *nullum crimen* principle. However, Thomas does not agree with Thompson arguing that Viscount Haldane had, when introducing the Official Secrets Bill in

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[19] Article 48A of the Criminal Code.

[20] His Majesty's Criminal Court (at Malta) has not given any definition of the said expression contrary to the House of Lords in the *Chandler* case in the three decided cases on the subject: *His Majesty the King vs. Herbert Charles Pollok and Constant Kahil*, 16 June 1934; *His Majesty the King vs. Arnaldo Belardinelli*, 13 March 1935; and *His Majesty the King vs. Dr. Nicolò Delia and Giuseppe Flores*, 26 June 1936. The provision as it obtained in the 1930s is still extant to date.

[21] [1962] 3 All ER 148.

[22] [1964] 2 QB 7.

1911, stated that 'there have been cases in which he found people close to magazines - very convenient targets for dropping explosives from above' as implying that Haldane had also sabotage in mind.[23]

Thomas quoting *Regina v. Aubrey, Berry and Campbell* points out that at first Berry and Campbell had been indicted for section 1 charges although later such charge was dropped. Thomas contends that this implies that section 1 may thus be applied also to subversion even though there is no decided case which confirms this interpretation.[24] I do not see any conflict with the *nullum crimen* maxim as the wording of section 1 of the U.K. Act admits of a construction to include sabotage. After all, it is only the marginal note in articles 3 and 17 of the Act (i.e. sections 1 and 7 respectively of the U.K. Official Secrets Act 1911) which mention 'spying': the text of articles 3 and 17 of the Act do not expressly use the term; nor are we afforded in the Act with a definition of the expression 'spying'. Indeed, whilst the marginal note to article 17 of the Act reads 'Penalty for harbouring spies', article 17 is by far wider as it contemplates the crime committed by any person who harbours another person who is about to commit or who has committed 'an offence under this Act'. The latter expression covers not only article 3(1) offences but also all offences created under the Act even though no question of spying may be involved as in the case of an unlawful disclosure of information (articles 6 to 13) or the offence committed by a forward receiving agent (article 21(4)).

Furthermore, I also agree that section 1 of the U.K. 1911 Act may be further expanded to include subversive acts in so far as sabotage is but only one particular manifestation of a subversive activity. Indeed, the amendments which were proposed in a Home Office report to the Official Secrets Act 1889 and which were subsequently included as section 1 of the Official Secrets Act 1911 were intended to include not only actual espionage but also -

> *... the preparation for and carrying out of those secret attacks on arsenals, explosive factories, and works of*

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[23] Rosamund M Thomas, *Espionage and Secrecy: The Official Secrets Act. 1911* in Public Law, 1963, pp. 201-226.

[24] Rosamund M. Thomas, *Espionage and Secrecy: The Official Secrets Acts 1911 - 1989 of the United Kingdom*, London, Routledge, 1991, pp. 38-39.

> *strategic importance which would be attempted during the critical moment preceding or immediately following a declaration of war or an attempted invasion.* [25]

The criticism levelled against the definition of what constituted the equivalent of a prohibited place in the Official Secrets Act 1889 made in this report was to include acts of sabotage apart from spying -

> *It seems desirable to have words which clearly include telegraph stations and lines, wireless stations, electrical apparatus, and everything else which might be destroyed by explosives ...*[26]

The report also suggested that a spy should be defined as a person engaged in any proceedings which constitute offences under section 1 of the Official Secrets Act 1889 and that, therefore, both acts of espionage as well as hostile acts were included in what was intended by the term 'spy'.[27] These recommendations were incorporated in the text of the Official Secrets Act 1911.

Moreover, commentators on the criminal law agree that section 1 of the U.K. Official Secrets Act 1911 applies also to sabotage. Smith and Hogan contend that the literal meaning of section 1 extends beyond spying. They cite as an example that of a person who approaches an airfield or munitions factory with the object of causing an explosion, so as to impede the defence of the realm against an enemy and conclude that if 'this is a purpose prejudicial to the safety or interests of the State, his conduct falls within the plain meaning of section1.'[28] They further express the opinion that there is nothing in the Act which supports the narrow construction which

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[25] Appendix V of the *Report And Proceedings Of A Sub-Committee Of The Committee Of Imperial Defence Appointed To Consider The Question Of Foreign Espionage In The United Kingdom,* October 1909, p. 33.

[26] *Ibid.*, p. 34. It is further stated that - It is also important to protect those points, not being military or naval works, where mischief might be done, with the help of explosives, at a critical time, e.g., bridges or viaducts likely to be used in the concentrating of troops at the moment of a hostile landing.

[27] *Ibid.*, p. 36.

[28] J.C. Smith and Brian Hogan, *Criminal Law.*, London, Butterworths, 1988 (sixth Edition), p. 839.

defence counsel sought to give to section 1, and that 'the decision on this point seems clearly correct'.[29]

Third, the terms 'safety' and 'interests' are not synonymous. Whilst the term 'safety' is more akin to the term 'security', the expression 'interests' has to be given a wider interpretation. Indeed, the latter term may include interests of the State which are not of a defence or military nature but, say, of an economic, technological or scientific nature. In this case, although there is no real or imminent threat to the existence of the State, the State itself may want to suppress the disclosure of any information which a potential enemy might be interested in acquiring and which the State considers, e.g., in its economic interest, that such information should not be divulged.

Of course, these interests have always to be linked to a 'purpose prejudicial to the State' and such information has to be 'useful to an enemy' in order that the crimes contemplated under article 3(1)(b) and article 3(1)(c) of the Act might subsist. In the case of article 3(1)(a) there need not be the second ingredient, that is, usefulness to an enemy, in so far as this element does not form part of the constitutive ingredients of article 3(1)(a). Once the definition of a prohibited place may be extended by the Prime Minister, the crime contemplated under article 3(1)(a) may well cover non-military places such as a laboratory where experiments are carried out to produce solar energy operated cars.

Fourth, what does the term 'State' mean? I think that this term should be contrasted with the expressions 'Republic of Malta' and 'Government of Malta' as used in the treason provision of the Criminal Code.[30] Indeed, the term 'State' is equivalent to the expression 'Republic of Malta' and not to the term 'Government of Malta' because 'Government of Malta' can be construed in a narrow way to mean only the executive branch of the State (including the Armed Forces of Malta and the Maltese Police Force) thereby excluding the Legislature and the Judiciary. On the other hand, the term 'State' is more embracing and should also include all the organs of Government.[31]

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[29] *Ibid.* p. 789.

[30] Article 56 of the Criminal Code.

[31] The notion of 'State' is discussed in Alf Ross, *On The Concepts "State" and "State Organs" in Constitutional Law,* Scandinavian Studies in Law, 1961, Vol. 5, pp. 111-

In *Chandler v. D.P.P.*, it was held that 'State' (per Lords Reid and Hodson) meant the organised community or (per Lords Devlin and Pearce) the organs of Government of a national community, and the words 'the interests of the State' meant such interests according to the policies of the State as they in fact were, not as it might be argued that they ought to be.[32]

The State is a politically organised community under a sovereign government. Such State need not have a democratic government: there might well be a dictator in power even though, in both the U.K. and in Malta, such is not the case.

With regard to the offences contemplated under article 3(1) of the Act, the state is the victim against which the crimes therein mentioned are perpetrated. The State is thus not only a politically organised community but also a subject of rights: the crimes mentioned in article 3(1) are committed against a juridical person - the State. Indeed, the Act considers the State as the juridical person *par excellence* of public law as the protection which it is being afforded by the criminal law has been singled out in its favour as distinct from the other subjects of the law (such as natural persons or other moral persons).

For the purposes of article 3(1), it is necessary to distinguish between the real personality of the state (i.e. the community of people) and the juridical personality of the State. When any crime is committed, even though the victim usually is a natural person, that crime is also committed against the State as the State's authority is being questioned. In the crimes contemplated under article 3(1), the passive subject of the crimes is not a natural person but the State itself. The juridical personality of the passive subject and that of the State under article 3(1) are fused together.

The constituent elements of the juridical personality of the State are those which are found in Article 1 of the Montevideo Convention on Rights and Duties of State, 1933:

129; H.C. Dowdall, *The Word "State"* in The Law Quarterly Law Review, 1923, Vol. 39, pp. 98 - 125; Giorgio del Vecchio, *The Crisis of the State* in The Law Quarterly Review, 1935, Vol. 51, pp. 615-636; Rolando Tamayo Y Salmoran, *The State as a Problem of Jurisprudence* in Henri J.M. Claessen and Peter Skalmik (Eds.) *The Study of the State*, The Hague, Mouton Publishers, 1981, pp. 387-407 and Hans Kelsen, *Pure Theory of Law*, Berkeley: University of California Press, 1967, pp. 279-344.

[32] [1962] 3 All E.R. 143.

The State as a person of International Law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.[33]

Thus, Government is only one out of the four constituent ingredients of statehood under Public International Law.[34] What is important in this context is that the term 'State' as defined in the Montevideo Convention should not be confused with the term 'Government'.[35] Again, the Constitution of Malta gives the term 'State' a very wide meaning;[36] in the Constitution, the term 'State' can be easily substituted by the expression 'the Republic of Malta'.[37]

These principles under discussion require that punishment may be inflicted only when the act in question is clearly considered by law to be punishable. It must therefore correspond to the statutory definition of the offence charged. The judge is deprived of all creative capacity in this sphere and s/he cannot, as the Law Lords did in the *Chandler* case, introduce novel elements such as the royal prerogative which is not recognised in Malta in construing article 3(1). In the case of a *lacuna*, the judge has only one option - that of acquitting the accused - even though it would be to the advantage of society that the mischief in question should be reprehended.

Furthermore, due to the royal prerogative, one of the constituent elements of section 1 of the U.K. Act was in *Chandler v.D.P.P.* not proved in the normal way, that is, by bringing forth evidence and being cross-examined on it, but a single declaration made by a rep-

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[33] D.J. Harris, *Cases and Materials on International Law*, London, Sweet & Maxwell, 1991 (fourth edition), p. 102.

[34] Cf. Ian Brownlie, *Principles of Public International Law*, Oxford, Clarendon Press, 1990 (fourth edition), p. 72.

[35] Cf. David M. Walker, *The Legal Theory of the State* in Juridical Review, 1953, Vol. 65, pp. 255-261.

[36] 'State' is used twelve times in Chapter II of the Constitution of Malta and the obligations imposed by the Constitution on the State have to be exercised by one and all and not only by the Executive organ of the State.

[37] Articles 8 and 9 of the Constitution are a literal translation of article 10 of the Italian Constitution. In the Italian Constitution the term 'Repubblica' is used whilst in the Maltese version it has been translated as 'State'.

resentative of the State was considered sufficient to constitute evidence. The evidentiary rules of credibility were thus displaced once an authoritative declaration was made by Air Commodore Magill that a particular act was prejudicial to the safety or interests of the State. This made it very difficult for the accused to put up any defence at all once the competent officer had given his evidence.

One must admit that it is the Government who should set out the country's defence policy and that a court should as far as possible avoid a political debate in a judicial forum. But should these assertions imply that the right of cross examination be denied to an accused person whose liberty is at stake?

Even the right to a fair trial might have been prejudiced in *Chandler v. D.P.P.* as the Government adduced expert evidence - that of Magill - apart from the fact that Magill in practice could not be cross-examined and the accused were deprived from adducing their own expert evidence. There does not seem to have been an equality of arms between the Prosecution and the Defence.

Indeed, the Chandler judgement was criticised on the ground that it was inappropriate to resort to the Official Secrets Act against nuclear protesters when, as D.G.T. Williams opines, it was then possible to have recourse to the common law offences of riot (or violent disorder) unlawful assembly, affray and other crimes affecting public order.[38]

Thomas concludes this argument by proposing that -

> *... although section 1 of the 1911 Act should not be invoked for crimes other than espionage without careful consideration of alternative laws under which charges could be brought, its terms remain available to deal with sabotage and related offences at a 'prohibited place' by consent of the Attorney General.*[39]

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[38] D.G.T. Williams, *Not In The Public Interest: The Problem Of Security In Democracy*, London, Hutchinson & Co. Ltd., 1965, pp. 109-111. These are now statutory offences under sections 1 to 10 of the Public Order Act 1986.

[39] Rosamund Thomas, *Espionage and Secrecy: The Official Secrets Acts 1911-1989 of the United Kingdom, op. cit.*, p. 94.

4. The Ambiguity of Article 3(1)(c) of the Act

The next aspect to be considered is whether article 3(1)(c) of the Act is clear or otherwise. Must the information mentioned therein apply only to the communication of information that is officially secret? Article 3(1)(c) contemplates communicating 'any secret official code word or password, or any sketch, plan model, article or note or other document or information'. In interpreting the equivalent expression to article 3(1)(c) of the Act, Canadian Courts[40] have on a number of occasions held that only 'secret official' information is subject to the Canadian Official Secrets Act.

Do the words 'secret official' in article 3(1)(c) refer only to 'code word' and possibly 'password' or do they qualify all of the list mentioned in article 3(1)(c) including 'information'? M.L. Friedland[41] argues that the words 'secret information' did not appear in the 1889 or 1911 U.K. Official Secrets Acts. In fact, these words were added by a Schedule at the end of the U.K. 1920 Act and were referred to in the Act itself as 'minor details'. No one suggested that by adding these words the meaning of the 1911 Act was being changed. Indeed, the 1911 Act was introduced in part to control the activities of German agents who were openly collecting information that was clearly not secret or official such as sketching harbours.

In the U.K. it is not at all surprising that the words 'secret official' have been held to qualify only the words 'code word' and 'password'.[42] Not only is this interpretation given to section 1 of the U.K. Official Secrets Act 1911 but also to section 2 thereof where the words 'secret official' are also used. Indeed, it has been held in the U.K. that the information under section 2 of the 1911 Act need only be of an official character and not necessarily secret.[43]

Canadian Courts do not agree with their British counterparts in construing the expression 'secret official'. In the *Biernacki Case,*[44]

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[40] Franks Committee, *Departmenal Committee on Section 2 of the Official Secrets Act 1911*, London, H.M.S.O., Cmnd. 5104, Volume 1, 1972, p. 125. Franks Report, *op. cit.*, p. 125.

[41] Martin L. Friedland, *A Century of Criminal Justice*, Toronto, Carswell Legal Publications, 1984, p. 147.

[42] Franks Committee, *op. cit.*, p. 125.

[43] *R. v. Crisp and Homewood* (1919) 83 J.P. 121.

[44] Judgement No. 5626, Court of Preliminary Inquiry, District of Montreal. This

Judge Shorteno dismissed the accused at the preliminary hearing on the ground that there was not sufficient evidence to warrant a committal for trial. Indeed, the accused went to Canada from Poland and began to collect information preparatory to the setting up of an espionage ring. According to the judgement, the information which Biernacki was collecting did not correspond to that contemplated in section 3(1)(c) of the Canadian Official Secrets Act. Judge Shorteno decided that the words 'secret official' qualify not only 'code word or password' but also the rest of the clause so that the term 'information' should be read as secret and official information.

The grammatical construction of article 3(1)(c) of the Act is not a clear one and one may argue in favour of two different and opposite constructions. One can argue in favour of Judge Shorteno's decision in the sense that once there is no comma inserted between 'code word' and 'password', the expression 'secret official' applies to all the list mentioned in article 3(1)(c) as it does not only qualify the term 'code word'. Moreover, one can also argue that the title of the Act itself may be used as an aid to construing article 3(1)(c) as the title is contemplating official secrets.

M.L. Friedland argues that the phrase 'official secret' is used nine times throughout the Canadian Official Secrets Act and that in each case it precedes the word 'code word' or 'password'. In six occasions no comma is used. Furthermore, there are two instances where the expression 'secret official code word or password' appears at the end of the same list found in article 3(1)(c) and, therefore, cannot possibly qualify the earlier specific items.[45] In the *Toronto Sun Case*, Judge Walsberg discharged the accused on the preliminary hearing because the information had to be secret and in that case it could no longer be assumed that it was such.[46]

If the information need not be 'secret official' as the U.K. Courts hold, is not one widening article 3(1)(c) too much? Consider, for example, the Canadian case of *Spencer*.[47] Spencer was a post-office

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judgement is unreported. Cf. M.L. Friedland, *National Security: The Legal Dimension*, Toronto, footnote no. 116 at p. 147.

[45] *Ibid*, p. 42.

[46] *R. v. Toronto Sun Publishing Ltd.* (1979) C.C.C. (2d) 535 (Ont. Prov. Ct.).

[47] Cf. *Report of the Commission of Inquiry into Complaints Made by George Victor Spencer*, Ottawa, 1966.

employee who supplied the Russians with important information that would help them establish foreign agents in Canada. This consisted of outwardly innocuous information on such matters as names, with dates of birth and death, gathered from tombstones in local cemeteries. The Russians could then send in an agent with a foreign birth certificate and other documentation who would take on the identity of one of these persons. Since the real person was dead the chance of detection was lessened.

If the British construction were adopted, Mr. Spencer would probably be found guilty of an offence as the information which he had collected was not 'secret official' and, consequently, falls under section 1(1)(c) of the 1911 Act. On the other hand, if Mr. Spencer was charged before a Canadian Court, the probability is that he would be discharged at the preliminary hearing as the information gathered by him is not 'secret official' and, consequently, does not contravene section 3(1)(c) of the Canadian Official Secrets Act.

With regard to the expression 'obtains' in article 3(1)(c) of the Act reference is to be made to article 2 of the Act which provides that expressions referring to obtaining any sketch, plan, model, article, note or document includes the copying or causing to be copied the whole or any part of any sketch, etc. and that the expression 'communicating' in the same paragraph includes communication in whole or in part, and whether the sketch, etc. itself or the substance, effect, or description thereof only be communicated, and also includes the transfer or transmission of the sketch, etc.

Collection of information may take place in several ways. Electronic surveillance is but one of the modern techniques to collect information. Interception of oral communications by technical devices can take two different forms: the recording of telephone conversations and the planting of hidden microphones. Although Maltese Law does have among its enactments a law regulating the interception of communications,[48] article 3(1)(c) of the Act does to a certain extent regulate such a matter in so far as -

(a) there is collection of information by electronic surveillance;
(b) such task is undertaken for any purpose prejudicial to the safety or interests of the State; and

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[48] Security Services Act, Cap. 391, articles 6 to 10.

(c) the information gathered is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

It follows from article 3(1)(c) of the Act that mere collection of such information as, for example, that regarding the supplies or resources of a locality, or the contents (or emptiness) of a military storehouse, or the reconnaissance of tactical positions, or the addition of details not included in published official maps, may be an offence under this section, whether or not there is any communication to any other person.

Article 3(1)(c) of the Act applies to all such information, whether relating to a prohibited place[49] or not, although more proof of a prejudicial purpose is necessary where the information does not relate to a prohibited place.

In order to comprehend what information is calculated to be or might be useful to an enemy under article 3(1)(c) of the Act, reference may be made to the case *R. v. M.*,[50] a case under the similar provisions contained in Regulation 18 of the U.K. Defence of the Realm (Consolidation) Regulations, 1914, when it was held that if a person intentionally communicates information, intending to inform and not to mislead, it is immaterial whether the information is true of not.

An objective test has to be adopted in order to appreciate what 'might be directly or indirectly useful to an enemy' in article 3(1)(c) of the Act. This expression does not look at what the accused intended. On the other hand, what is 'intended to be directly or indirectly useful to an enemy' poses a subjective test as here one has to discern what the accused intended.

As to what is 'calculated to be directly or indirectly useful to an enemy', the term 'calculated' has to be first interpreted. Glanville Williams holds that the primary meaning of 'calculate' is to reckon or design but the notion of design gradually disappeared, leaving merely the sense 'suited; of a nature proper or likely to'.[51] He thus opines that if the word is found in a criminal statute, it should -

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[49] This is defined in article 2 of the Act.

[50] [1915] 32 1 Times Law Reports 1, C.C.A.

[51] Glanville Williams, *op. cit.*, p. 66.

> *... in accordance with the general presumption that mens rea is required, be interpreted in the primary sense of the verb as involving design or at least foresight.*[52]

In article 3(1)(c) of the Act, *mens rea* is not presumed but contained within the meaning of the term 'any purpose'. Thus, it seems that the correct construction of the expression 'calculated' should be that of 'likely'. It is the same meaning which is given by the U.K. Law Commission to this expression in section 53(1) of the U.K. Police Act.[53] Thus. it appears that the objective meaning should be upheld.

As to the term 'enemy', this term is not restricted to belligerents but has a wider meaning as is the case with the meaning given to the term in *R. v. Parrott.*[54]

What has to be established here is whether there is any ambiguity as aforesaid in this provision. The solution seems to differ according to which construction is given to section 3(1)(c), i.e. whether the Canadian or the British interpretation is adopted. But before taking up this aspect it is necessary to clarify at this stage what is meant by the expression 'any purpose prejudicial to the safety or interests of the State'.

5. Ambiguity in Establishing The *Mens Rea* Requirement

The leading case concerning the construction of the expression 'purpose prejudicial to the safety or interests of the State' is *Chandler v. D.P.P.* According to Lord Reid, 'purpose' within the meaning of section 1 of the U.K. Official Secrets Act 1911 was to be distinguished from the motive for doing an act, and the words 'any purpose' meant or included the achieving of the consequence which a person intended and desired to follow directly on his act, viz. his direct or immediate purpose as opposed to his ultimate aim, and even if a person had several purposes, his immediate purpose remained one of them and was within the words 'any purpose'.[55]

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[52] *Ibid.*

[53] The Law Commission, *Codification of the Criminal Law - Treason, Sedition and Allied Offences*, Working paper No. 72, London, H.M.S.O., 1977, p. 55.

[54] [1913] 8 Cr. App. R. 186.

[55] *Chandler v. D.P.P.* [1962] 3 All ER 143.

The House of Lords held that if a person's direct purpose in approaching a prohibited place was to cause obstruction or interference, and such obstruction or interference was found to be prejudicial to the defence dispositions of the State, an offence was thereby committed under the section; the indirect purposes or motives of the accused in bringing about the obstruction or interference did not alter the nature or content of his offence.[56]

Lord Radcliffe held that in the *Chandler Case* it was not difficult to draw a distinction between the purpose and the motive, as the purpose of the appellants had been to immobilise the airfield, the motive being to achieve their ultimate aim in regard to nuclear disarmament. The statute was concerned with the direct purpose and not with the motive or indirect purpose.

Another point made by the House of Lords concerns what constitutes the state and the interests of the state. Though Lord Reid held that 'State' means 'the organised community'[57] he held that the words 'the interests of the State' did not necessarily mean the interests of the majority; and distinguishing the court's right to consider what is in the public interest he considered that the Act should be construed if possible so as not to leave the jury the political question of whether a particular policy was beneficial in the interests of the State.[58]

Once the organs of government had decided their policy it was not open to the courts to consider the rightness or wrongness of it.[59] The Courts cannot inquire into matters of policy decided under the prerogative powers or under statutory powers giving discretion in management or control.

Accordingly, once the Government has determined its policy and it is established that the actions of the defendant conflict with that policy then if it may be evident that the policy is foolish and the defendant's action right, the court will be unable to intervene: the purpose prejudicial to the safety or interests of the State will be made out and the offence proved. This cannot mean that all evidence on the question of prejudice must be excluded, for the requirement that there

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[56] *Ibid.* 149.
[57] *Ibid.* 156.
[58] *Ibid.* 160.
[59] *Ibid.*

must be a purpose prejudicial to the safety or the interests of the state is clearly essential for liability under the section, and must be determined by the jury.

If the British construction of section 1(1)(c) of the U.K. Official Secrets Act 1911 is adopted, then this means that the Strasbourg organs would have to examine the construction given by British Courts to that paragraph, namely that -

(a) not all the information named therein need to be secret;
(b) that 'safety or interests of the State' means essentially what the Government says that it is.

6. Conclusion

It is difficult to consider as reasonable a provision that in its completed form establishes 32,400 different permutations of the offence, let alone if a preparatory act, an attempt, a conspiracy or an incitement to commit a crime under article 3(1) of the Act are added thereto. When article 3(1) of the Act is read together with article 23[60] of the Act, the combined effect - excluding complicity - is that these two provisions combined together contemplate 1,296,000 distinct offences. Again, this amount does not take on board the extensive interpretation that may be given to article 3(1) of the Act through the application of articles 3(2) and 3(5) of the Act.

Although *stricto jure* subversion is part and parcel of the offence created by article 3(1) of the Act, there is no doubt that this provision should have clearly and unequivocally said so: it should not be left to the courts to make sense of what the legislator had in mind when enacting the statute. Furthermore, once the provision under examination's marginal note refers to spying, this term should also be clearly defined and its constitutive ingredients set out with precision to distinguish them from the other crimes contemplated in the

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[60] 23. Any person who attempts to commit any offence under this Act, or solicits or incites or endeavours to persuade another person to commit an offence under this Act, or aids or abets and does any act preparatory to the commission of an offence under this Act, shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

Official Secrets Act such as sabotage, obstruction, interference, or disclosure of official information.

The fact that different courts - British and Canadian - have given a different interpretation to the equivalent provision in the U.K. and Canadian Official Secrets Acts to article 3(1) of the Act, in itself already points out to the unclear nature of the provision under review. Not only so but the divergent interpretations given cannot be said to be minimal in view of the fact that U.K. and Canadian courts have delivered contradictory and irreconcilable opinions.

Finally, the *mens rea* ingredient of this crime tends to be very subjective and not easily discernable because it depends to a large extent on what a prosecution witness sets it out to be. This, of course, makes it impossible to know with absolute certainty what is actually being criminalized especially in the case of the U.K. where, due to the royal prerogative, it is not possible to cross examine the said witness.

Undoubtedly, for the reasons given above in this conclusion, the provision under examination - which dates back to 1911 - infringes the *nullum crimen sine lege certa* maxim of human rights law and hence the necessary action should be taken by the Maltese legislature for its reform.

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COUSCOUS DEMOCRACY: TRANSITIONAL JUSTICE IN MOHAMMED VI'S MOROCCO

ABDELILAH BOUASRIA

This paper will examine the current state of regime change literature with its fortes and flaws. It will apply this dynamic to the case of Morocco with the Commission of Equity and Reconciliation. It is the fruit of many years of field work and interviews gathered while I worked as a news writer in Radio SAWA, Washington DC. The paper assesses the arguments of two camps regarding the issue of human rights in Morocco: those who think that the country is undergoing its *"velvet revolution"* and those who inscribe themselves along the pessimistic side repeating the motto *"nothing is changing."*

Introduction

The question of democracy is one that has assumed monumental stature within the last ten years, as efforts to foster and deepen democratic attitudes have taken an increasingly central role within scholarship and policy making. As the third wave has crested, both researchers and practitioners have struggled to develop an understanding of democracy as a concept. Democratization has drawn together work on social movements, revolutions, economic and political development and transitions literature through the implied assumption that all of these forces are moving in a democratic direction. In that sense this literature has been both the beneficiary of an immense amount of effort and expense over the last few decades, as transitions, social movements and development have all

come to be seen in the context of democratization, and the efforts to understand the dynamic relationships which exist between the individual, the state, society and market.

The democratization literature has grown considerably. Yet, without an effective definition of democracy, debate has centered as much on how to understand degrees of democracy, as the processes of transition. Although political science literature is almost invariably debating definitions, and defining terms, the degree to which we have been unable to decide on a notion of democracy which encapsulates both the spirit of the ideals as well as the mechanical apparatus of institutions effectively means that the literature in this field has approached the concept form a number of different and largely unconnected points of view. Such division continually raises variables to the process without even really piecing them together into something resembling a paradigm or general framework.

Democratization literature within the Middle East largely suffers from these issues, as scholars have struggled to understand the dynamics of change and cultural forces utilizing western tools in non-western societies. In that sense much of this literature has been unable to define itself, but rather utilizes existing frameworks in a region that was widely passed by in the Third Wave. As Huntington noted in *The Third Wave*, the degree to which the third wave generally passed over the Middle East and North Africa as a whole makes the subject matter under debate focused to a different level, as questions of consolidation are irrelevant when one is still concerned with beginning the transition (Huntington, 1993).

Background

On January 7, 2004, the Moroccan Commission for Equity and Reconciliation took office. Morocco could boast that it was the first Muslim country in which such an institution came to light. After many talks between the Ministry of the Interior and the leaders of the Truth and Justice Forum, the new Commission was created with the sole goal of shedding light on human rights violations of the past regime. It was given eleven months to complete its report on forced disappearances and the burial sites of people who passed away in custody. The issue of compensation for victims of arbitrary imprisonment was also on the agenda. In the winter of 2004-2005, the King

Mohammed VI's Commission opened its hearings to two hundred victims of human rights abuses from Morocco's independence to 1999, date of the current king's accession to the throne. The number of the cases that have been filed with the commission totaled 22,000.

Those analysts who started to draw parallels with the South African Truth and Justice Commission soon met with deception since the Commission was extra-judicial and no names of those responsible for human rights abuses were allowed to be given. The Association for Human Rights in Morocco held alternative hearings in which two of the King's Commission's taboos were broken: witnesses had the right to name their torturers, and official misdeeds under the new King were denounced. It was clear that what appeared on the surface to be a human rights issue was more of a power political game between the monarchy and political parties. It is clear that in light of this game of positions, the fact that the day when the new Commission took office (January, 07, 2004) was the same one in which King Mohammed VI declared his pardon to thirty three political prisoners-including the newspaper editor Ali Lmrabet who was serving a three year jail time for the peculiarly Moroccan crime of *lèse-majesté* - is an ironic *"coincidence."*

The Moroccan political and cultural scene became a site divided in two camps, the ones who supported the new Commission and those who condemned it as a mere propaganda machine. Both camps are garnished with credible sources such as human rights activists, former political prisoners, academics, political refugees, and media personalities. After a year of interviews conducted while I was a news writer at Radio SAWA I came to the conclusion that after two years of digesting the publicized confession of grief, Morocco succeeded in inserting what the Moroccan philosopher Taha Abderrahmane calls *"Talk Civilization" (hadaratu al qawl)* into the new generation's *Habitus*. I had interviewed many Moroccan personalities among whom the former minister of interior and second man of the country the now much-despised Driss Basri. I had conducted an analysis of academic books on the issue (the excellent work of MIT's professor Susan Slyomovics) and the memoirs of former prisoners (Marzouki's *Cellule Numéro 10*), Sins of Commissions and sins of Omissions danced together in a well staged choreography with Moroccan flavors. This paper is the prelude to such a conclusion reached outside the media frenzy atmosphere of *"snowball effects"* or *"declarations in the heat of the moment."*

1. Morocco's "Yes-Men": The Use of Crying over spilled Milk

In order to understand the mindset of those *passionnés du Roi*, one has to look deeply into the Moroccan cultural legacy left by the deceased King Hassan II. The new commission is headed by Driss Benzekri, a former political prisoner who spent seventeen years behind bars for extreme leftist inclinations. Driss Benzekri and Latifa Jbabdi, a former political prisoner, went touring the world's capitals to sell Morocco's image as an emerging democracy. The former deemed the Commission a courageous undertaking and engaged with the latter in a wide international tour to sell the image of Morocco.

The Government of the United States clearly welcomed the creation of the Moroccan Commission as it is expressed in the following words of President W. Bush in his January 6th 2006 message to King Mohammed VI: "*Morocco plays a leadership role in the region by engaging itself in a delicate process of political reform.*" Moreover, President Bush qualified the Commission's work as "*audacious*" and described it as the "seal of open societies.[1]" Former US ambassador Edward Gabriel played on the same note when he said that the reforms are "*spontaneous*" and emerge from inside Morocco[2]. This testimony might indicate that Morocco is indeed on the right track while it might ring a bell, of an imperialist nature, of *ingérence*. In its 2005 annual Human Rights Report, the State Department congratulated Morocco's efforts in human rights describing the *Instance d'equite et reconciliation* (IER) as an entity that "reports accurately on the abuses of human rights." One wonders here about the use of the concept of "accuracy" in the presence of omissions that red-flag the report as astonishingly accurate.

Ali Boureqat, a former eighteen years "*guest*" of the horrifying Tazmamart military prison and one of the rare French political exiles in the US, considered the sessions of testimony of the victims of human rights abuses "a good move" and "a courageous act from the current King who/which is unprecedented in history." Abdellah A'gaou, a former captive of Tazmamart because of his involvement in one of the military coups against the former King, joined the Yes-Men camp though in a less stubborn way when he announced that it was

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[1] Maghreb Arab Press (MAP), 08/03/2006.
[2] MAP, 14/03/2006.

a good gesture and complained twice because he was jailed for merely executing military commands.

The issue of chain command mentioned by A'Gaou raises important questions. Is chain command sacred even when it runs against the interest of the highest entity of this chain? Or does dissidence become a valued gesture when the life of *Notre Ami le Roi* becomes threatened? How can we then reconcile the accusation of A'gaou with the charge of treason with the accusation leveled against Captain Adib, who was jailed under the current regime, of breaching the chain of command when he sent a letter to the king condemning the corruption of his superiors?

Ahmed Herzenni, a former leftist political prisoner in Morocco, came to be seen as a sellout when he issued a positive judgment of the Commission's work and its "*great king.*" In his interview with Radio SAWA, he justified un-disclosing the names of the perpetrators of human rights abuses in the following way:

> *Even if it were allowed to name those perpetrators, one would only encounter names of those third or fourth category perpetrators, and not all the names will be known.*

Herzenni touched here upon the issue of chain command and gave a second reason for not disclosing the names:

> *The hearing sessions of the Commission are not judicial hearings and those who are willing to ask retribution from their aggressors can do so in Moroccan courts.*

Ahmed Herzenni had the courage to say that he engaged previously in an authoritarian mindset and that he resorted to violence as a way of political opposition hence not throwing away his share of responsibility. However, his two reasons do not seem to stand scrutiny.

First, it is not always the case that only second or third executioners appear on the surface of a testimony. For example, in her book *Stolen Lives*, Malika Oufkir mentions the visits of Housni Benslimane, now a very prominent general, to her prison and the same scenario came up in Boureqat's recalling of the PF3 secret *Gulag*. Moreover, Jamal Benomar, now a senior UN diplomat and then a Moroccan political exile, said in his only time interview with the Moroccan Francophone *Tel Quel* how he was stunned when he

bumped into Yousfi kaddour as a member of the Moroccan team which came to Geneva to present the country's annual human rights report to the UN Commission. The stunning effect comes from the fact that Kaddour was Benomar's torturer for months when he was handcuffed and blindfolded in the "then" tyrannical Morocco.

Second, resorting to Moroccan courts to ask for retribution from a senior public official is a suggestion that parallels putting a pedophile in charge of changing a baby's diaper. The Moroccan judiciary system is still corrupt and nepotism and interventionism are yet to be seen deserting the conflict zone. For example, Narjis Reghaye, a Moroccan journalist, faced a court unwilling to listen to witnesses when she gave the name of police official "Arshane" as a former *"butcher."* She even ended up being fined, whilst he ended up just fine. It is in this sense that Aziz Loudiyyi, a former political prisoner, deems the public sessions a symbolic event that equalizes the victim and the aggressor.

2. The Moroccan *Refusnik*: an anthology of a new opposition

Ahmed Benani, a professor of political science at the Swiss university of Lausanne and a self-exile who did not return to Morocco in about 22 years, rebuked the work of the Royal commission by questioning its purpose and its royally granted status in opposition to a naturally emerging outcome of the efforts of civil society. Ahmed Benani expresses his opposing stance in the following words:

> *This whole operation is mere propaganda undertaken by Mohamed VI's council and unfortunately other public figures have fallen into this trap such as Driss Benzekri and Driss Yazami.*

Benani engaged as well in some futuristic scenarios for his native country when he said:

> *Morocco's problems have one solution: a white revolution that will bring us back to a real constitutional monarchy.*

As for the reasons lying behind the espousal of such a propaganda by respected human rights activists in Morocco, Benani offered the following explanation:

> *...there are some liberal factions acting in this way with a strategic goal in mind in the sense that they see democratic change in Morocco in small steps, and some Tazmamart witnesses refused to play this game because they saw bringing past abuses to light and unmasking the perpetrators of those abuses as two corollary actions.*

Another Moroccan political exile in Sweden involved in the coup against King Hassan II in 1972 expressed the same view. Ahmed Rami said that Morocco was going through a crisis in which many Moroccans were deceived after nurturing reasonable hope in the current regime. Rami described Morocco as a "*bomb bucket*" eager to explode at any moment. In opposition to other analysts, Ahmed Rami does not see any utility in discussing the positive aspects as well as the negative aspects of the Royal Commission of Equity and Reconciliation since the problem is situated for him at a higher ontological ceiling: the legitimacy of the monarchy. Rami did not observe any censorship while describing the Moroccan political zoo:

> *Hypocrisy became a political ideology in Morocco. One of the good points of such an era is to sift through people.*

Belgium's Parliamentarian, from a Moroccan background, Safia Bouarfa, condemned the Moroccan government as a whole for those human right abuses because of the prior knowledge of all senior public officials about those abuses.

"All of the ministers have to be judged at least those of sovereignty" adds Bouarfa during an interview with her on Radio SAWA in October 2005. In the same line of thinking, Mohamed Bettioui, a Moroccan political exile living in Belgium interviewed by me in November 2005 for Radio SAWA, regrets the way this commission went even if he deems it an action worthy of applause:

> *This is a tactical move from the Moroccan officials who despite their bloody nature are not dumb. We need to set a parliamentary commission to institutionalize this body. The regime fears a snowball effect of hierarchically ascending confessions but this is the normal dynamic of every truth commission.*

Another voice that condemned the work of the commission is Al Khatib, the ex-secretary general of the Islamic Party PJD, who shocked more than one by saying:

> *We heard that the Moroccan TV will broadcast the testimonies of those jerks who fought the monarchy and who rule the country today. They earn money and the state award them big amounts of money.* [3]

Thus, Al Khatib, who is a man close to the palace, is reintegrating his old battle with the leftists in the political Webster of today's Morocco. In fact, when I interviewed Abdeslam Ameziane, who was a political exile in Spain since 1958 until his return to Morocco this summer, about the abuses of human rights that touched the people of the Rif in the end of the fifties, he cited Mehdi Ben Barka, the Moroccan socialist leader, as one of the people responsible for those exactions.

3. Is Morocco's "New Justice and Reconciliation" policy an indicator of Regime change?

There are three main waves in the literature of comparative politics dealing with regime change, a term that is coined by comparative politics experts to describe countries in transition to democracy. The first generation studies adopted the structural approach and were associated with the dependency literature. They had as a goal to explain the rise of authoritarianism in the 1960s and the 1970s. The main works here are Guillermo O'Donnell *Modernization and Bureaucratic Authoritarianism* (1973), and Barrington Moore in his book *Social Origins of Dictatorship and Democracy* (1966). The second wave of literature used voluntarist approaches to regime change as one can see in the work of O'Donnell and Schmitter *Transitions from Authoritarian Rule* (1986) and *Tentative Conclusions about Uncertain Democracies (1986).* The third wave literature is represented by Larry Diamond and Samuel

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[3] *Assabah*, 22/12/2004, p. 6.

Huntington among other scholars who follow an integrative strategy linking structural factors such as class to agency factors like the choices of actors. Below I will explore how both camps conceptualized agency and structure explaining the essential elements of the two approaches focusing on the necessity of such an approach in reading Morocco's human rights issues. I will hence address two main approaches that tried to integrate structure and agency, namely the path-dependent strategy and the funnel strategy. An example of the former would be Ruth and David Collier's *Shaping the Political Arena (1991)*, and an example of the latter would be Juan Linz and Alfred Stepan's *The Breakdown of Democratic Regimes* (1978).

4. The building blocks of the two camps

4.1. Defining structure:

Structural approaches conceive structures as generative relations defining the interests of actors, meanwhile agency approaches view structures as external constraints. O'Donnell and Schmitter point out in their *Tentative Conclusions* to the relevance of structure when they said that the emphasis on agency is not a denial of the fact that the macro-structural factors are present. They only say that during regime change, the structural interventions are looser than in normal cases. Moreover, they say that voluntarist approaches are more suited to analyze transitions from authoritarianism rather than to it. Besides the fact that this agency school believes that the causal impact of structures varies across time, it also says that structures *potentially*, rather than *necessarily*, limit actors' abilities to achieve their goals. In other words, actors pre-exist structures by their interests and identities.

4.2. Defining Agency:

Voluntarist approaches see human action as independent from social structures. In their book, *Tentative conclusions*, O'Donnell and Schmitter argue that explaining democratic transitions cannot be a

reliance on stable economic, social, cultural and partisan categories. They state the following:

> *[I]t is almost impossible to specify ex ante which classes, sectors, institutions, and other groups will take what role, opt for what issues or support what alternative.*

This under-socialized conception of agency shows how interactions between actors shape regime change, but by not shedding light on pre-existing social relations, these approaches overemphasize short-term processes.

4.3. Building blocks of both approaches

Four criteria are generally used to distinguish the voluntarist and the structural approach: primary explanatory variable, use of comparison, temporal focus and level of analysis.

The voluntarist approach uses as a primary explanatory variable the subjective evaluations of key actors making the transition. O'Donnell and Schmitter divide the military into soft-liners and hardliners and minimalist and maximalist opposition members according to their subjective goals. The key actors in the Moroccan case analyzed in this paper are the monarchy, the political parties and civil society advocates.

The political parties used each a discourse to describe and opinionate about the Justice and Reconciliation Commission. El Yazghi, a current Moroccan minister who heads the USFP (*Union socialiste des Forces Populaires*), wrote an editorial in *Libération* putting his party *"at the top of those who politicized national reconciliation."* (www.liberation.ma) Larbi Messari, an ex-minister of Information from the *Istiqlal* party, wrote an article in the Moroccan daily *Al Alam*) about the destruction of any secret ailment in Morocco which *"showed a societal maturity and the actors who made the event."* (www.liberation.ma) Moreover, he considered those public hearings broadcast on TV as a willingness of the state to relinquish its monopoly over the mass media. In his article, he distinguished himself from Driss Basri, the minister of interior, by saying that "the intelligent media of truth prevailed over the stupid motto of 'say the world is nice'" alluding to a famous song by folk dancers

from the region of Chaouia, the place of Driss Basri, as an anonymous source told me.

In terms of the use of comparison, voluntarist approaches use idiographic analysis (sensitive to the uniqueness of cases). Whereas structural approaches use nomothetic analyses (generalizations). In that sense, the *PJD* Islamic party generalized the abuse to all actors since the totalitarianism of the regime "was inscribed in a general culture of exclusion where state butchers were facing anarchists very far from democratic practices." [4]

When it comes to temporal focus, structural approaches emphasize long-range causes. For instance, Barrington Moore's structural account of the origins of modern democratic and totalitarian regimes comes back in time to pre-industrial agrarian class relations. Voluntarist approaches, on the contrary, focus on short-term causes. Abdellatif Housni, a former political prisoner, made an interesting parallel here between a former historical case of Ba Hmaad, an ancient Vizier in Morocco, and the prevention of Driss Basri to renew his passport by Moroccan authorities. Although he suffered himself abominable torturing sessions under the command of Driss Basri, Housni defended his right to have a passport.

Finally, there are five levels of analysis explaining regime change: Macro-Structural (Global political economy, societal culture), Domestic-Structural (Social classes and groups), Institutional (Party systems, Military), Social Group (Social Movements) and Leadership. Some scholars reject the cultural argument concerning tribalism or familial control as a source of monarchy, linking development close to that of Europeans, as poor performance on the part of institutions limits the ability of government beyond personal relationships in friends and family of the ruling group.

It is this link to institutions which provides a unique twist and degree of cross cultural comparison to the study of monarchy, noting that even in the West practices, norms and actions were the by-products of efforts at consolidation, and as institutionalization grow within the region so too will grow the ability of government to extend beyond a family network to include broader groups. I will explore in the following section the concept of leadership as an explanatory variable.

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[4] *Min Ajli Insaf wa musalaha shamilayn*, *Attajdid*, 04-01-2004.

5. The Moroccan Monarchical Institution and the Capacity of Leadership

Institutional arguments concerning the failure of transition to democracy within the Middle East and North Africa represent by far the largest and most diverse set of causal explanations, as legal structures and party structure, monarchy and notions of citizenship are all examined as possible variables of the question.

Political parties have long been seen as maintaining a central role within the process of democratization and political development. Essentially dismissing many Western notions of party structure and merit, Nazih Richani noted the ability of political parties over the last quarter century to undermine democratic mechanisms as parties based on ethnic lines were motivated more by limiting the access of opposition parties then by actually promoting a degree of inclusion. While in some respects drawing back to previous arguments about the role of a fragmented society, the raised stakes of the case put forward by Richani help to demonstrate the degree to which parties in hostile and polarized environment can be as much of a threat as they can be a stabilizing force (Richani, 1998).

The interview with political Islamic exile Abdelkarim Moutii, who lives currently in Libya, sheds some light on this process of partisanship as hostile to democracy. Since he left Morocco following his conviction in the assassination of Labor Union leader Omar Benjelloun in 1975, the head of the first Islamic movement *Chabiba islamiyya* attacked the leaders of the Commission of Equity and Reconciliation as atheist Marxists plotting to overthrow the King.

> *The principle of neutrality lacks in this commission because its head is an extremist Marxist Leninist who cannot step out of his classical enmity towards the right (the Moroccan monarchy) or towards his ideological enemy (the Islamic movement).*[5]

After mentioning the fact that most of the victims were Marxists, Moutii wonders why some names like Abdelaziz Ben Driss, who was

[5] An interview I conducted with him for Radio SAWA, and which was also transcribed in the website of the movement.

according to Moutii killed by Mehdi Ben Barka and Fqih Basri both of whom are emblematic figures of Moroccan resistance, were not mentioned by the commission. Moutii gives as an example his son who was tortured at the age of fifteen only to carry the effects now when he is a forty five man waiting for his Moroccan citizenship and his passport. Furthermore, the Moroccan monarchy did not change its strategy for Moutii nor did the leftist faction which is still plotting to overthrow the regime gradually. Moutii goes about articulating the steps that the "*leftists*" will follow in their strategy:

> *They will start with a propaganda public hearings marathon to arouse the emotional dissent. Second, they will neutralize the current security apparatus by exposing the dirty laundry of the former officials showing the impotence of the monarchy to prevent such a display. Third they will shift from judging the people of the former regime to judging the former king himself ending with a trial of the monarchy itself.*[6]

One should not dismiss here the importance of citizenship, and the specific role that the development of a civic identity comes to play in democratization. In this approach questions of equality and gender are frequently raised in an effort to develop a uniform conception of citizenship and the legalist and corresponding cultural frameworks necessary to implant it. In a collection of works edited by Saud Joseph, the author examines main laws by which construction of the legal subject in Middle Eastern state gave privilege to the masculine citizen. As states struggle to develop a conception of citizenship, gender continues to remain a primary question as states move at varying speeds of inclusion and with different rates of success (Joseph, 2000).

The gender aspect of human rights abused is addressed by former political prisoner Fatna El Bouih who narrated how she was given a masculine name while in prison so as to make her face the loss of her femininity. Focusing on the absence of female specificities as former victims of such abuses, Fatna disapproved of the methodology of the royal commission by saying:

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[6] *Interview with Radio SAWA.*

I saw my torturer peacefully boasting in front of me at one of those public hearings so how can we talk about change?[7]

One final area of institutional interest stems from the apparent resilience of monarchies in the region against forces of development and democratization from both internal sources as well as the broader international paradigm of democratization. Despite the claims of O'Donnell and Schmitter (1986) that authoritarian regimes can no longer maintain their position within the modern insistence for change, Middle Eastern monarchies have proven to be increasingly adaptive to the prospect of change. To some degree Joseph Kostiner attributes the continuation of monarchies as a reaction against nationalist movements to the nationalistic aura of the ruler, assuming a protectorate and modernizing status within the nation as well as learning the practical skills necessary to survive resistance; in essence linking national ideology along with survival skills to maintain ones own position. It is interesting to notice here how this resilience is played in the case of the Justice and Reconciliation Commission.

The resilience of the Moroccan monarchy is apparent in the behavior of three scholars and politicians. The former Minister of interior Driss Basri told me in the first interview I held with him outside of Morocco after he went to France (2005) that he was like the "*mopping cloth*" of the government. He deemed the televised sessions of public hearings an "operation of marketing" and said that Morocco's past does not involve only issues of human rights but also infrastructure. He said: "I do not recognize the work of this ghostly Commission, and it is buffoon-like hilarious." He added that he only believed in the work of two Justice and Reconciliation commission: the South African Commission and the Algerian policy of civil reconciliation undertaken by President Bouteflika. When I asked him how he would respond to the charges brought against him in a human right court in Belgium by Bettioui, a Moroccan political exile that lives in Belgium, Driss Basri said that the man in question was involved in a driving infraction and was thus trying to obtain his Belgian refugee status. Basri added ironically that he had answered

[7] Fatna El Bouih interview with me on December 2005.

him in newspapers proposing to help him achieve this goal without "*all this noise.*" When scrutinized the story turned out to concern Abdelilah Lehbaili another exile who brought up the same charges against the ex-second Moroccan man. This confusion only shows that political prisoners become just numbers and lose their specific identity in the process. What is interesting about Basri's fiery appearances is that he never criticized the King. He always blamed other aides or policies but never dared he criticize the King directly. The resilience of the monarchy is once again established even when facing one of its dearest "*enemies.*"

The second case is that of Abdellatif Housni, a former political exile who is the director of the Moroccan journal *Wijhat Nadar*, who defended Driss Basri's right to have his passport despite his criticisms of the workings of the Justice and Reconciliation Commission. One might give Houssni a salute of bravado for his human rights coherence but when one knows that Abdellatif Houssni visited the United States to learn English as a guest by the "*red prince*" Moulay Hicham whom he defended as a victim of the new age's political stains, the bravado seems to lose its fervor. Moreover, his defense of Driss Basri is also inscribed in the same line of alliance with the grieving royal cousin since another political exile told me that Prince Moulay Hicham advised him to leave Driss Basri alone. In an interview with *L'intelligent*, dividing Hassan II into the bad and the good, Prince Hicham himself said about the commission:

> *How can we talk about all this when Amnesty International and Human Rights Watch are reporting serious abuses of human rights in Morocco?*

Another case that points to the resilience of the Moroccan monarchy is that of Abdeslam Maghraoui, a Moroccan scholar heading the Muslim World Initiative at the US Institute of Peace and a friend of Moulay Hicham, who told me in an interview for Radio SAWA that the democratic institutions in Morocco are not yet strong when asked to give his opinion about the public hearings. Dr Abdeslam Maghraoui is known to be very objective and very frank, hence the reliability of his statement. Dr Abdeslam Maghraoui described the creation of the commission as a "courageous and positive step toward democracy" even if he made his reservations about the exclusion of the Islamists who are today the victims of human rights abuses in

Morocco. Furthermore, "the public hearings will start as a reconciliation process and will end as a judgment institution" adds Dr. Maghraoui. After his appointment as the head of the Muslim World Division, Abdeslam Maghraoui reduced the intensity of his criticisms toward Morocco, established in published articles, to describe Moroccan reforms as "very interesting" since they are "a model to be followed by other countries."[8]

Abraham Serfaty, a former exile and one of the oldest political prisoners in the world told me in an interview that he agreed with the findings of the commission not forgetting to make his reservations about the condition not to name the responsible heads of those exactions. When asked about Driss Basri's opinion regarding the commission Serfaty said:

> *Driss Basri was the master torturer in Morocco, so he has the right to one thing only: shutting up. They should have judged him and put him in jail. They let him go to France but he has no right to speak now. Depriving him of his passport is the least thing that should happen to him.*

The resilience of the monarchy here is operated through two channels:

a. Serfaty, whose message is certainly very credible, joined the goal of the monarchy to tarnish the image of Driss Basri; and

b. the totalitarian thinking became embodied by one of its famous resistors (Basri should not speak, it is all right to deprive him of his passport).

6. The AMDH (*Association Marocaine des Droits de l'Homme*) and the non-conditioned public hearings

The Moroccan Association of Human Rights conducted, on the twelfth of April 2005, its own public hearings where witnesses were

[8] Georgetown University Conference, 4/25/2006.

allowed to give the names of those who were responsible for the abuse of their rights. Moreover, there was no time limit for the period covered by the public hearings. Hence, Khadija Pighizzini the Italian wife of a Moroccan-Italian Jihadi Salafi who is jailed in Morocco spoke about the plight of her husband. Among the critiques addressed by the AMDH to the Justice and Reconciliation Commission, one can find the fact that the Moroccan state never formally apologized to the victims. On the contrary the consultative Committee on Human Rights asked, in its April 1999 memo addressed to the King, "*to grant his generous pardon to each person who was involved in a crime against the state security.*" Furthermore, the role of memory was highlighted here since the destruction of secret prisons was supposed to leave place to turning them into a museum.

(1) The Legal Flaws

The commission is not an instance of arbitration despite its name since the latter is governed by articles 306 and 327 of the Moroccan Civil Procedure code. In this code, the parties concerned design their referees. Meanwhile in our human rights case it was the state only that designated all the members of the commission. Moreover, the code stipulates that the carrying on of the arbitrage cannot happen until approved by the head of the first instance tribunal. In our case, there was no judiciary control over the indemnity files. Finally, the code insists that the person leading the arbitration reaches a final decision within three months. In our human rights case, no deadline was set for the commission.

The legal flaws permeate also the composition of the commission since two members of the state (the ministers of interior and justice) are part of it in a complete breach of the principle of neutrality, or what is known otherwise as a conflict of interest. For instance, Abdelaziz Mouride, a leftist ex-political detainee, recalls how his tribunal president Mohammed Afazaz became a member of the Advisory Committee on Human Rights. Furthermore, the commission makes its decisions in secret and its debates are not public. This lack of publicity as a guarantee of fairness breaches the 1966 International Pact of Civil and Political Rights that Morocco signed.

(2) The Practical Flaws:

> The payment of indemnities is a burden carried by normal citizens who had no association with the abuses of human rights. Not only there is no legal text that specifies which instance of the state should pay the indemnities but the latter touch only two categories of abuses: arbitrary detention and forced disappearance. Houria Esslami, the sister of a disappeared doctor, opposed the commission's indemnities:
> As the family of a "*disappeared*," we are against the process of indemnification for those competent to stand on behalf of the dead or for the survivors, because indemnification should be the last stage of this dossier.[9]
> In the same spirit, Fatna Elbouih, a woman political prisoner, told me in an interview that she does not accept indemnities because they come from the state.

7. The Moroccan Christians and the taboos of the "new" regime

There is still a taboo in admitting that there are thousands of Moroccans converting to Christianity. I did an interview with Ali S, a Moroccan convert to Christianity living in the US and actively involved in the *Da'wa* for Jesus. When asked about the reason behind his undisclosed identity, Ali said: "the freedom of worship is not guaranteed in Morocco." Moreover, Ali added that the Moroccan Christians-who now have a website-, pray for the Moroccan King as a commander of the faithful and do not see themselves excluded from his rule. This stance towards Moroccan Christians, who cannot publicly declare their change of heart, will only strengthen the movement. For example, a musical Moroccan Christian group came out with a song after the bombings of Casablanca saying: "O terrorist, do not touch my country, I am a Moroccan Christian and I say it out loud." One can recall here the case of Benabdjelil, a prominent

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[9] Fédération Internationale des Ligues des Droits de l'Homme, *Rapport: Les disparitions forcées au Maroc: Répondre aux exigences de vérité et de justice* 298 (Novembre 2000), pp.1-115.

Moroccan convert to Christianity who reached high positions in the Vatican and who had met King Mohamed V.

The director of Moroccan palaces sent in 2005 a letter to the Weekly *Al Jarida Al Ukhraa* warning its editor not to publish any photos of the Royal family without his consent. The weekly Moroccan newspaper had published a story about the first lady in Morocco Lalla Salma. Furthermore, the newspaper *Al Ayyam* was judged because it published a dossier about the Royal harem of Hassan II based on an interview with one of his French doctors. Hence, the issue of gender becomes again at the core of any reasoning about human rights and by extension both the public and private spheres.

Any democratic coup aiming to overthrow Morocco's authoritarianism will fail in the long run because of the resilience of a pseudo-democratic political culture observed in tiny daily occurrences. As Guilain Doneoux emphasizes in a USIP publication, the Moroccan *"game is rigged"* and *"many believe they have no future in Morocco"* attempting hence a suicidal crossing of the strait of Gibraltar to embrace the European dream[10].

8. Conclusion

The analyses of democratization assume two things: that transition is a matter of short time, and all aspects of a democratic regime become institutionalized in a formal way one after the other. Consensus and pragmatism is given to justify elite choices without dwelling on further causes. That is the reason why we need to incorporate studies on civil society to see the interaction between the population and political elites. Another critique is the absence of concern with external factors as triggers of transitions. For example, the US ambassador Tomas Riley requested the Justice minister Bouzoubaa to stop the trial of the weekly *Al ousbou'iyya al Jadida* after it interviewed Nadia Yassine, an Islamic feminist, who publicized her preference for a republic in Morocco. The minister, who is a socialist, had to listen carefully to the American ambassador and by divine justice the court day was adjourned until an indefinite time.

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[10] Guilain Donoeux, "Challenges to Genuine Democratization in the Arab World" *http://www.usip.org/muslimworld/projects/case_study_morocco.html.*

The process of "*turning the page*" might generate some healing and open many wounds but it is a necessary process of democratization. Among its advantages one can cite:

> *...the necessity to retain large numbers of trained civil servants, the impossibility of dismantling a complicit army and police force, and the need to ensure a stable monarchy and parliament as these institutions progress toward economic and political reform.*[11]

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[11] Susan Slyomovics, "No Buying Off the Past", *MERIP* 229.

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THE DEVELOPMENT OF WOMEN COMBATANT ROLES IN CONTEMPORARY ARMED CONFLICT: THE CASE OF COLOMBIA

CATERINA CHANTAL ARENA

This study focuses on women's involvement in armed conflict, specifically dealing with their roles as agents of political violence. Particularly I analyse the female participation in the armed struggle within the insurgent group "Revolutionary Armed Forces of Colombia". Feminist theories constitute the theoretical framework of this analysis, in order to discuss the role played by women combatants in Colombia. The central point is to understand the needs of women combatants while taking into account the relationship between their involvement in the armed struggle, the specific goals they achieved in gender equality within the armed groups, and the role that society could give them during the post-conflict reconstruction. Additionally, this study shows that myths of women warriors are used to pull women into the fight. Gender equality issues are instrumental in framing the female participation. Nevertheless within insurgent groups, women face difficulties to challenge sexist stereotypes intrinsic to native culture, which could lead to the female exclusion from peace building process, thus misunderstanding their specific attributes as women and as combatants.

Introduction

The present study aims to provide information and data about female involvement in armed conflict within the insurgent group of the Revolutionary Armed Forces of Colombia.

Indeed, the relative lack of research in this field has contributed to the underestimation of the importance of the roles of women combatants during conflict and post-conflict periods. As UN Security Council Resolution 1325 (2000) underlines, the necessity to bring women's concerns to the attention of the UN itself and of the States involved in armed conflicts, is functional to increase women's decision-making roles with regard to conflict prevention and resolution (UN Resolution, 2000).

This article focuses on women as agents of political violence, who constitute a specific part of the whole societies where the conflicts take action. Particularly, the comprehension of the different conditions, motivations and needs of male and female combatants is fundamental in order to achieve the DDR (Disarmament, Demobilization and Reintegration) programmes and also to develop a gender dimension in the peace building processes. Indeed, with regard to DDR, the UN Security Council resolution [1325]

> *encourages all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants (art.13).*

As Mazurana stresses

> *earlier publications reveal that neglect of the many and complex roles that women and girls play during war and peace leads to less informed and effective DDR policies and programs that do not fully extend to the community level and may not contribute to peace (Mazurana: 2004,57). C*

Colombia presents peculiar features in the history and evolution of its conflict and the involvement of women in the armed insurgent groups is linked to contextual factors that are interesting to analyse. Moreover, the Colombian FARC present a high proportion of female combatants (constituting more than one third within the armed group) who are constantly increasing also due to the lack of solutions to the political violence. One of the main risks that these women would run in a post-conflict situation is being underestimated or not

recognized as combatants. This would lead to their efforts to pursue feminist goals being ignored in societies where the female traditional role conflicts with the idea of women combatants.

This article is divided in two parts: a theoretical framework and a case study exposition. The first part is aimed at defining several categories that will recur throughout the work, particularly in the part dedicated to the case study. The theoretical part is focused on different roles of women in war. It tries to explain the main theories and then analyse them from the point of view of Feminist Studies.

As Betty Reardon points out: "Research does indicate that the most of the behavioural differences between human males and females are the consequence of socialization and education" (Reardon: 1985, 8). Starting from this perspective I will deal with the deconstruction of sexist stereotypes about the attitudes of women towards peace and war. Particularly I will analyse the stereotypes of vulnerability and peacefulness traditionally attributed to women, in comparison with the opposite myths about female warriors. For this reason the Colombian case study is focused on the relations between male and female members within the armed groups.

1. Women At War: Deconstructing Stereotypes

Sexism, defined as the "the imposition of a specific sex-related identity, a sexually determined set of human attributes and sex prescribed social roles" (Reardon: 1985, 20) has deep roots in the world's history. Its transnational feature results in different impacts on women and men depending on the cultural and social context in which they live; but we can still refer to it as a universal phenomenon, based on the emphasis on the biological difference between sexes.

Indeed the most harmful assumption of sexism, based on the assignment of "natural" behavioural and separated characteristics of women and men, is their hierarchically based attribution of positive and negative values. The belief in the biological and intellectual superiority of men above women is fully held by sexism as shown by the attribution of positive values to men.

On the contrary, the attempt to deconstruct and then re-construct the positive and negative male and feminine values on a different basis is put into practice by feminist writers such as Betty Reardon.

In her view, the positive values are the "authentic" attributes that lead to the full realization of human potential both in the individual and social sphere, while the negative values are distorted which stifle human and social development. These negative values

> *underlie stereotypes and rationalize discrimination and oppression. Our present social order [...] is overly characterized by these negative values, both masculine and feminine (Reardon: 1985, 3).*

Following this perspective the stereotype, as a means to interpret or simplify reality through the construction of fixed categories, is based on one main image, idea or characteristic that has become standardized in a conventional form without taking into account individuality and differentiation.

Assuming that the fixed ideas implied in stereotypes are often discriminatory towards women, because societies conventionally give more value to men's "natural" attributes, stereotypes can be considered both indicators and agents of the society hierarchical order between sexes. As indicators they are useful in comprehending the individual and collective attitudes that produce the particular balance between male and female in different contexts. As agents, in the way that they are not deconstructed but used, stereotypes still play a very important role as instruments of discrimination.

1.1 Women as victims: the stereotype of vulnerability

Starting with the point that "masculinity, like war, is a cultural construction" (Pettman: 1996, 92) it is possible to individuate some "popular images" that associate men with violence and war, and women with peace and nurturing. As Betty Reardon points out,

> *men are socialized to be warriors, in their roles of either enemies or aggressors, while women are socialized to be victims and surrogate enemies. Each sex is trained to its role, not born to it.*

The feminization of the enemy has been discussed broadly by the feminist research on the war system's features. This attitude is visi-

ble from the gendered insults between opposing forces to the frequent sexual assaults against women during conflicts. Some theories attribute the misogynist attitude of the military to widespread aggressiveness towards females. Following this perspective, man's ancestral fear of women is the primary reason for attacking them.

As Simone de Beauvoir suggests there have been different kinds of myths and rituals all over the world instrumental to reducing the "dangerous" power of women, specially linked to the sexual and the reproductive sphere (De Beauvoir, 1999). Women were indeed associated with the negative powers of uncontrolled nature or to the diabolic temptations of passion that make manhood weak. They were charged with a fault intrinsic to their nature and impossible to borrow (the Christian myth of Eve is a clear demonstration of this). Following this perspective, men and societies had to neutralize this negativity by using different strategies: regulating women's life by marriage, establishing specific taboos or reducing their space of relationships. By the adoption of different ways to control women, channelling their negative 'power' in form more suitable and pleasing to men, the connotation for women shifts from the image of danger to the opposite standard of vulnerability. Thus, the final domination of women leads to their consideration as weak and consequently exposed to others' domination, so that they seem in constant need of protection.

Although the scheme drawn by Simone de Beauvoir denounces a certain simplification of the relations between sexes, reduced through these myths into a power struggle, it is true that the two mentioned categories, women associated at the same time to both fault and innocence, are still in use. In this perspective the relation between women, fault and enemization reflects the assimilability of women to innocence and victimization. But, given that the human behaviour is not as strictly dualistic as are stereotypes, there are still many categories that could be combined for the gendered process of enemization and victimization.

The assimilation of women to the nation or to the land is another way to gender armed conflict. Joshua S. Goldstein, among others, underlines this relation through many examples of war propaganda starting from the Second World War to the Vietnam conflict and to the Chinese/Japanese conflicts (Goldstein, 2001). As he underlines, in some cases the woman became symbol of the resistance to the enemy's attack while in other cases their violation is equated with

the defeat of the nation. Indeed Lois A. West recalled the classical association of men with the State and the woman with the Nation (West, 2005). Further, sexist stereotypes connect these associations to the idealized concept of women's bodily integrity: if women resist the enemy's sexual assaults they could symbolize the national integrity, if they are raped the nation is metaphorically contaminated, if they fight the nation seems at the last resort , if they are protected the nation is held secure.

All these stereotypes depend on the basic consideration of women as prey. Indeed masculinity's cultural construction is based on the image of the man as conqueror. If we associate this idea to armed conflicts, it is almost inevitable that women become virtual war booty. Moreover, the conquest implies the forced appropriation of the object conquered, so that from such a perspective women shift to become property. The problem, from a masculine point of view, is not considering the act of taking possession of females as embezzlement for the reason that women are human subjects and as human beings they belong to themselves. Masculinity puts into practice female embezzlement with even greater impetuosity if the woman in question "belongs" to another man or community of men. The great aggressiveness towards women belonging to the enemy community, as well as the specular care for the integrity of women belonging to one's own community, depends primarily on the high degree of competitiveness between men that masculinity underlies. From this perspective the rape of the enemy's women represents a continuation of the fight among men through the sexual dominance of the female body used as a "vehicle" for the symbolic depiction of political purposes (Handrahan, 2004).

1.2 Women as peace-supporters: the stereotype of sensibility and emotionality

In this section I will address the stereotypes about the "innate capacity for greater sensitivity or more moral behaviour to women", which depend on the general assumption of "feminine values and characteristics more human or humane than the masculine" (Reardon: 1985, 25). One suitable explanation for this deep rooted belief concerns the different patterns of education aimed to define and separate the men's from the women's sphere, through the

achievement of a distorted complementary scheme: if men are trained to be warriors, women are educated to be peaceful.Betty Reardon explains very clearly this process of differentiation:

The imposition of different forms of behaviour on men and women reinforces several characteristics of the war system: namely, the legitimation of aggressive behaviour and competitiveness among men is specular to the prohibition to indulge in aggressive impulse for women and their discouragement about competitiveness, except in the case they are fighting among them 'to win' and 'hold on to' a man. The cultural expectation of these patterns of behaviour is often perceived as necessary for order, security or the defence of national interests (Reardon: 1985, 19).

> *Indeed if women were trained to express aggressive attitudes this order would be overthrown, thus shifting the complementarity of men's and women's behaviours. Another factor that contributes to the cultural expectation of the peaceful woman is her duty to take care of the household and the children. This implies a broad spectrum of qualities, such as the capacity to organize the space and time of the family life, the ability to understand the needs of the children and their relations with the internal sphere (as father and relatives) and social circle, the skill to interlace connections with the neighbourhood and the community in general.*

All these abilities underlie the capacity to communicate, to comprehend another's feeling, to foresee and prevent some problematic situations, to be the bridge of the other's communication. Some stereotypes of women are strictly related to this trend of female life. Indeed the quality of mercy, often associated with the image of a mother, wisdom, by which she can advise and warn her children, and traditional knowledge, for instance doing handicrafts, are all qualities attributed to women because the patriarchal division of labour required the glorification of the female idea of cleverness. And clearly the traditional division of labour recognized the role of mothering as the primary function of the woman. Although, depending on the context, the attribution of these qualities would not fully reflect the actual condition of women, it is still probable that, as time has passed, many women really developed some of these attitudes.

Women are not by definition wild, merciful, sensible or intuitive but in some situations they are quite used to communicating, organizing, building relationships and intervening, whenever possible, to resolve conflict situations.

Some contemporary examples show this ability: in Colombia women are very active as supporters of peace especially within communities harshly impacted by the conflict, for example within displaced villages. This strong activity depends on a variety of reasons among which the traditional role of women in organizing the life of the community is a key factor (mutual collaboration in growing up children, the skill to provide the minimal food, resources to solve the housing problem, the establishment of an informal kindergarten, the possibility to keep in touch with other groups that can collaborate for the community's survival have been, for a long time, common practices for most Colombian women) (Moser & Mcilwain, 2001). In this regard, efforts to achieve visibility and subsidies through connections with institutions and human rights enterprises, and to build a peaceful context, are kept especially by women. This is so because women are used to establish useful nets and relations in order to maintain a collective way of life. Indeed, sometimes this represents their only way to survive.

It is also true that generally during wars and conflicts the male presence in the community declines because of their greater involvement as fighters. As a consequence, women have to supply functions that usually are of men's concern, thus gaining more space and the possibility to express themselves. In one sense, wars tend to break down the traditional roles performed during periods of peace, thus opening some "fissures" for other kind of social sharing. This is particularly evident in the case of Colombian female-head of households within the communities: "In IDP communities and areas with large numbers of single mothers, female-head of household have been targeted by armed groups precisely because of the strong community leadership they have exhibited when abandoned or widowed" (Unifem: 2004, 2)

As Simone de Beauvoir pointed out, this represents another typical stereotype: the "*heroic mothers*" are those that mourn and bury the dead accepting the sacrifice of their son in the name of the country (De Beauvoir: 1999, 221). The association of the mother's image with politics is used both to fight and to support war. In this way as Pettmann underlines, the stereotype of the peaceful mother vanishes:

> *There is no necessary relation between mothering and pacifism. Some mothers understand their attachment and responsibilities as requiring either the sacrifice of their sons for the state or nation, or the use of violence against other women's son and daughters. Many women do organize or participate in political action and resistance, and in support of armed struggles, as mothers. But we can make no presumption about their particular politics (Pettman : 1996, 121)*

1.3 Women as fighters: the myth of the Amazon

Resistance towards the image of women soldiers or fighters has been quite widespread. Indeed all the stereotypes mentioned about the traditional role of women in society become stronger when translated in the war system. From this perspective the normal function of women in supporting wars was not participation in the fight itself but their contribution to produce "*cannon folder*". Nevertheless other examples of women who worked for the war are also accepted, such as their strong (and cheap) labour in support of their communities, their function as cooks, nurses, spies, scientists, informers and weapon carriers. But their direct involvement in the fight has been scarcely recognized or legitimized.

Even when they began to participate in armed struggles, the army or the insurgent groups that held them as fighters presented many impediments to their recognition. A few representative examples: during the Second World War Russian troops successfully used women's armed corps, but repeatedly tried to stop this practice (Goldstein, 2001); and during the first formation of the IRA in Ireland and LTTE in Sri Lanka women were not allowed to embrace arms (Alison, 2004). They had to create political pressure in order to form the "women's front" that was legitimated after some years they commenced hostilities. Other cases of nationalist religious conflict, such as that of the Palestinians, show initial resistance, based on sexist religious rules, to keep women for suicide bombing attacks (Brunner, 2005).

This attitude arises from the combination of different sexist ideas. First, women's vulnerability could put the whole armed group in danger. Secondly, their physiological weakness does not cope with the

concept of warfare. Thirdly, pregnancy could be an obstacle to their motivation and physical participation in armed actions. Moreover in the common imagination of war, women are charged with a lack of responsibility because of their 'natural' fear and softness. Their capacity to behave rationally is seriously put into question when they join armed groups. The strongest reticence springs from the break in complementarity between the male protective function and the women's and children's need to be protected. As we have seen given that the second position (the protected) is characterized by subalternity (Pettman, 2001), this relation is deeply unequal.

In a specular way the myth of the Amazons, the most common image that associates women with battle, turned this balance upside down by proposing the idea of a strong group of independent and very aggressive young female warriors who are substantially not won, not submitted to males. The stereotypes that derive by this image, still alive in the collective imagination, are linked to women's power associated with the fierceness of animals and with the female willingness to subjugate men. This image expunges from women all their 'good' qualities, such as mercy, caretaking, and sweetness, while encouraging the ideal male characteristics of proudness, competitiveness and cruelty. The meaning of their name (without breast) refers to the practice of cutting off the right breast in order to comfortably grasp a bow during battle. Moreover their custom of sexually using men only to ensure female descent, the killing or rejecting of male babies, and the supposed practice of reducing men to slavery, is quite horrifying to the masculine point of view. Nevertheless, from another point of view, this myth could also symbolise the masculinization of women, rather than their dominance over men. Indeed, the only positive and traditional female feature that characterises the Amazons is their beauty, that leads to the male desire to win them and, at the same time, to their being defeated by their charm.

It is not a coincidence that women who join the armed fight are often required, and present themselves as determined, to behave "like a man", to cancel their "feminine" characteristics, among which the motherhood is again perceived as the questionable point of their identity as fighters. In some insurgent groups, as the guerrilla groups of El Salvador, the strong prohibition against women getting pregnant represents the consequence of the process of women's masculinization (Ibanez: 2001, 121).

But in other groups the image of mothers who fight because of

their maternal instinct for protection is quite accepted. As Goldstein underlines, there is a very famous picture of Vietcong women holding, at the same time, both guns and babies in their arms (Goldstein, 2001). In a sense this image recalls that the 'nation' is using all its resources to carry on the fight. Indeed although it is true that female armed participation put in question some traditional rules about men's and women's space, the overcoming of the patriarchal pattern seems to be trapped between change and restoration and there is no way to classify uniformly how these two aspects are put in relation.

Even from a women's rights point of view, strong female participation tends to open some issues related to women's liberation, as has happened in Iran. Indeed, some studies underline the concept of "feminist nationalism" to explain "cases where women's efforts to improve the status of women in their nation coincided with efforts of state-building" (West, 1997, 152).

Betty Reardon underlines the concept of "deterrence" to explain how sexism and war system, both based on patriarchal patterns, put in practice some strategies in order to prevent the achievement of liberation by the oppressed (women, minorities, and in general, "the third world") (Reardon, 1985). It seems important to consider which could be the deterrent strategies used against women who threaten the "natural order" by joining the armed struggle.

Forcing women back into vulnerability when the fight is finished (through the performance of their traditional roles) represents another way to consider their equality temporally determined. In this way women's participation corresponds to an emergency's measure. In other words: it constitutes the exception that confirms the general rule.

2. Colombia Case Study

2.1. The roots and evolution of the F.A.R.C.

The FARC arose in 1964, when a military operation ordered by the Government, with the support of US policy and funding, took place in Marquetalia against the so-called "Independent Republic" which was formed by Manuel Marulanda (the actual chief of the FARC) and Jacobo Arenas (a Marxist ideologue), with the aim of creating self-management and military self-defence communities (Molano, 2000).

Forty-eight guerrillas, among them two women, managed to escape from the attack and afterwards created the FARC in the mountains of Cauca, a south-western region where they hid. Clearly, since the beginning, the US invasive interests, foreign business enterprises, landowners' oligarchy and government authoritarian politics were targeted as the oppressive powers to fight on behalf of the Colombian people.

Indeed, the FARC defined themselves as the People Army (FARC-EP, Fuerzas Armadas Revolucionarias de Colombia - Ejercito del Pueblo) as they believed in the strong involvement of the lower classes to see addressed their right to education, health care, employment, housing and land as well as their right to participate to political decisions. As written in the FARC's statute "Our organization and arms should always be at the service of the people so that we are seen as their army. It is very important to transmit always our politics to the masses, so that they are conscious of it and therefore can participate in the struggle" (FARC-EP, 2000). This purpose was reached during the seventies and the early eighties, as from 1970 to 1982 FARC grew from 500 to 3000 members (Molano, 2000). Their popular support was found mostly among peasants but even intellectuals, students and workers who protested against the governmental repression of strikes and peasant movements. By 1986 the FARC had risen to 3600 members, reaching 7000 in 1995, 15000 in 2000 (Safford & Palacios, 2002) until almost 20000 in 2005 (UNIFEM, 2004).

The history of the FARC is characterised by attempts to negotiate peace with different heads of government. The most famous started under the Presidency of Belisario Betancourt (1982-86) who achieved a partial ceasefire with the FARC through the formation of a political wing affiliated to it (UP, Union Patriotica). This political party achieved a significant parliamentary representation during the elections in 1986, but it was progressively eliminated by paramilitary groups during the following years. Around 4000 members of the UP were killed as well as four presidential candidates in 1989 (Carlos Pizarro of the M-19, Jaime Pardo Leal of the UP, followed closely by his replacement, Bernardo Jaramillo, and the Liberal Luis Carlos Galan) (Prolongeau, 1994).

Meanwhile (1987) FARC joined other rebel groups in the Simon Bolivar Coordinating Guerrilla Groups (CGSB) to form a guerrillas' alliance in order to face the escalation of violence against them.

Moreover, as the model of the liberal economies was the disputed point, all the business associations criticized the Government for the

decision to discuss this kind of issues with illegal groups who did not have a legitimate position in the Colombian society. This remains a crucial debate for the solution of the conflict, given that the recognition of the insurgent groups as agents within the political agenda could lead to a reconciliation process, but it would imply their role of combatants within a context of internal conflict. Both the government and the insurgent groups know this possibility. In 1995, the Constitutional Court, with regard to the constitutionality of Protocol II of the Geneva Conventions in conformity with the Law 171 (whereby such Protocol is approved), declared it applicable, recognizing its importance for the Colombian conflict:

> *As regards the situation in Colombia, application of these rules (the obligations deriving from the principle of distinction) by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case (Sassoli & Boivier: 1999, 1367).*

In the same way the possibility to "foster reconciliation between the parties" is linked (according to the Court) to the respect of the rules of International Humanitarian Law (IHL) which

> *encourages mutual recognition by the protagonists and therefore promotes the peace process and the reconciliation of societies disrupted by armed conflict (Sassoli & Boivier: 1999, 1363).*

Even the FARC is conscious of IHL rules for the peaceful resolution of internal conflicts. Indeed they recognize themselves as a belligerent actor within the conflict, declaring that their statute and their practice are in conformity with the protection of civilians as well as with the principle of distinction.

They produced a document underlying their compliance with IHL in order to show their state of belligerence.

It (the document) concerns the state of belligerence covered by the international rules contained within the Geneva Conventions of August 12 1949 and especially the additional protocols. The material

clearly demonstrates that the FARC-EP has all the conditions so that it can be recognized as a belligerent force, in its structure and in practice. The Colombian Government and State have even recognized this. Despite this, there has not been any advancement in the juridical Status of the situation, which as is known concerns aspects of law in its different variations, the most decisive legal aspect being the political (FARC-EP, 2000).

Actually their respect for the civilian population is far from the required standard of IHL rules. Many reports denounce the FARC's abuses with regard to kidnappings, murder and extortions to communities living in the so-called "red zones" (areas where the army, paramilitary groups and insurgent groups are fighting for the control of the territory) (Amnesty, 2004). It is also true that the army, with the consent of the Government, attributes its own abuses to the FARC in order not to cover responsibility and to shame this insurgent group (Molano, 2004). The United Nation High Commissioner for Human Rights for the Human Rights situation in Colombia reported that the practice of paying demobilized persons to provide false testimony is also recurrent (UNHCHR, 2004). Nevertheless, FARC are responsible for the 16 % of murders against female activists, they practice sexual abuse and recruit minors (Amnesty, 2004).

Indeed, FARC continue to consider themselves as a political power closer to peasants, so that they constitute themselves as a little State within the State. Simon Trinidad, a commander involved in the last peace talks who was captured in 2004 and extradited to US, declared that people go to the FARC to see addressed their disputes with neighbours or their problems within the family. Although he did not agree about the FARC's voluntary replacement of the State functions, as judiciary or executive, he said that it was a necessity to do it on behalf of the peasants (Leech, 2000). FARC also contains a clandestine revolutionary organization, called the Bolivarian Movement for a New Colombia, which is considered the political alternative for the constitution of a new Colombian state, lead by the lowest classes.

In 1998 President Andres Pastrana visited the FARC-EP camps and met with their Commander Manuel Marulanda Velez. In the same year, members of the National Secretariat of the FARC-EP met with a governmental delegation. Finally, it was on the 7th of January 1999, that public peace talks in San Vicente del Caguan (region of Caqueta) were officially established. This area was one of the five municipalities demilitarized by the Government as a condition

demanded by the FARC-EP for the peace talks. National and international guests, representatives of the powers of the state and the accredited diplomatic body of Colombia participated in the negotiations. The failure of these peace talks led to another stage of intensified violence in which the FARC, now considered a terrorist group, are showing their military strength in opposition to the bloody attempts by the government to destroy them.

2.2. Data on female participation in the FARC

According to UNIFEM, "today one third of FARC forces are women" (UNIFEM, 2004). Indeed, they are around 6000 of 18000 combatants within this insurgent group. Nevertheless some sources suppose that female members of the FARC are near to the 45% (UNIFEM, 2004). Rebel leaders of the FARC said in 2001 that between 30% and the 40% is made up by women (Brown, 2001); although the majority of sources agree that the most accurate percentage is around the 30%. In 2001 FARC members were estimated at 17000 (Brown, 2001) (Leech, 2001), so since the time of the last peace negotiations to this moment their growth has been quite strong (1000 more combatants). Indeed it seems that during the period of the demilitarized zone, recruitment and training were intensified within the FARC. Particularly, many of the new arrivals during 2000 and 2001 were women. Nevertheless their increased participation, according to Brown, is visible since 1997: "The sharpest rise has come since mid-1997, when fewer that one-in-five FARC guerrillas were women"(Brown, 2001). There are even some motivations because FARC are recruiting more women than in the past.

The first factor seems strategic: the role of women in intelligence tasks has been appreciated during different military operations. Women can easily infiltrate themselves as house-maids in luxury buildings and provide information about persons targeted by the insurgent group for kidnapping or murder. In July 2001 the column Teofilo Forero used this method to prepare the kidnapping of 15 people in Neiva (Mcdermott, 2002). By assuming the traditional stereotype of seductive women sometimes they are required to extort information from policemen about important strategic matters. According to a Colombian NGO, in 2003 three girls were killed by the FARC because they refused to use seduction to obtain information

(UNIFEM, 2004). Another factor seems to be the lack of combatant men with relation to the intensified violence (McDermott,2002) (Woroniuk, 2002): "the presence of so many female combatants at La Plata shows FARC is increasingly forced to rely on its women warriors as the intensifying war puts the rebels under greater pressure" (Woroniuk, 2002). The journalist is speaking about a bloody fight near the southern city of La Plata where 52 persons between the army and FARC rebels (with a high percentage of young women) died in July 2002. Of course not all female members of the FARC are combatants on the frontlines. Some are fighters, some others are working in intelligence roles, recruitment, tasks of propaganda or traditional gender roles such as cooking and cleaning. Nevertheless the initial training in combat is obligatory for all members, without taking into account the coming tasks.

2.3. Motivations of the female participation in the armed struggle

As I explained before there are many reasons that contribute to female involvement in the armed fight. Apart from the personal motivation and experience of every woman joining the struggle, the Colombian context presents basically three pushing factors with regard to this choice:

(1) the feminization of poverty,

(2) the widespread violence linked to displacement and human right abuses and, particularly for minors,

(3) the crisis of the traditional family structure (mainly within the rural areas) affected by economic difficulties and often by domestic violence.

Of course all three elements are in relation to each other, but usually one of the three mentioned elements is stronger than the others. There is even an ideological component among the factors of women's involvement in the struggle, although I found few cases related to it. Many young women are politically indoctrinated within the FARC, and afterwards become more conscious about the reasons and purposes of the armed fight.

The feminization of poverty is provoked by the deeply rooted sexist structure of society: women earn less than men doing the same job (wage of 66% lower than men according to Brown), they have a low degree of literacy which affects their access to work and they are often charged with the whole family's economic survival (there is a very high percentage of women who are the head of the family). This situation is often mentioned by studies on the topic of Colombian women joining insurgent groups (Keirns, 2002) (Amnesty, 2004) (UNIFEM, 2004) (Human Rights Watch, 2003) or developing other kinds of illegal activities, including prostitution, in order to survive (Leech, 2001). Even members of the FARC, at different levels of command, mention women's economic difficulties as a strong factor for their involvement in the group. Some interviews with women combatants (from peasant families of Southern Putumayo and Huila, which indeed are very poor areas) confirm this trend: they joined because they could not find a job and their families were unable to feed the newborn children (Brown, 2001). Olga Marin, wife of Raul Reyes (the official spokesman of the FARC), works with the team of FARC envoys who travel trying to achieve international support. Her opinion is quite similar: "The economic crisis has meant that women cannot find a suitable place in society and see greater possibilities in the armed struggle" (Brown, 2001). The FARC Commander Simón Trinidad underlined that in Colombia there are many young girls, "exploited in the coal mines, the gold mines, the emerald mines, and in the coca and poppy fields", as many of them "in the streets of the cities doing drugs, inhaling gasoline and glue".

Trinidad added even the story of a girl (voluntarily joining the FARC) who was sent back home because she was too young, although afterwards she started to work in prostitution: "She is 14 years old. A child prostitute. She was better in the guerrillas. In the guerrillas we have dignity, respect and we provide them with clothes, food and education" (Leech, 2000). This is a classic explanation for recruitment of minors by FARC members. Some combatant women from Colombia explained during a workshop held in Geneva that the FARC offer protection to young girls at risk of abuses by the military (or paramilitary groups) (Mazurana, 2004).

Apart from the moral (and juridical) judgements regarding these justifications, it is also true that young girls and women go to FARC to seek revenge or to address their security problems: "I just want-

ed revenge and although I was very young, I begged the guerrillas to let me go with them" pointed out a twenty seven years old female combatant who saw abuses on her family when she was only twelve (Brown, 2001). Eliana Gonzales, one of the oldest female guerrillas (fifty years old; she joined the FARC when she was eighteen) said: "I am a daughter of the violence that has isolated this country for the last 40 years". After her mother died of illness and her father was killed in a political dispute, she decided to enter the FARC. Her first husband and her son (only eleven years old) have been also killed for political reasons (the son because her mother is a guerrilla). But the most interesting thing she said is about her daughter, who also joined the guerrilla after her father's death: "She has done well, she has learned a lot. Here you learn who you are. You feel fulfilled because in the civil life you are just one more on the misery belt around the cities" (Galdos, 2004).

Unintentionally Eliana explained another reason of involvement for girls and women: the perspective of an adventurous life and the performance of an active and important role far from the daily life of exploitation and misery. Indeed she is not the only one who declared the charm of the guerrilla life in opposition to the lack of greater alternatives: "I went because I was bored at home and thought that life with the guerrillas would be an adventure. At 13 I did not know what I wanted to do, I did not realise that I could study like I am now" (McDermott, 2002) said an ex female guerrilla who deserted the FARC. Of course this is even an appealing reason for men, but for women there is an added component, given that they can fulfil themselves in a way that does not exist in civil life. A group of ex-combatant girls interviewed in a rehabilitation centre said that, within the guerrilla group, they participated in "criticism" groups where they developed communication skills, gained knowledge and progressively learned to teach to other members: "If it were not for the fighting, the girls would have preferred life in the armed group over their life as a civilian" (Keirns: 2002, 4). Women can become commanders, perform tasks of responsibility, give orders and express their opinion in the established spaces for it (political debates, training groups, workshops). This is quite different from the traditional rural life in Colombian society. Finally, another gendered reason for female involvement is the high percentage of sexual abuses and domestic violence within the family. Of course minors are more at risk:

My father [sexually] abused me from the age of five. He did not want me to study or talk to anyone. Just work milking the cows. My mother knew nothing. He gave the orders. My father came looking for me but I did not go back. The FARC gave me an AK-47 with three ammunition magazines, clothes and boots. He [the father] couldn't hurt me any more. [...] Now that I am no longer fighting, I would like to go somewhere else to study and work. Because I am worth it. I've never told anyone about the abuse. Nobody has ever asked me about it before. And anyway you keep quiet about such things. All I knew was that I had to get away (Amnesty: 2004, 12).

2.4. Equality issues: what equality means within the FARC

Many female members of the FARC are very determined when they explain in what way the FARC intend equality and non-discrimination principles within the group. They have clearly repeated during various interviews that there is not sexual exploitation within the FARC and that women have the same duties of their male counterparts. They strongly underlined that women don't enjoy concessions because of gender, specially when they have to perform physical-hard tasks, as "hiking over rough countryside with backpacks weighing up to 75 pounds, or frontline combat duties" (Brown, 2001). Indeed the women's opinion about equality is often considered in relation to physical and professional attributes that are judged as being the same as men: "Women are not treated differently, we do not cut them any slack during training or operations. (...) They march with the men, they carry their equipment and they fight just the same" told Marianna Paez, a thirty-eight year old female commander (McDermott, 2002) who participated in the peace talks in 2001. And indeed women and men are trained together, go to the same military operations and there are not separated corps of women combatants.

Equality is an issue often mentioned within the FARC, by the political and social point of view to the gender perspective. So, just as there should be equality between the rich and the poor, the black and the white, women, and even children, are treated with equality in the sense that they are required to do the same things that men do like embrace arms, be trained in politics and express their support for the

fight. In order to eliminate any kind of discrimination, strict rules of behaviour have to be followed: "Regulations have no friends" is the meaningful saying within the camps about discipline, which is indeed considered one of the pillar of equality (Human Rights Watch, 2003). Punishments for serious infractions are usually decided by war councils, where all the participants of the front vote for which punishment has to be used (death or a lesser punishment), which in a sense represents a way to reproduce a "democratic" structure of judgement. Sometimes executions are used to show that friendship or any kind of strict relationships should not interfere in the judgements: a friend who votes "no" to the death penalty at the war council is probably chosen to execute the transgressor. I want to mention an example of summary execution in relation to the idea of gender equality within some fronts of the FARC.

Marcos, the gun expert, told us how three adolescent girls - aged fourteen, sixteen, and nineteen-defended a girl accused of being a police infiltrator. The trio insisted that the accused be spared to respect her rights as a woman (the war council was held on International Women's Day). The war council voted that she be killed. The girls who had defended her were selected to pull the trigger (Human Rights Watch, 2003).

In general, principles of positive discrimination (although the case mentioned is not the best to talk about positive discrimination) are considered as privileges that could damage the order among comrades, which is not as horizontal as the strict rules of conduct could suggest. FARC follow a vertical hierarchical structure of power and commandants have discretional powers about slighter infractions and permissions that usually should not contradict the Statute. Nevertheless top ranks can authorize or alter decisions on executions and other important matters.

Indeed, the criticism that Flor Romero offers about gender and hierarchical order is focused on the favouritism which protects the wives of the high quarter chiefs and, in general, the female relatives of guerrilla men, from the risks of the armed fight:

The curious thing is that the daughters or wives of the guerrilla men do not increase the commando troops. Just to let you know, neither the partner of Manuel Marulanda, known as Tirofixo and chief of the FARC, nor the ones of the other chiefs participate in military operations. There are no sisters, mothers or daughters of the guerrilla men in the ranks. Neither Olga Marin, or Liliana Lopez, wife of

Raul Reyes, spokesman of the FARC, fights. She is chief of the Public International Relations and just attends meetings (Romero, 2003)

On the other side, during an interview with the review Links, the above mentioned Olga Marín confirmed that the lack of specific policies about FARC's women does not imply that discrimination is allowed, although she recognized that sexism is a reality even within the FARC:

> Journalist: *Does the FARC have specific policies to promote women?*
>
> Marín: *As a policy, no. The FARC is a military political organisation for women and men and there are no different rules based on gender. There is a clause in our platform stating that women are free to be active in the guerrilla movement and prohibiting discrimination. As in every society, and as Colombians brought up in a capitalist society with its associated class relations, sexism is real, both in men and women. But of the women within the FARC, some 30 per cent, many are in mid-level leadership positions in the various fronts. Those who are able and willing can fight at the front line. Others choose to become involved in educational or political work. As women, we often have to fight against our own weaknesses, against our own form of sexism as well as sexism of the men (Jennings, 1997).*

The conception that Olga Marín underlines about the breaking of sexism is indeed linked in her view to the elimination of women's vulnerability or 'weakness' through the fight, or through the general participation in the activities of the insurgent group. Nevertheless, this is the central point that leads once again to the assumption of the sexist value of male strength as the guiding rule for the women's behaviour: they have to be strong as men are. In a sense the masculinisation of women becomes the goal of the gender's equality.

Even though women pay for their involvement in the armed struggle by renouncing maternity and developing traditional men's skills, none of them is in the group of the seven persons ruling council, which is still an all male domain. In the same way there are other signals of inequality within the FARC, as in the fact that men are

usually allowed to have love or sexual relationships outside the camps while the majority of women are not (McDermott, 2002). Maria Eugenia Vasquez Perdomo was a combatant in the former M-19, where the concept of equality was quite similar to the FARC: "The fact that I was a woman by biological definition did not bother me, but I was not very aware of what it meant, either, in world that made us all the same in ideology. Equality weighed more than difference" (Schmidt, 2003).

2.5. Issues of maternity: pregnancy and forced contraception

Despite FARC's drive to employ more female guerrillas, women provide the domestic labour in the camps and are vulnerable to unscrupulous leaders who enforce strict decorum from their foot soldiers but not on themselves. The FARC impose strict rules on sexual relationships and forbid pregnancy, which often results in forced contraceptive use abortion and abortions (UNIFEM, 2004).

Indeed, love relationship is not forbidden but it is obligatory to ask permission from the commander to form or to break a couple and to have a sexual relationship, which implies a very intrusive attitude in the intimate life of the combatants (Human Rights Watch, 2003). The commanders can even decide to stop a love relationship between a couple, namely because it is interfering with the guerrilla work (Mc Dermott, 2002). They usually are charged with birth control within the front and give contraceptives to the male and female members when they ask permission to have sexual relationships.

The use of contraceptive measures is not a choice up to combatants but has become a rigid rule: "Well it is not written anywhere that we cannot have kids, but there is an obligation to plan against such. (...) It is understood that we are professional revolutionaries. Now while that might not be stated when you join, slowly that is made clear to you, as it is very difficult to be a revolutionary and be a mother" said the commander Marianna Paez (Mc Dermott, 2002). The forced contraception is mentioned by many sources. A study conducted on female soldiers found that within the guerrilla group girls receive contraception "immediately upon their entry into the armed group" (Keirns: 2002, 9). Mostly they were given an injection every six months, while condoms were used only by men infected by HIV. Indeed a girl reported that contraception, like pregnancy, were con-

sidered matters for women. It is considered their responsibility to take precautionary measures because, as the commander explained, women make the decision about the possibility to have sex with their male comrades. Pregnancy is strictly forbidden and the women are warned about this since the beginning of their involvement. In case of pregnancy abortion is the main outcome, even when women don't agree. Another girl pointed out that pregnant women could be even killed for this (Keirns, 2002).

This is not only a practice of the FARC. Vera Grave, a senator who belonged to the M-19, wrote in her book that women were not allowed to have children. She had to abort as her partner simply said that any other solution was not possible:

> *What for many people represents an ethical or juridical question constitutes for us (the women guerrilla) pain and violence. This has been one of the most critical debates with myself (Grave: 2002, 179).*

Olga Marín from the FARC takes another perspective:

> *Why are women the ones who should renounce this fight (the guerrilla's fight)? Why are women the ones who should solve the problem of children by desisting from their contribution to the (guerrilla's) project and from their self-development? Why should always women have to sacrifice themselves? (Lara: 2002, 117).*

For security reasons, women who belong to the FARC, ELN, EPL (and the past M-19) cannot maintain contact with their sons or daughters. Of course some women (especially among the veteran ones) manage to write to their families or to visit them once a time, although this is not usually allowed. Others could carry on their pregnancy (with the special permission of top ranks), but they had to leave their children to civil relatives, the more possible far from the struggle. It is clear that for women the choice to join guerrilla groups represents an out-out, that is family or fight. And indeed many of them say that the guerrilla group has become their family (Galdos, 2004) (Keirns, 2004). This is true for men too, but as I underlined, they are freer to go out from the camps and, within the Colombian society, are considered less responsible about the growth of children.

Indeed civil society often shames guerrilla women for leaving their sons and daughters. I would like to mention an article published within El Espectador, one of the main newspapers of Colombia. It was written at the time of the peace talks when women of the FARC began to tell their stories to the journalists.

Within the camps there is no dispute neither about the priority that the women give to their own interests to the detriment of their children, nor with regard to the respect of freedom. On the contrary, for these skilled women everything is all right. It is said that female guerrillas are very responsible women - which kind of reputability are we talking about? By leaving their children alone? - and that they assume with more passion commitments and challenges - by kidnapping innocent civilians? Responsibility is the last quality that could be attributed to these women (El Espectador, 1999) .

This constitutes an important issue for DDR programmes, which will have to face in the majority of cases disrupted families and often the rejection both by children who feel abandoned and by the society that does not accept the image of women combatants or the renunciation of the role of maternity.

2.6. Violence of the FARC against women

Although sexual abuse is forbidden within the FARC, UNIFEM reported that girls are often abducted and some of them reduced to sexual slavery (UNIFEM, 2004). The rules establish that rape should be punished with execution by the war council. According to the normal procedure, a sexually abused woman first must report it to the commander (McDermott, 2002). Nevertheless others studies report that usually women don't tell about abuses they suffered because this could put them at risk if the aggressor is not considered guilty. And if he is executed they face hostility from the ranks (Mazurana, 2004). Moreover there are many cases of middle and high level commanders who have sexual relationships with girls between twelve and fourteen, because of the privileges or protection that commanders could provide to the girls (Human Rights Watch reports that commanders often give presents or money to the girls just arrived to the camp) (Human Rights Watch, 2003) (Gonzales, 2002). Rape is considered a serious crime even if perpetrated against civilian women. In general FARC say that they try to not damage the civilian popula-

tion, and especially women, because often they rely on their help for food, information, clothes washing or any kind of goods that are not available in the camps (Mazurana, 2004). Nevertheless, problems arise when someone is suspected of collaboration with the Government, army or paramilitary groups. There are cases of women who have been raped once they were captured by the FARC:

> *Members of the FARC have also carried out sexual assaults on women and girls living in areas where the group has a presence. Breaches of the ban on civilians fraternizing with members of the security forces or paramilitaries have sometimes resulted in rape and killings. In some areas, the FARC have declared women and girls who associate with soldiers and police to be "military targets". Sexual abuse is sometimes the punishment meted out to women and girls who "transgress" in this way (Amnesty, 2004).*

Of course desertion is another reason to be executed, and in many cases girls and women escape because they do not want to have an abortion (Human Rights Watch, 2003) (Guillermo Gonzales, 2002).

Now, there is another issue that I would like to outline about sexist stereotypes which lead FARC to exercise gendered violence. The UN Commissioner for Human Rights said that in Colombia "lesbians, gays, bisexuals and transgenders were also victims of abuses and discrimination, including mistreatment and acts of 'social cleansing', because of their sexual orientation" (UNHCHR, 2004). In particular for the FARC, prostitution and homosexuality are generally considered transgressive practices that have to be eradicated or at least discouraged.

An interesting article from Amnesty International described how two lesbians were forced to leave their house by the FARC. Paramilitary groups target lesbians too, and rape and kill them. Amnesty underlines that these armed groups, fighting each other, are curiously close with regard to intolerance about sexual orientation and prostitution (Amnesty, 2004a). With regard to prostitution, this practice is not usually punished, but FARC can decide to 'grant' the custody of the children to the father if there arises some dispute between the couple (Leech, 2000). Another case is reported by a former (minor) combatant within the insurgent group, who was ordered

to shoot a woman accused of "practicing witchcraft, of casting spells on people who she did nott like and stealing things from people in the neighbourhood" (Human Rights Watch, 2003). Again stereotypes about witches, or women considered sexually compromised, are not alien to the FARC. Sexual control of women within the group is quite accepted by women too: "The guerrilla movement says that women are free here. But that means free to learn and act. That doesn't mean, though, that she's free to have five or six partners. If we're carrying out the armed struggle, things have to be well-ordered", said a female commander (Brown: 2001).

Other kinds of problems arise from the lack of proper contraceptive measures in relation to gender discrimination (as we have seen FARC women have to use mostly pills, injections and intrauterine dispositives): in the Department of Santander, UNIFEM found that seventy percent of former female combatants and camp followers present sexually transmitted diseases (UNIFEM, 2004). Moreover, the access to health care centres is very difficult both for guerrilla members and displaced persons, being the last ones prevented by the escalation of violence to move out from the place where they take refuge. (Elustondo, 2003).

According to Amnesty:

> *Driven by homophobia, the armed groups have responded to the spread of HIV/AIDS by expelling civilians from their homes and killing individuals suspected of being infected, including members of their own forces. Women fighters were more likely to be killed than men, according to testimonies from former FARC combatants. It is the women who suffer all the consequences. Men are not obliged to use condoms but pregnancy is punished. While a woman who is HIV-positive may be shot, there are [infected] men who are not. (Amnesty, 2004a)*

> *It is also important to underline that "discipline in the FARC-EP is particularly strict, suggesting strongly that the abuses committed by guerrillas, including children, are the result of specific orders that have been carried out and are not the product of misconduct" (Human Rights Watch, 2003).*

2.7. (Deconstructing stereotypes) Analysis of the women's FARC statement: gender's roles within the political ideology of FARC-EP

To conclude the above exposition I would like to quote and afterwards comment "the international women's day statement of the FARC", in order to show how women officially are appealed to participate in the FARC struggle.

INTERNATIONAL WOMEN'S DAY STATEMENT OF THE FARC-EP

March 8, 2001

The sublime expression of women must be valued in its tenderness, both in their sacrifice for their children and for the causes of freedom. From these two elements the integrity of the human being comes about.

Spartan women loved and trained their children for combat. In the same way, the Amazon women in the south and in the Gaitana in Colombia did the same against the European invaders in America. During the wars of independence they gave displays of courage that lit the path of the victors, among them Manuelita Sáenz. Finally, in the great universal conflicts of all times they have left their stamp of heroism. It is not in vain that the most beautiful symbol of the French revolution and of freedom is a woman.

The imperialist assault on Marquetalia in 1964, the origin of the Revolutionary Armed Forces of Colombia People's Army, met the resistance of the women guerrillas Miriam Narváez and Judith Grisales. In the revolutionary assault on July 26, 1953 on the Moncada garrison in Cuba, there were Melba Hernández and Aidé Santamaría.

The class confrontation against capitalist exploitation produced, and continues to produce, episodes in which valour and sacrifice for the cause of the oppressed reaches such a level of intensity that humanity cannot but recognize and commemorate them every year. International Women's Day praises those tragic moments in which the determination assumes epic proportions. In those moments, women have never wavered one instant in assuming that determination, with their physical death if necessary, in the face of enemy arrogance.

Humanity, in its incessant search for spaces and new forms of the confrontation of the social classes, in its universal dimension and in the 21st century, has brought us the possibility to objectively understand the commitment of the proletarian women to our class in the socialist framework as well as their inhuman conditions under capitalism. The first case exists in the context of the sciences, technology and social equality; in the latter case, under the weight of neoliberalism, misery and discrimination.

In socialism, women are in the forefront of all fields of human labour, even fighting to defend the homeland at the highest military levels. Under capitalism, they are leaders in the various forms of class struggle, which extend from the struggles in the streets to its highest expression in the form of guerrilla war.

For this reason, we want to send our Bolivarian greetings to all guerrilla women fighters of the FARC-EP, and to the women of Colombia and the world. Let your cries of anger and protest continue to be heard against social injustice, wherever it may happen.

With Bolivar for Peace and National Sovereignty
Opening new roads to the New Colombia
International Commission, Revolutionary Armed Forces
of Colombia People's Army (FARC-EP)

3. Farc-Ep Statement: Deconstructing Stereotypes

In order to analyse this brief Statement made in 2001 to celebrate the 8th of March I will recall some of the before described categories. As we have seen, the participation of women in the armed struggle links, at least theoretically, their involvement in politics to several women's issues. This connection allows the creation of ideological space for women's motivations for the fight, apparently giving back to them the important role that society has historically denied them. According to this operation, first women are defined, valued and praised for their most beautiful distinctive quality, which in this case is "tenderness", following the stereotype of women's sensibility. But then, this characteristic is linked both to the women's 'nature', represented through the correlated "sacrifice for children" and to women's history, to which they have supposedly contributed with their cause for freedom.

These two elements (nature and history), opposed by definition, are used to recognize the traditional role of women in society and, at the same time, to glorify their liberation's fight. Particularly, the latter element is framed against external actors, as colonising powers, rather than internal traditional rules that produce discrimination within the Colombian society. Indeed the element of freedom seems more functional to FARC's ideology, although the idea of "sacrifice", by then spoiled by the role of maternity, is also quite remarkable of the whole statement.

Even the myth of the Amazons, that traditionally symbolizes the female fight against male hegemony, is used in another sense, recalling the indigenous struggle against the European oppressor. The assimilation of Spartan women, the warrior's skills of the Amazons, the courage of Joan d'Arc and the sacrifice of Manuela Saenz are all elements that contribute to the framing of female engagement in the struggle as "epic".

From this perspective, the strong determination of women that do not hesitate in front of death has overthrown the women's vulnerability stereotype, making women instrumental heroines for the land-defence. The issue of discrimination is then used to mean that women may and should fight on behalf of themselves for the social justice against capitalism, without touching the point of their own oppression within the society.

The ambiguity of the statement with regard to women depends on the combination of different ideological claims, selecting from them the slogans more suitable for female participation in the fight, through the use of more traditional stereotypes. Indeed, nationalist claims are linked with socialist ideals, by unifying the fight of Bolivar for independence with the struggle against the unfair system of capitalism.

Consequently, women shift from mothers (by using the stereotype of women as mothers of the nation), to fighters for their land against the external oppressor (recalling the myth of the Amazon linked again to the feminization of the land), and then to a special category within the oppressed proletarian class (reminding issue's of women discrimination within the capitalist system). Women in the FARC are supposed to take all these struggle's traditions, opening themselves to an international claim of women's issues which do not go beyond the "proletarian" claims of socialism and the heroic commitment to the nation.

Conclusions

Taking into account that the aim of this article was to analyse women's involvement in the armed fight, I focused particularly on their roles, needs and perspectives with regard to gender equality. I will now underline the main results of my research:

a) Colombia is a country where the roles of women are underestimated from a political, economic and social point of view. Women that joined FARC, although in the most of cases they did not initially hold specific gender goals, came to believe that their involvement was important also in addressing gender equality issues within their society. Indeed, this case study shows how the need to be considered "equal" to men played a great role in motivating women to carry on the fight and to assume a way of life completely different from the traditional female one.

b) The same armed group appealed to female participation by underlying the discrimination that women usually suffer due to their assignment in subordinate roles. FARC offers strong propaganda to pull women into the armed struggle with the promise that in that context they would be respected and considered capable to do everything that men do. From this perspective, the value of women combatants has been assimilated to an imitation of the male role in the fight, with all manner of sexist stereotypes that this assumption implies. The theoretical feminist framework agrees on the fact that men and women are socialized as aggressive or peaceful, respectively. Thus while the roles of warriors and protectors are usually assigned to men, women are traditionally identified as bearers of life, implying attributes of softness, vulnerability and emotionality. It is for this reason that the conception of women combatants has been used to symbolize the overthrow of a deeply rooted pattern which separates men from the women's sphere by attributing opposite characteristics to each other, thus leading to the 'sexual alienation' described by Betty Reardon.

c) Nevertheless, the analysis of this case study reveals that women's involvement in the armed fight depends on various motivations among which the specific impact of war on women (conflict factors) and the traditional oppressive sexist practices that affect them within their societies (pre-conflict factors) are the main causes.

- The conflict factors include displacement (given its huge proportion in Colombian context), gender-specific threats to

women (rape committed by paramilitary groups, high rates of domestic violence and harassment, forced abduction of girls by the armed groups), and the disruption of traditional gender roles due to the conflict itself (high rates of widows, orphans and dispossessed people who have to provide to their own survival without the support of the traditional family's pattern). The desire of revenge for abuses suffered or seen makes also part of this set of reasons for women joining the insurgency in this context.

- The pre-conflict factors are linked to the traditional views of women's roles in the family and in the society where women are not allowed to develop their capability outside of the private sphere. Some women joined the struggle to avoid such pressure in order to achieve an alternative way of life.

d) This Colombian case study shows how traditional gender restrictions were mostly removed within the armed groups although this "freedom" was strictly ruled by a military hierarchical order that women could not question, even when issues as sexuality, marriage and pregnancy affect more them than their male counterparts. Thus women within the FARC are forced into abortions or the use of contraceptives dangerous to their health (male comrades are not submitted to specific rules in this regard). These characteristics are meaningful to an ambiguous policy about gender roles within the armed groups, especially taking into account that women are less represented than men in top decision making committees and that their goals are perceived as secondary to the fight itself.

e) Apart from the implications for life within the camps, where (especially within the FARC) gender abuses have been reported, another important point is to understand how women are and will be involved in negotiations, peace talks and DDR programmes. Indeed, even during the conflict itself women could be important in promoting International Humanitarian Law (IHL) and International Human Rights Law (IHRL). As Mazurana stresses: "Women within armed opposition forces may be more inclined than their male counterparts to view sexual assault against female civilians and members of their own forces and killing of children and civilians as unnecessary and abusive and seek ways to address or prevent it" (Mazurana: 2004, 45). The recognition of women's struggles could be a means to pressure armed opposition groups in promoting key aspects of IHL and IHRL. This step is particularly advised during the pacification

process because the participation of women in round-table meetings with international actors give them visibility and power to speak about this (for instance formalizing or strengthening internal codes of conduct or disciplinary codes to incorporate IHL and IHR provisions). Nevertheless, concerning this case study, women seem not to yet have the necessary power, or possibly the willingness, to hold this kind of role within these armed groups, despite their high proportion.

f) The issues of gender equality born or held within the insurgency, although not fully developed, could have both a positive and negative impact on the society at large. Indeed women within this group reject traditional forms of gender oppression and push for ideals of liberation. At the same time, they do not recognize that the character of the armed struggle itself separates them from civil society, thus eliminating other possibilities to support feminist goals. Consequentially, the future outcome of their roles in post conflict periods are not so clear.

- With regard to the FARC the failure of the last peace negotiations in 2002 closed, once again, any possibility to recognize the roles and goals of women within that movement, although it should be underlined that those peace talks included only one female member of the insurgent group: "Colombian women have never been represented as a sector at formal negotiations with guerrilla groups. However, during the 2002 negotiations between the FARC and the Pastrana administration, one woman participated in the Thematic Commission on Behalf on FARC and one woman participated in the Notable Commission." (Rojas, 2004)

This is indicative of the risks of a peace-building process in which women combatants (and those belonging to sectors of civil society) are not considered as actors in the creation of democratic institutions.

g) As shown in the above analysis, the image of women involved in the armed fight is not accepted by society, so that their difficult reintegration could be another reason for rejecting options of disarmament and demobilization. Women belonging to FARC have a fearsome reputation and their choices could be seen as threatening the cultural expectations on traditional gender roles. For this reason, a special concern about their needs in a post-conflict reconstruction is necessary, which also takes into account that their experience within

the armed groups led mostly to a process of masculinization or the eradication of their "femininity".

h) I focused on the kind of conflict that involves the FARC and tried to explore its features with regard to the ideological premises of the fight and the gender's commitments to it. My analysis has stressed that FARC has a deeply rooted experience of insurgency. It controls huge parts of territory and population and gains resources by means of constant mobilization. The participation of women is linked to this reality and threatening practices impede them, as their male comrades, to leave the group if they are willing to do so. In a word, the commitment to the cause of social justice becomes compelling from the beginning of such a choice.

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Note: Internet sites have been accessed between February and July 2005.

LAND RIGHTS AND HUMAN RIGHTS IN TRANSITIONAL STATES[1]

BEN CHIGARA

"Now the sons of Noah who went out of the ark were Shem, Ham and Japhet. ... These were the sons of Noah, and from these the whole earth was populated. And Noah began to be a farmer, and he planted a vineyard." Genesis 9:18-20

This lecture examines a problem that is overdue the attention that it duly deserves. This is the problem of land. I purpose to do three things. Firstly, I will problematize land generally. Secondly, I will contextualise land problems by examining the land issue in the Southern African Development Community (SADC) by examining Zimbabwe's land issue. Finally, I will propose a strategy for the resolution of Zimbabwe's land issue that has caused enormous travail in Zimbabwe itself and the Region and abroad.

1. The problem with land

The problem with land inheres in its elemental qualities that are beyond dispute. Domestic lawyers are acutely aware that: "... in the

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[1] Inaugural Professorial Lecture, Brunel University, 29 January 2007. The author is grateful to the following: the independent referee of the Mediterranean Journal of Human Rights for comments on an earlier draft; my wife Constance Chigara; and my sons Benedict Chigara Jr. and Barnabas Chigara for their loyalty and support. Amai - naBaba - naMbuya - naMukoma - vese Ndakavaona - vese Handichavaoni.

case of real property there is a defined and limited supply of the commodity" - per Lord Browne Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals* Ltd. [1994].[2] International lawyers too recognize the fact that in the relations between States title to territory is the single most important signifier of sovereign status. It demonstrates independence in regard to a portion of the globe to exercise therein, and to the exclusion of any other State, the functions of a State - per Judge Huber, *Island of Palmers Case (1928).*[3]

For the Theologian, land is permanently out of production because humans lack the divine art of speaking it into being.[4] For Economists and the Statisticians, land's ultimate value is incalculable because of its unique qualities of utility and indestructibility. These qualities are enhanced by factors such as the ever growing world population - the majority of which earns its living by growing and selling crops. Especially in the major cities of the world, a growing proportion of individuals earn its living by building, managing, selling or renting out property.

For the Environmental Scientist, drastic measures are required to save the earth from certain destruction.[5] The term "eco-warrior" was coined by journalists in the 1990s to denote a person with a "hands-on" approach to the protection or preservation of a plot of land, or the advancement of a particular ideological environmental agenda. For the Sociologist, land provides the basic substratum for all social, economic, political and all manner of interaction.

Consequently, land ownership is inevitably an expression of social status and an instrument of social engineering. All of us - even the truly homeless live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter.[6] However, "quite apart from the residential dimension, the impor-

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[2] 1 AC 85 at 107D.

[3] (Netherlands v. US) (1928) 2 R.I.A.A. p.829. See also Harris, D.J. (6th ed. 2004) *Cases and Materials on International Law*, Sweet and Maxwell, London, pp.190-200.

[4] The theory of creation suggests that it was by divine art and intervention that the world came into being - Genesis 1:31; Holly Bible, available on the Bible Gateway website, http://www.biblegateway.com/passage/?book_id=1&chapter=1&version=31 (visited 21 July 2007)

[5] See generally the *Global Warming: Early Signs website* @ http://www.climatehotmap.org/ (visited 19 June 2007)

[6] See Gray, K (1987) *Elements of Land Law*, Butterworths, London, p.6

tance of land as a form of property becomes almost incalculable when it is borne in mind that land has an enormous economic significance in terms of investment, business and agriculture".[7]

This explains why the law refers to land as "REAL PROPERTY". This distinguishes it from CHATTELS and other forms of PERISHABLE PROPERTY and tells us unequivocally that land is the most prized possession everywhere. Therefore, if you have land, no matter how small the portion is, please hold onto it for yourself, and for your heirs.

1.1. Land and the Law

Land laws are amongst the clearest anywhere you look. Particularly in the developed world, land laws refer to specific square metres of the nation's land and designate it private, public or national trust land. They assign ownership and dealing rights and invoke the language of rights, duties and responsibilities to and against individuals. The English private law of law of tort assigns among other things "occupiers' liability" in order to ensure the safety from foreseeable danger of persons coming onto property occupied by another, including safety of intruders. The Occupiers' Liability Act (1957) imposes a duty to take reasonable care to keep visitors reasonably safe while the Occupiers' Liability Act 1984 imposes a duty to ensure that trespassers do not suffer injury from reasonably foreseeable sources of danger - a duty of common humanity.[8]

The tort of public nuisance operates to prohibit acts or omissions that materially affect the reasonable comfort and convenience of life of a class of Her Majesty's subjects.[9] A case in point is *Tate & Lyle Industries v. Greater London Council* [1983].[10] The defendant entity was constructing a number of ferry terminals on the Thames. Their activities caused silting in several parts of the river. The plaintiff owned a jetty on the Thames and had to have some of these parts dredged so that large vessels would be able to reach their jetty. It was

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[7] Ibid.

[8] See *British Railways Board v Herrington* [1972] AC 877.

[9] *Attorney-General v PYA Quarries Ltd.* [1957] 2 QB 169, 184.

[10] AC 509.

held that the defendant entity's activity did not constitute private nuisance, since it did not interfere with the plaintiff's use and enjoyment of their own land.

However, it constituted public nuisance which happened to affect the plaintiffs especially quite severely. Notwithstanding that the use of the highway for passage and repassing is itself a lawful activity, excessive noise and vibration from heavy goods vehicles passing along the highway could constitute public nuisance.

To this end, land laws impinge upon a vast area of personal social relations and expectations and exert a fundamental influence on the lifestyles of ordinary people. As a consequence, not many countries can boast of a past that has not been exercised by intense social conflict and upheaval over land rights.[11]

Empires were built especially in the 19th century in part to extend kingdoms and land rights.[12] Particularly in Africa, liberation wars were fought in the 20th century in part to restore land rights to dispossessed indigenous populations.[13] It is settled that land's political dimension resides in the fact that power over matter begets personal power.[14]

In post-colonial Zimbabwe, failure to conceive of a land strategy that is consistent with that country's social realities and political and

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[11] On the controversy regarding Aboriginal land rights see Mabo and others v. State of Queensland, Australian Law Reports, (107 (1992); Bartlett, R. (1991) "The Affirmation of Aboriginal Land Rights in Canada: Delgamuukw and Bear Island", *Aboriginal Law Bulletin*, 2; Discussing Latin America's experiences with land rights problems see Smith L. (1992) "Indigenous Land Rights in Ecudor", *Race and Class* vol.33 No.3 p.102. See also Brennan, F. (1991) *Sharing the Country: The case for an Agreement between Black and White Australians*, Penguin, Ringwood. Regarding Southern Africa, see Sjaastad, E. and Bromley, D. W. "Indigenous Land Rights in Sub-Saharan Africa: Appropriation, Security and Investment Demand", *World Development*, 25 No.4 p.549; Platteau, J. (1996) "The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment", *Development and Change*, 27; Cleary, M. C. (1992) "Plantation Agriculture and the Formulation of Native Land Rights in British North Borneo c.1880-1930", *The Geographical Journal*, 158 No.2 p.170.

[12] See Judd, D. (1996) Empire: *The British Imperial Experience, From 1765 to the Present*, Fontana Press, London. See also Douzinas, C. (2007) Human rights and Empire, Routledge, London.

[13] See Martin, D. and Johnson, P. (1982) *The Struggle for Zimbabwe*, ZPH Publishers, Harare.

[14] See Chigara, B. (2001) "From Oral to Recorded Governance: Reconstructing Title to Property in 21st Century Zimbabwe", *Common Law World Review*, Vol.30. p.36.

economic aspirations has brought a once prosperous nation to its knees. Once regarded as the bread-basket of Africa, Zimbabwe now imports much of its staple diet regardless of the fortunes of the farming season, be it dry and harsh or wet and favourable.

1.2. The difficulty with land in the SADC

SADC states' land issue is inextricably linked to interventions of empire building nations that colonized them in the nineteenth century. Generally the conquering nations presumed that the indigenous populations whom they encountered existed in a state of nature.[15] Judd writes that Britain's late-nineteenth-century imperial mission was not inclined to politeness.

> *Missionaries, colonial administrators, settlers, traders, observers of all sorts undoubtedly exaggerated the defects of African self-rule in order to justify their own activities. The massive ancient ruins of Zimbabwe were thought to be beyond the capacities of local Africans, and eventually it was speculated that visitors from outer space were responsible for them. The substantial achievements of West African civilization also tended to be written off and ignored.*[16]

Thus, imperial forces took no notice of well-established native kingdoms - their structures of governance, cultures or their religions. Civilizing of natives by superimposing Western structures of governance, culture and religion occurred immediately the British, Portuguese, Germans and French landed in the SADC as they carved it amongst themselves.

Regarding land, this resulted in a two-tier structure of land tenure. One system was formal and the other customary.[17] The for-

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[15] Tully, J. (1994)"Aboriginal Property and Western Theory: Recovering a middle ground", *Social Philosophy and Policy*, vol.2 p.159.

[16] Judd, D., Empire: *The British Imperial Experience*, From 1765 to the Present, 1996, Fontana Press, London, p.129.

[17] Smith, M.G. (1956) "The Transformation of Land Rights by Transmission in Carriacou", *Social and Economic Studies*, p. 103.

mal system guided official policy of the land. Titleholders enjoyed exclusive rights that were backed up by the sanction of the law. Communal rights to land are understood as general rights to use land which fail to include the right to deprive others of access to it, except by prior and continuing use.[18] Communal title does not confer the standard attributes of exclusivity and free transferability, but merely trust authority to use the land as long as another is not using it.

Allocation of land into privately owned zones for white commercial farming needs and communally owned zones for indigenous peasant farmers was preceded by a thorough and comprehensive study of the country's soils and climate. That study resulted in the classification of Zimbabwe into agricultural regions.[19]

Zone one comprises the most fertile regions of the country with the most potential for agricultural production while zone five comprises semi-desert soils with the least potential for agricultural production. As far as possible, land allocation proceeded on agro-ecological values, with privately owned commercial zones situated in the fertile, high rainfall areas with the greatest agricultural potential (Zones I and II) and the Tribal Trust Lands (TTLs) situated in infertile, low rainfall areas with the least agricultural potential (Zones IV and V).

This set up was achieved by forcible movement of the indigenous populations from land that they had owned and lived on from time immemorial. Throughout this process, legislative force was the critical tool - one reason why huge sections of the Zimbabwean community today might have a deep mistrust of the law and protest its relevance to the resolution of the land issue.

By the Royal Charter granted in 1889, the British South Africa Company (the Company) had obtained from the British Government authority to settle and administer "... an unspecified area known as Southern Rhodesia".[20] Shortly after the hoisting of the Union Jack at

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[18] Platteau, J., "The Evolutionary Theory of Land Rights as Applied to Sub Saharan Africa: A Critical Assessment", *Development and Change*, 27 (1996), p.29 at p.31.

[19] See Chigara, B. (2001) "From Oral to Recorded Governance: Reconstructing Title to Real Property in 21st Century Zimbabwe", *Common Law World Review*, Vol. 30 No.1 p.36 at p.42

[20] Platteau, J. (1996) "The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment", *Development and Change*, vol. 27, p.29 at p. 144.

Salisbury in September of 1890, the Company obtained further authority from the British Government, to acquire, cultivate, develop and improve any lands within the territory under its jurisdiction. New patterns of property rights began to emerge in 1895, when the Company identified 2.2 million acres for native occupation "...according to their tribal custom".[21]

By the Matabeleland Order in Council of 1894, an agreement was reached between the Company and the British Government, entitling native Africans to acquire, hold, encumber and dispose of land on conditions identical with those of non-Africans. However, this did not affect the Company's policy of isolating agro-economic efficient zones for Europeans.

The Morris Carter Commission of 1925 reported that Africans had acquired only 45,000 acres while Europeans had acquired 31,000,000 acres. The Commission's Report led to the passing by the Southern Rhodesia Legislature, and with the blessing of the British Government, of the Land Apportionment Act (1930) by which the constitutional entitlement of Africans to purchase land anywhere outside the area already reserved for them was rescinded.

Further, Africans were forbidden to hold land in:

> *... what was officially termed the European Area, the designation of the several other classes of land then being Native Reserve, the Native, the Undetermined, the Forest and the Unassigned Areas. He could purchase land in the Native Area, under certain conditions. The Native Area was, indeed, what is known today as the Native Purchase Area, a title not embodied in the Legislation until the 1950 amendment to the Land Apportionment Act.*[22]

The Land Apportionment Act (1930) reserved thirty percent of agricultural land for the 1.1 million Africans and fifty-one percent for the 50,000 whites.[23] The Land Husbandry Act (1951) enforced pri-

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[21] Ibid.

[22] Ibid. p.145.

[23] See Chigara, B. (2001) "From Oral to Recorded Governance: Reconstructing Title to Real Property in 21st Century Zimbabwe", *Common Law World Review*, Vol. 30 No.1 p.36.

vate ownership of land while the Land Tenure Act (1969) reinforced land classification into African and European areas.[24]

By the application of these legislative acts, natives were disappropriated of their lands, without compensation and forced mostly into the wilderness of regions with the least agricultural potential and least favourable rainfall. The result was that by 1960 more than 25,000 families were squatting in the Purchase Area on a "communal basis". The Advisory Committee of the Southern Rhodesia Government (1962) reported that: "This set acute problems of satisfactory re-settlement of the squatters and the finding of sufficient suitable land for the more than 3,000 applicants...".[25]

By 1976, a total of four and a half million Africans were crowded in the infertile, drought prone Tribal Trust Lands (TTLs).[26] This position was entrenched throughout the colonial period and beyond into independence.

1.3. The International Community and Zimbabwe's land issue

At Zimbabwe's independence from Britain in 1980, six thousand commercial farmers owned forty-six and a half percent of all arable land, more than half of it in the high rainfall agro-ecological regions where potential for agricultural production is greatest. Eight and a half thousand black farmers held five percent of the agricultural land situated mostly in the drier agro-ecological regions. Just over four million black people occupied just over forty-nine percent of the agricultural land - seventy-five percent of which is located in the drier agro-ecological regions where the soils are poorest.[27]

It is arguable that this set up represented the young nation's biggest challenge in terms of social re-engineering strategy because sixteen years earlier, it had committed Zimbabwe onto the ugly path

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[24] Ibid.

[25] Ibid.

[26] "The Zimbabwe Land Question in Perspective", *Zimbabwe High Commission*, Summary of Commissioner's discussion with Tim Sebastian of BBC News 24 , April 2000, p.1.

[27] "The Zimbabwe Land Question in Perspective", *Zimbabwe High Commission*, Summary of Commissioner's discussion with Tim Sebastian of BBC News 24 , April 2000, p.2.

of a civil war where to put it bluntly, all generations of commercial farmers did battle with all generations of peasant farmers.

This is the inheritance that history chose to confer upon the new nation of Zimbabwe. It was an inheritance not chosen or even desired by most Zimbabweans. However, that is what they got. And they all shared in it equally by virtue of being Zimbabweans. It was an inheritance that challenged all Zimbabweans to respond to it soberly, with their heads, and with courage, and with humility, and in favour of equity and social justice. Nothing else would do because:

1) Contemporary Zimbabwe is a multiracial society. More than a century after the first Europeans settled in Zimbabwe, today's native Zimbabweans are black, white, Asian and mixed complexion.
2) Moreover, Zimbabwe is a party to the 1951 United Nations Refugee Convention; and its 1967 Protocol and the 1969 Organization of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa.
3) The Zimbabwe Refugee Act (1983) and Regulations of 1985 effect international law of refugees into Zimbabwean law.[28]

It is difficult to see how any State that has been participating in all these international conventions and welcoming others to settle on its shores for such a long time can refuse the armband of a "multi-racial society". I shall return to the issue of courage and humility in a moment. For now, I would like us to consider two things. The first refers to the law's response to indigenous or native claims to land that Zimbabwe's land issue points to, and the second is the main serious attempts that have already been made to try and resolve this matter.

2. Indigenous claims to land and the Law

It is estimated that indigenous peoples in the world today number between 250 and 300 million, or upwards to 600 million if the distinct peoples of Africa are included, making up between 5% and 10%

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[28] At the time of writing Zimbabwe had a caseload of 1,200 applications for asylum, the majority of applicants coming from the Great Lakes region as well as Somalia and Ethiopia. See http://www..unhcr.ch%2Fworld%2Fafri%2Fzimbabwe.htm

of the world's population.[29] In China and India, indigenous peoples make up 7% of the population, that is, 80 and 65 million respectively. In Latin America, the largest numbers are found in Peru 8.6 million and Mexico 8 million. In Africa they number over 25 million, in North America 2.5 million, and over 160,000 members of the Inuit and Saami groups populate the Arctic and northern Europe. The survival of these groups is threatened in several parts of the world sometimes by natural conditions, sometimes by health conditions which continue to be the most appalling in the world, and sometimes by the pressure of surrounding populations and government institutions.

As an example, nearly 125,000 Tuareg nomads in the Sahara starved to death during the droughts of the 1970s.[30] Increasingly, the combination of Government and multinational corporations' interest in the mineral resources of the Kalahari Desert of Botswana is threatening the Bushmen's way of life with efforts being made forcibly to make them urban dwellers.

In the effort to draw attention to cultural and proprietary injustices, there is a tendency to categorise and statisticise the either or, or both the victim(s) and the aggressor(s) as I have just done with indigenous people. Yet, if ever we needed reminding of the difficulty, and sometimes futility of categorisation, we need not look further than the divided conceptual framework of the human rights regime. Attempts to cast rights as civil and political on the one hand, and economic, social and cultural on the other have significantly weakened the potential of the agenda for now, to promote, protect and ensure the sanctity of the dignity that is inherent in individuals as human beings precisely because any real enjoyment of civil and political rights impliedly presumes fulfilment of certain economic and social and cultural rights. In this sense, human rights are counter-balanced.

Tell a homeless man freezing on a New York sub-way that he has the right to freedom of speech (Article 19 ICCPR 1966); or a man starving to death under a savannah tree that he has the right to par-

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[29] Washington, J.L. (1998) "United Nations Human Rights Apparatus for the Protection of Indigenous Peoples", *The Mediterranean Journal of Human Rights*, vol.2 No.2

[30] See "A Commitment to Plularism: Indigenous Peoples", at http://kvc.minbuza.nl/uk/archive/report/chapter2_6.html (visited 18 April 2003)

ticipate in the governing of his country by participating in periodic free and fair elections (Article 25 ICCPR 1966). Determination of "a people" *viz* the right to self-determination;[31] and "indigenous" in the context of exploitation of natural resources[32] demonstrate that we indulge in the exercise of categorisation at the risk of unhelpful reductionism.

Yet we cannot do without it because particularly when we speak of rights, we raise inevitably the question of limits because first, resources are not unlimited, and second, some rights target specific needs of particular sections of communities. Since the second half of the last century, international law began to acknowledge that indigenous peoples have claim rights under the international legal system, thus recognising groups as subjects of international law both as peoples and as an indigenous entity.

This two-pronged evolution of local people's rights hastened juridical recognition of their rights. Convention No.107 of the International Labour Organization (ILO) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations (1957) appears to have set off juridical normative recognition of claim rights of indigenous people. Revision in 1989 of Convention No. 107 with Convention No. 169 (1989) showed the growing importance of the subject. Between the adoption of Convention No. 107 and Convention No. 169 Commissions, Sub Commissions and Working Groups were established that researched and presented reports on indigenous people's status and rights.[33] Moreover, the ICCPR had declared in Article 27 group rights of per-

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[31] Acknowledging this difficulty, but insisting that the principle appears to have a core of reasonable certainty, see Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 5.

[32] Arguing that most Africans do not fit into the category of indigenous people, see Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 - 412.

[33] For a discussion of some of these see Nettheim, G. (1988) "Peoples' and Populations - Indigenous Peoples and the Rights of Peoples" in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, pp.107- 26; Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 4.

sons belonging to ethnic, religious or linguistic minorities. In 1992, two developments cemented juridical recognition of indigenous peoples' rights. One was establishment at the Earth Summit in Rio of Agenda 21 which was adopted as a strategy for the implementation of principles and policies agreed upon by the negotiating conference. Agenda 21 specifically required that the lands of indigenous peoples and their communities should be protected from activities that are environmentally unsound or that the indigenous people consider to be socially and culturally inappropriate.

The other, was adoption by the UN General Assembly of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which in Article 1 enjoins States to:

1) protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity, and
2) adopt appropriate legislative and other measures to achieve those measures.

However, juridically, indigenous and minority groups are not necessarily one and the same thing. Washington[34] writes that protection of indigenous peoples in international law is relatively recent while attempts at safeguarding the rights of minority populations date back to the predecessor of the UN - the League of Nations. The working definition adopted by the UN Special Rapporteur on Minorities suggests that a minority is "a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population".[35]

Similarities are few between the two groups. The most common one is that both exist as a numerical minority on the territories that they are located. Their aspirations could not be more dissimilar. Whereas minorities aspire to either "assimilate into the dominant population with adequate safeguards to protect their unique charac-

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[34] Washington, J.L. (1998) "United Nations Human Rights Apparatus for the Protection of Indigenous Peoples", *The Mediterranean Journal of Human Rights*, vol.2 No.2

[35] Ibid.

teristics and mores, or to gain equal standing within a nation-State structure, if not a State",[36] indigenous people are keen "to maintain, preserve or regain their separate and distinct attributes and existence in mutually exclusive communities. [They] ... seldom consider themselves as voluntarily being members of any State and generally wish to continue their own indigenous structures rather than aspire to Statehood".[37] Unlike minorities, indigenous people have inhabited their land from time immemorial. International law recognises the right of indigenous populations to pursue the right to self-determination while the same cannot be said of minorities[38] who are not necessarily indigenous. It is clear from the discussion so far that peasants of the SADC that are said to be the subject of land reform policy in the SADC are neither a minority in the juridical sense nor indigenous people. For the sake of clarity, discussion of their case should desist from labelling them as such.

But the juridical conception that has emerged of indigenous people has "... much to do with the West's perception of non-Western peoples and the reaction of those non-Western peoples, particularly in States where they constitute a minority".[39] This has skewed the juridical conception of indigenous peoples to exclude from them potential harvests of belonging to the category of indigenous population, the peasants of the SADC because they are neither a minority nor an indigenous population in the juridical sense.

Today, the term indigenous refers broadly to living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and such other groups among those generally regarded as indigenous.[40]

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[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 at 390.

[40] Ibid. at 391.

But why? There are probably several reasons for this but two are to my mind salient ones. Firstly, while the post-colonial States of the SADC that have emerged from the collapse of the European empires may have within their jurisdiction indigenous peoples, it is perhaps correct to say that only a few of these people continue to identify themselves as indigenous peoples in the sense taken by human rights discourse. The majority do not perceive themselves as such nor do they expect anyone else to regard themselves as such. To borrow from Date-Bah,[41] they have mainstreamed themselves in the political and economic life of their post-colonial State to the extent that the core essentials of the juridical definition of indigenous peoples no longer apply to them. A 1981 UN commissioned Study on the Problem of Discrimination against Indigenous Populations[42] and led by Special Rapporteur José R. Martínez Cobo defined indigenous people as:

> *Those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence with their own cultural patterns, social institutions and legal systems.*

This understanding of "indigenous people" suggests that landless peasants' claim of an equal share of the land held by commercial farmers in the SADC should not be posited as indigenous claims because the core elements of this definition clearly do not fit with the SADC situation. They include:

1) Longstanding ties to a particular land area by a group that shares a conscious sense of its distinctness from the surrounding majority population.

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[41] Ibid. at390.

[42] The first report was submitted in 1981 (EC/CN.4/Sub.2/476). The study was completed in 1986 (E/CN.4/Sub.2/1986/7 and Add.1-4).

2) A shared culture, language, ethnicity and social patterns that the group desires to identify themselves by, and pass on to future generations as a mark of distinction from the surrounding majority.
3) A context of numerical minority of the claimant group.

The SADC land issue is characterised by organised people of varying backgrounds and aspirations that are incensed by the injustice of unequal access to land and the widespread poverty that that has resulted in. Article 1 of the ILO Convention No. 169 (1989) defines indigenous peoples as:

a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of the present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In its guide to the interpretation of this Convention, the ILO is absolutely clear that references in the Convention to indigenous and tribal peoples refer "... to those who, while retaining totally or partially their traditional languages, institutions, and lifestyles which distinguish them from the dominant society, occupied a particular area before other population groups arrived"[43] and not to people that have integrated themselves into the mainstream roles of their national life.

Nonetheless, if we turn to the purpose for which the notion of indigenous peoples or even that of minority groups, it would be odd if international law sought to guarantee the land rights of indigenous groups and minority groups but not those of majority native populations that were dispossessed after colonial occupation of Europe's

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[43] Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 at 392.

empire nations. Rights of minorities that have been recognised under international law serve to both preserve and protect the group by restoring any land and cultural rights that may previously have been lost, or are actively under threat from their dominant majorities. Given that in Africa, Africans who are also among the world's most dispossessed exist only as dominant numerical majorities, is it international law's intention to deny them what rights it recognises for minorities on their territories even if the minorities are not native to those territories? Were that international law's objective, few would find reason to believe in it. Because no other group right has been formulated that targets their particular situation, which it might be said is equally grave and urgent, interpretation of group rights under international law should reflect their situation too. From the outset the human rights movement has sought to restore dignity that persons had either lost or were threatened with losing.

The human rights movement targets equity in the enjoyment by any population of its basic natural resources and opportunities. If this is correct, then juridically, groups, including Africans that are neither indigenous nor minority groups in their own countries have historical land rights that ought to be accounted for. Brownlie[44] writes that these rights manifest three special aspects.

The first is that they "... do not cope with claims to positive action to maintain the cultural and linguistic identity of communities especially when the members of the community concerned are to some extent territorially scattered". The Belgian *Linguistics Case*[45] suggests that they impose no positive duty on States to provide subsidies and other material underpinning to the rights protected.

The second aspect is that they make exclusive claims in respect of specific areas.[46] According to Brownlie, "This sets the land rights issue and the traditional ownership of a group, apart from the usual prescription of human rights on the basis of individual protection".[47]

The third is that group rights are often based on the political and

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[44] Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 3.

[45] *Belgian Linguistics Case*, European Court of Human Rights, Ser A No. 6 (1968)

[46] Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 4.

[47] Ibid.

legal principle of self-determination.[48] This study is concerned mainly with the second aspect though the third one is implicit in the land issue because ultimately, struggles for independence in the SADC relied on restoration of land rights to recruit cadres to arms.

In *The Commercial Farmers Union v. Comrade Border Gezi and others*[49] the High Court of Zimbabwe appeared to reject international law's notion of enduring native land rights. The Court's ratio precluded inquiry into the legality of the dispossession of natives of their land by their colonial masters. This raises the question whether what a robber plunders and keeps long enough permanently becomes his own, so that when the owner is able to claim it back, the robber can turn to the Courts to deny his victim of what is rightly his. The High Court of Zimbabwe ordered that:

1) Every occupation of any property listed in the Schedule hereto or of any other commercial farm or ranch in Zimbabwe that has been occupied since February 16 2000 in pursuit of any claim to a right to occupy that property as part of the demonstrations instigated, promoted or encouraged by any person, is hereby declared unlawful.
2) All persons who have taken up occupation of any commercial farm or ranch in Zimbabwe since February 16 2000 in pursuit of any claim to a right to occupy that property as part of the recent demonstrations instigated, promoted or encouraged by any person shall vacate such land within 24 hours of the making of this Order.
3) The first three Respondents should not encourage, allow or otherwise participate in any demonstration in protest against the holding of commercial farming or ranching land in Zimbabwe according to the race of the present owners or occupiers....

This approach to native claims to land discredits the rule of law because it alienates the hope of the majority and reinforces the values of an epoch that had been roundly condemned for its discriminatory approach to human rights. In this way the Court appeared to

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[48] Discussing the range of political models possible, see Cassese, A. (1995). *Self-Determination of Peoples: A Legal Appraisal,* Cambridge University Press.

[49] Case No. H.C. 3544/2000 HE. Available on CFU website, http://www.samara.co.zw/cfu/courtorder.htm. (visited 3/4/01)

suggest that the law applies blindly to the context of its sphere of operation. The moral of this outcome is that where the rule of law opposes human rights the law risks its integrity. In *ex parte Bennett* [1994] the House of Lords observed that there was a natural link between the rule of law and human rights. According to Lord Griffiths:[50]

> *... the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*

This decision shows that where native claims to land expropriated is concerned, justice cannot be achieved without a substantial acknowledgment of the values and institutions of the native population. Yet these values and institutions may not readily fall under the framework of existing state structures. Therefore, "... attempts to redress injustice towards indigenous groups which do not question the justice of existing state institutions will therefore prove to be inadequate responses to indigenous people's demands for substantive justice."[51]

In another sense, this decision casts the Court as a mature legal institution, fully aware of its juristic function. The principle of non-retroactivity constrains the Court from applying norms of law that were established post-breach. This case had alleged that the "squatters" had breached the law of trespass by setting up camps on private farms without invitation or authorization of the landowners. Therefore, the Court could be congratulated on its decision to consider only the legal issue (trespass) under the laws of trespass in force at the time that offence is alleged to have been committed.

Perhaps the decision utility lies in its insight about choosing a political way forward to resolve the land issue. The Court rejects outright the notion of violent conquests, a fashionable means of the 19th Century to expropriate and acquire political authority, and with that, property that previously belonged to the native indigenous popula-

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[50] 1 AC 42, 61-2.

tion. "Conquest" is both unfashionable and unacceptable to the modern humanistic atmosphere desired by the international community's fervent push for a culture of human rights.

International law insists upon prompt adequate and efficient compensation to the victim of State appropriation of property legally recognised as belonging to another. In the *Iran-US Claims Tribunal*[52] the tribunal granted an interlocutory award upon the determination that there had been a "taking of the claimant's property," and appointed experts to calculate the loss. The *Starrett case*[53] has helpfully defined "property" and "taking of property." A taking may be effected by transfer of title by law, as in the typical case of nationalisation or of the expropriation of land. The physical seizure of property may suffice, as may its transfer under duress or by confiscatory taxation.[54]

Harris writes that, "constructive expropriation" occurs when "events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.[55] In *Tippetts v. TAMS-ATTA*[56] the Tribunal insisted upon an objective theory of State responsibility. Consequently, it was neither the intention of government, nor the form of the measures of control or interferences that mattered, but the effects of the measures on the owner and the reality of their impact that mattered.[57] Property is defined as: "all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property".[58]

In *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others*[59] the applicant, an incorporated voluntary

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[51] Dodds, S. (1998) "Justice and Indigenous Land Rights", *Inquiry* vol. 41 no.2 p.187.
[52] 23 *International Legal Materials* (1984), p.1090.
[53] See Harris, D. J. (1998) *Cases and Materials on International Law*, Sweet and Maxwell, London, p.555.
[54] Ibid.
[55] Ibid. p.556.
[56] 6 Iran-USCTR (1985), p.219 at 225.
[57] See also Explanatory note to the 1961 Harvard Draft Convention, Article 10 in *American Journal of International Law,* 55 (1961), p.558.
[58] See Harris, D. J. (1998) *Cases and Materials on International Law*, Sweet and Maxwell, London, p.557.
[59] SC/132/2000

association that represents the interests of commercial farmers operating within Zimbabwe sought an order declaring *inter alia* that the exercise of acquiring land by the Land Task Force had not progressed accordingly with the Declaration of Rights under Chapter 3 of the Zimbabwe Constitution. Section 16, provides that:

> 1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that:
>
> (a) requires -
> (i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land-
>
> A. for settlement for agricultural or other purposes; or
>
> B. for purposes of land reorganization, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
>
> C. for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;
>
> OR
>
> (ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public;

Further, Section 16A, which deals with "Agricultural Land Acquired for Resettlement" provides that:

> 1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a

programme of land reform, the following factors shall be regarded as of ultimate and overriding importance -

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly -

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable:

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

(c) the cost or value of improvements on the land;

(d) the current use to which the land and any improvements on it are being put;

(e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;

(f) the resources available to the acquiring authority in implementing the programme of land reform;

(g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and

(h) any other relevant factor that may be specified in an Act of Parliament.

Sitting in its capacity as the Constitutional Court of Zimbabwe, the Supreme Court held that the compulsory acquisition of agricultural land for resettlement was a programme of land reform. Such a plan would have to be in conformity with the law.

> *Apart from those farms whose owners had agreed to the takeover of their properties, the settling of people on farms had been entirely haphazard and unlawful: a network of organizations, operating with complete disregard for the law, had been allowed to take over from the government. War veterans, villagers and unemployed townspeople had simply moved onto farms, encouraged, supported, transported and financed by party officials, public servants, the Central Intelligence Organization and the Army. Such settlement had not been done in terms of a programme of land reform or in terms of the Land Acquisition Act.*[60]

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[60] At 940B/C-D.

> *... as to the respondents' contention that the matter was a political one and not a legal matter, that, while it was fundamentally true that the land issue was a political question and that the political method of resolving that question was by enacting laws, the Government had enacted and amended the Land Acquisition Act and then failed to obey its own law by flouting the procedures laid down in that Act. The Courts were doing no more than to insist that the State comply with the law.*[61]

The Court's insistence on the rule of law is justifiable. The need to separate the functions of the legislator, judiciary, and the executive is recognized in the doctrine of separation of powers. Justifications of this doctrine are commonplace. Locke[62] writes that:

> *It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making law, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law both in its making and execution, to their own private advantage.*

Therefore, application of the doctrine is an attempt to institutionalize conscience in order to ensure accountability that promotes democratic governance. Montesquieu[63] writes that if the judiciary is not independent of the legislature and the executive, the law could not become as efficient a tool for ensuring liberty advances. In such circumstances the law would not be capable of empowering the citizen to challenge the lawfulness of legislative or executive orders that impede her/his rights. He writes that:

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[61] At 940I-941A.

[62] Locke, J. (1980) *The Second Treatise of Civil Government*, Hackett Publishing, Indianapolis Ch XII, Para 143

[63] Montesquieu, "De l'Espirit des Lois" Book XI, Chapter 6 cited in Bradley, A.W. & Ewing, K.D. (12th edn 1997) *Constitutional and Administrative Law*, Longman, London, p. 92.

> *When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to the arbitrary control; for the judge would then be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression. There would be an end to everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.*

Without a separation of powers, collusion of functions with respect to clearly delineated purposes of the organs of government is possible. Such a possibility would threaten wherever it existed, to undermine objectivity in the conduct of government.

Application of the doctrine is a matter of course in democratic States, suggesting firm acceptance of the virtues of the doctrine. The United Kingdom Bill of Rights (1869) and the Act of Settlement (1700) are credited with establishing the doctrine in the modern British Constitution.[64] The United States Constitution of 1787 carefully delineates the functions of the executive, judiciary and legislature, providing for a system of checks and balances that facilitates a measure of accountability. South Africa's constitution of 1996 provides for a Constitutional Court that acts as final guarantor of protection of individuals from State power. Japan's Constitution of 1946 shows similar adherence to the doctrine.

However, what is difficult to justify in *The Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others*[65] is the Court's complete blindness to the realities of social evolution where legal procedures preferred by the State are overtaken by popular revolt of the people, the *grundnorm*, or where an aspect of it is replaced not in the orderly manner previously contemplated by the collapsing order, but by force.

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[64] See McEldowney, J.F. (2nd edn 1998) Public Law, Sweet & Maxwell, London, p.8.
[65] SC/132/2000

The language of both the High Court and Supreme Court of Zimbabwe in the preceding discussion shows the judges and justices in denial of the existence of a very active context to which they also contribute much in terms of stabilisation, sanitization and balancing. This casts suspicion on the objectivity of the two Courts because judges are not mere automatons, blindly pushing the buttons of the law. On the contrary they can and perhaps should seek to realise the objective and purpose of particular national laws rather than seek to demonstrate that Parliament had been inept when the laws in question were going through their creative motions in the relevant fora.

In *Pepper (Inspector of Taxes) v Hart and related appeals*,[66] the House of Lords considered at length whether judges may use Parliamentary Hansard as an aid to Parliamentary construction, contrary to the general rule which forbade reference to such material in construing statutory provisions. The Court stated that: "Statute law consisted of the words that Parliament had enacted. It was for the Courts to construe those words and it was the Court's duty in so doing to give effect to the intention of Parliament in using those words". Therefore, the proper allocation of work is that Parliament legislates and the courts construe the meaning of the words finally enacted. The Court held that:

> *In many cases references to Parliamentary materials would not throw any light on the matter. But in a few cases it might emerge that the very question was considered by Parliament in passing the legislation. In such cases the Courts should not blind themselves by strictly adhering to the rule excluding references to Parliamentary material as a guide to the construction of the words used in the Statute. Thus, subject to any question of Parliamentary privilege, the exclusionary rule would be relaxed so as to permit reference to parliamentary materials where (a) legislation was ambiguous or obscure, or led to absurdity; (b) the material relied on consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other parliamen-*

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[66] [1993] AC593.

tary material as was necessary to understand such statements and their effects; and (c) the statements relied on were clear.

Thus, judges are more than mere automatons pushing the buttons of the law. They are co-creators of the law. Cooray[67] writes that interpretation of the law provides some basis for modification and judges in one of three ways can effect fundamental change in the law.

First, judges can express disagreement with pre-existing law for whatever reasons, and substitute a new rule or a new set of rules, in effect over ruling the cases, which declared the pre-existing law. Secondly, judges can ignore precedent and prior decisions and make a statement of new law. Thirdly, "... judges could pretend that they were following existing law and manipulate previous decisions to obtain the desired results. Courts in Australia, and other common law jurisdictions have done this for generations".[68] Thus, and notwithstanding the desired practice of separating judicial powers of government decisions like *The Commercial Farmers Union v Minister of Lands, Agriculture;* and *Resettlement v Others* where the judges appeared to fold their arms in matters of constitutional importance and to mock the Zimbabwe Government instead of giving effect to its intentions, these cases cast doubt on the willingness of that bench to give effect to Governmental intentions as expressed through legislation.

3. Attempts to resolve Zimbabwe's land issue

The two serious, noticeable and worthy attempts to resolve the Zimbabwe land issue so far have been the "Lancaster House"[69] and the "Land grab"[70] approaches. The land lease policy announced in April 2006[71] is yet to be tested though its chances of success are doomed because of its inherent failure to realize that commercial farming especially in the drought prone SADC region requires prior

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[67] Cooray, M. "Mabo Amends State Constitutions", at http://www.ourcivilisation.com/cooray /mabo/indexa.htm (visited 04/05/03)

[68] Ibid.

[69] See Davidow, J. (1984) *A Peace in Southern Africa*, Westview Press.

capital investment in dams and other permanent fixtures which amount to land development.

Unless farmers are assured of the possibility of ownership rights over such developments, they are unlikely to take the risk of such investment. The number of white commercial farmers is reported to have shrunk from 4,000 in the year 2000 when the land grab policy began to be implemented to 300 in 2006 when the long-lease policy was announced.

Only 200 white farmers had applied for land under the long-lease policy. The majority of the victims to the fast track land reform policy ushered in by the land grab policy are now reported to be practising their vocation in neighbouring Mozambique, Zambia, South Africa and even Nigeria.[72] Nonetheless, the less fortunate among them have become nomads, of the region. Disaffected by financial challenges created by unfulfilled promises of their courtiers in these new vocational refugee destinations (including Malawi, Zambia, Mozambique and Nigeria) they have returned to Zimbabwe, the only place that they call home.[73]

3.1. "Lancaster House Approach" -1980-1990

This approach was dependent upon the good faith and absolute commitment of stakeholders. Its purpose and focus was to achieve in the end, an orderly transition to a better-organised society with much improved prospects for peace and economic security for all Zimbabweans.

The Lancaster House approach was premised on respect for the rule of law and the validity of all existing land titles and land rights and for the rules governing land use, exchange, etc.

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[70] See Chigara, B. (2004) *Land Reform Policy: The Challenge of Human Rights*, Ashgate, Aldershot.

[71] See "Zimbabwe confirms white farm move", available on BBC News website, http://news.bbc.co.uk/2/hi/africa/4937310.stm (visited 22 July 2007)

[72] See "As country heads for disaster, Zimbabwe calls for return of white farmers", available on *The Guradian website*, http://www.guardian.co.uk/zimbabwe/article/0,2763,1489173,00.html (visited 22 July 2007)

[73] "Zimbabwe: White Farmers Begin Returning Home", available on *AllAfrica website*, http://allafrica.com/stories/200707170532.html (visited 27 July 2007)

3.1.1. Details of the scheme

Donor countries pledged to pay for the purchase by the Zimbabwe government of land to resettle the landless peasants. The scheme was premised on the willing seller/ willing buyer policy according to which the Zimbabwe government would not compel commercial farmers to sell their land. Rather land would be made available to the government on a non-compulsory basis.

Between 1980 and 1990 the British government provided forty-four million pounds British Stirling for that purpose and the Zimbabwe government acquired three and a half million hectares. Seventy-one thousand households were resettled. In 1990 the British government stopped its funding of this project, alleging corruption on the part of the Zimbabwe government.

The Zimbabwe government complained that land that Commercial farmers had made available to the government for purchase had not always been the best land. Therefore, commercial farmers still controlled land allocation by not making available to government some of the best land in the agriculturally favourable regions of the country.

In 1992 the Mugabe regime introduced the Land Acquisition Act (1992) to facilitate redistribution of under-utilised commercial farmland because at that point:

1) 4,000 large-scale commercial farmers owned 11,2 million hectares while more than 1 million communal area families occupied 16,3 million hectares, mainly in drier and less fertile agro-ecological regions.
2) Only 70,000 families had been resettled on 2 million hectares.
3) State owned farms amounted to only 0,5 million hectares.
4) The Zimbabwe Government claimed that it wished to resettle a further 150,000 families on at least 5 million hectares which only the large-scale commercial farming community could provide.

Thus, began the infamous farm invasions accompanied by murders, thuggary and human rights abuses that appear to have now brought the Zimbabwean economy to its knees. Was the British government ever a victim? If so of what? Is the Mugabe regime a victim? If so of what? And the Commercial farmers? Could the Lancaster House strategy have worked? Under what conditions, if at all? These questions are comprehensively examined in a recent arti-

cle[74] that argues that victimology arguments are wasteful in that they tend to lock up stakeholders in the custody of the award of the "victim" label and distracts them from the search for a solution to their problem so that by the time they come back to the problem, it will have deteriorated and assumed new complexities that in turn require more to be done in order to resolve it.

3.2. "Land grab strategy" 1992 - present

Under this paradigm, the rule of law is suspended and the ruling class seize land off legal titleholders who are left with no redress. It is premised on a myopic view of the situation, which is inconsistent with reality. It is characterised by rigidity of stakeholders in their claims and counter claims. What you get is commotion, confusion and wanton destruction as each stakeholder competes for the ear of significant others in whose eyes the victim status is a form of insurance at the point when the ultimate throw of the dice is cast. Thus, everyone pursues the victim status. Enormous energy is expended on that while the problem festers and assumes new complexions hitherto unforeseen.

Pursuit of the victim status locks up the problem so that significant others can see it for what it is and pronounce whom among the stakeholders the actual victim is. Until such a determination, no actual progress can be made in the effort to settle the issue. Therefore, to offset the victim status dynamic from complicating the problem, it may be necessary for the perceived significant others to pre-empt that fight by determining whom among the stakeholders the actual victim is very early on in the situation.

In the Zimbabwe land issue there is only one victim - the dignity inherent in every one of the stakeholders as human beings.

3.3. "Humwefficiency" - A Proposal

My proposal is premised on the rejection of the recognition/acceptance of the "victim status" so vigorously pursued by individuals and

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[74] Chigara, B. (2001)"The Contest for labels in the SAD Land Issue", *Nordic Journal of International Law*, vol. 72 No.3 pp.369-97.

groups of stakeholders because it delays and sometimes even blocks the possibility of achieving a resolution. It requires that all stakeholders focus on the whole and not the sum of the parts and insists on a knowledge-based human rights orientated programme that targets four things. The first, is to get all stakeholders to arrive at a point where they agree and acknowledge that the status quo is an unconscionable and even frightful inheritance for them all.

The second is to establish a common understanding of the local significance of land and how the majority and not the minority are to be included in its enterprise. This is because quite apart from the social status and power that we commonly associate land ownership with especially in the West, in the predominantly agrarian communities of the SADC ownership of land is a matter of life and death.

The third, is to establish the universal significance of the value at issue because more than ever before, the interdependence of States today, facilitated by technological developments, has reduced peculiarities of the past between individuals and their communities and compelled the human family to work together first to avert and secondly to resolve common problems - particularly those that threaten international peace and security. In this connection, human rights law has confirmed that every individual has a right to life. Amongst the commercial and peasant farming communities of the agrarian communities of the SADC that right can only be secured by an efficient distribution of the world's mot prized commodity - land.

Fourthly, the local and the universal significance of land are combined to arrive at a common appreciation of the significance of land to all stakeholders. That understanding becomes the matrix on which land allocation then proceeds, ensuring that the rights and minimum needs of all stakeholders are provided for, taking out of the equation the tension and strife surrounding the land question.

The strategy outlined above is what I call "*humwefficiency*" based on the Shona idea of "*humwe*" which means "in this together" and the universally acknowledged virtue- efficiency. It is dependent upon and manifests first, the collective responsibility of all stakeholders in the construction of knowledge about a common social problem - in the case of Zimbabwe and the SADC, the land issue.

Humwefficiency as a strategy for resolving difficult social issues is dependent upon and manifests a common understanding of the society's historical fortunes and misfortunes and then challenges all stakeholders to show both courage and humility in perceiving one

another as equals in the search for a solution to their common inheritance and problem.

It is dependent upon and manifests the recognition by all stakeholders that the protection of the dignity inherent in them as human beings depends upon their own initial recognition, promotion and protection of the dignity inherent in other stakeholders *qua* human beings.

In the final analysis, it is a strategy for prosperity and peaceful coexistence for these States in transition towards democratic governance. It is a strategy that depends on initiation and continuance of dialogue even among communities that had hitherto isolated themselves from one another. Often that takes humility and courage. That space for humility and courage must first be established in order for *humwefficiency* to succeed. Dialogue should be facilitated by independent public commissions of enquiry and a responsible media that sees itself as burdened foremost with a responsibility towards nation building. From such a dialogue should emerge a consensus about the way forward.

This approach has the advantage of liberating all stakeholders from any myths that they might have previously held about their fellow human beings. Also, it recognises all stakeholders as co-owners of the resolution strategy with an interest in its success, something that both the Lancaster House and the Land grab approach lacked.

4. Conclusion

Human Rights have become the DNA of human dignity.[75] Therefore, to have the slightest possible chance of success, all social engineering strategies that we pursue, even the fruits of such long discarded evils such as colonialism and slavery ought to be informed, guided and governed by the requirements of international human rights law. In the land issue, there is only one clear victim, the dignity inherent in all stakeholders *qua* human beings.

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[75] See also Chigara, B. (2007) "To discount human rights and inscribe them with *fakeness* and unreliability, OR to uphold them and engrave them with integrity and reliability? - UK experiences in the age of international terrorism", *Nordic Journal of Human Rights*, vol. 25 No.1. pp.1-16.

Therefore, the only logically sustainable resolution strategy is one that recognizes, promotes and protects the dignity inherent in all stakeholders *qua* human beings. As a strategy, *humwefficiency* combines the local intuition about land with requirements of international human rights law. I have argued that if properly administered to the land issue that is currently exercising the SADC community, and in particular Zimbabwe, this strategy might easily resolve the land issue for the reasons that this lecture has advanced.

The strategy calls for EQUAL courage by ALL stakeholders - the sort of courage witnessed at the end of the Second World War - when victors' vengeance gave way to the rule of law, no matter how flawed.

New problems in international life today will only be resolved by the kind of courage that recognises, promotes and protects the dignity inherent in all individuals *qua* human beings in spite of what their personal history tells us about them.

The search for victim status by stakeholders attempting to resolve their biggest challenges is always futile and counterproductive. Perhaps time is a better jury than every other jury.

THE DEVELOPMENT OF ASYMMETRIC REGIONALISM AND THE PRINCIPLE OF AUTONOMY IN THE NEW CONSTITUTIONAL SYSTEMS: A COMPARATIVE APPROACH

GIANCARLO ROLLA

Federal states were created with the purpose of providing an answer to the need for unity; but currently, the "centripetal" trend of the original federalism is confronted with a more "centrifugal" inclination to promote autonomy and differentiation. The reasons for this trend are various: there is a connection between autonomy and the recognition of cultural differences; autonomy constitutes the means through which specific communities acquire a political representation, and tends to minimize the distance between governing authorities and citizens. The positive outcome of the process of decentralization is based on the ability to reach a balance between the constitutional principle of autonomy, the principle of equality (in the enjoyment of social and economic rights) and of solidarity (between territories).

1. From the federalizing process to multilevel constitutionalism

The development of asymmetric regionalism and the establishment of the principle of autonomy of territorial communities represent two elements of modern constitutional systems.

Unquestionably, this trend is innovative when compared to the previous federal experiences, given that the ongoing devolution processes reveal different characteristics with respect to the impulse favouring federalization, which promoted the establishment of

important liberal and welfare States during the Nineteenth and the Twentieth centuries.[1]

From a historical point of view, federal states were created with the purpose of providing an answer to the growing need for unity. Several territories devolved their original sovereignty to distinct parts, in order to facilitate the joint resolution of common problems. The federalist principle seemed like the most appropriate institutional system for the maintenance of a greater legal unification, as well as for a better fusion of different cultures and tradition.[2]

The reasons that induced originally sovereign legal orders to turn to federalization were numerous: the introduction of a common market and of common economic relations; the principle defending equal enjoyment of social and economic rights; the compliance with the same political principles or ideologies. However, in spite of the different reasons, the federalizing process appeared coherent to the original meaning possessed by the work "federalism", which comes from the Latin word *foedus,* that is "to be together".

For example, the intention of establishing a unitary economic market was the basis of the decision made in 1867, according to which a number of British colonies spread out in Northern America came together and formed a united Confederation, thus determining the

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[1] See: S Ortino, (1970) *Ordinamenti costituzionali federativi*, Firenze.
AA.VV, (1994) *Federalismo e regionalismo dall'Italia all' Europa*, Napoli.
ibid, (1997) *Regionalismo, federalismo, Welfare State,*Milano.
A.D'ATENA, (1994) *Federalismo e regionalismo in Europa*, Milano.
AA.VV (2006) *Organización territorial de los Estados europeos*, Madrid.
A.Reposo (2000) *Profili dello Stato autonomico. Federalismo e regionalismo*, Torino.
E. Argullol Murgadas (dir.) (2004) *Federalismo y autonomía*,Barcelona.
D. Valades - J.M. Serna De La Garza (coord.) (2005) *Federalismo y regionalismo*, Mèxico.
A.M. Hernandez (dir.) (2005) *La descentralización del poder en el Estado contemporáneo*,Buenos Aires.

[2] Cfr.,G.Bognetti, *Federalism* (2001) Torino.
A.La Pergola, (1987), *Tecniche costituzionali e problemi delle autonomie "garantite"*,Padova. Pp. 123. G.Lombardi, (1981) *Lo Stato federale.Profili di diritto comparato*, Torino.
D.J.Elazar, (1995) *Idee e forme del federalismo*, Milano.
K.C.Wheare, (1997) *Del governo federale*, Bologna.
C.Friedrich, (1968) *Trends of federalism in Theory and Pratice*, New York.

creation of Canada. Similarly noteworthy is the influence exercised by economical reasons on the North American States, which at first transformed the Confederation in a Federation, and then developed the authority possessed by the Federation of the United States on economic matters.[3]

Subsequently, following the establishment of a welfare state, the concentration of powers was determined, on one hand, by the need to promote State intervention in economy and economic planning, and on the other hand on the need to ensure that all citizens enjoyed equal social rights.

However, in other continents federalism represented the process through which different territories and legal orders were joined in view of a common ideology: an example is provided by the creation of the Soviet Union, or of the Federal States of Latin America right after their independence from Spanish colonialism.[4]

This impulse towards federalism cannot be considered entirely completed: for example, in the era of globalization, it still emerges as it induces the establishment of supra-national legal orders, just as it happened in the European Union; specifically, in this instance, the integration process was initially set off as a result of the aspiration to create a common economic market and only after it brought about the establishment of a political community sharing common values codified by the European Constitution.

Yet, the new form of constitutionalism reveals a rather different scenario: the "centripetal" trend of the original federalism is now confronted with a more "centrifugal" inclination, which enhances the unique characteristics that set apart local communities.

First of all, there is now a "dissociative" type of federalism in opposition to a more traditionally "associative" kind. This phenomenon is significant, especially in those political systems defined by ethnic and

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[3] G.Bognetti, (2000) *Lo Spirito Del Costituzionalismo Americano.La Costituzione Democratica,*Torino.

[4] D.Valades, (1979) *Presupuestos Históricos Del Federalismo Mexicano.* (G. Trujillo Coord.) Federalismo Y Regionalismo, Madrid pp.197.
M.Oropeza, (1995) *El Federalismo,*México.
L.Melica, (2002) *Federalismo E Libertà,*Padova pp.81.
F.Fernandez Segado , (2002) *Reflexiones Críticas En Torno Al Federalismo En América Latina,* Ciudad Del México.
J.Carpizo, (1973) *Federalismo En Latinoamèrica,* Mexico.

racial contrasts, where the impetus towards solidarity is overwhelmed by a propensity towards "localism" and "particularism".[5]

Besides, recent events have provided numerous examples of devolution processes that rearranged legal orders without determining the dissolution of unitary relations (Belgium); of devolution processes that represented a merely transitional stage in the quest for a consensual division (Czechoslovakia; Soviet Union); also, there have been examples of irreversible demolition of the unitary framework, such as in consequence of the crisis in ex-Yugoslavia, as well as cases of social framework break-up, the outcome of which has yet to be determined (Iraq).

Nevertheless, the main characteristic of constitutional legal orders is to bring to light different purposes: the intention is not really to promote "dissociation", rather "autonomy", differentiation, enhancement of (political, institutional, economic, legal) uniformity.[6]

It is a rather common trend to assign broader decision-making power to local political authorities: not only is it a geographically widespread tendency, but it also relates to very different legal orders, thus including traditionally unitary systems, such as the United Kingdom and France. However, a common theme sets apart the establishment of multilevel constitutional systems: legal orders are reciprocally autonomous, yet they are mutually coordinated and communicating.[7]

From a European perspective, this phenomenon may be compared to the relations existing between the European Union and its Member States: specifically, all intra-institutional relations are defined by their compliance with the same rules, that is, homogenous laws, coordinated measures for the implementation of common needs, acknowledgment of the principle of subsidiarity with regard to the distribution of competence.

Multilevel constitutionalism is founded on the recognition of two institutional principles.

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[5] A. E. D. Howard, (1993) *The Values Of Federalism*, New Europe Law Review, 7, pp. 143.

[6] G.Rolla, (1998) *L'autonomia Costituzionale Delle Comunità Territoriali.Tendenze E Problemi*, In (T.Groppi) Principio Di Autonomia E Forma Dello Stato,Torino.

[7] Cfr.,G.Rolla, (2001) *Evolución Del Sistema Constitucional De Las Autonomias Territoriales Y Nuevas Relaciones Entre Los Niveles Constitucionales*,Rev. De Estudios De La Administración Local, pp.13.

a. First, system unity and local community autonomy must be considered complementary, yet non-antithetical values. Without a doubt, every territorial system, albeit sovereign, still pertains to a whole: State and local autonomies together give rise to distinct orders - that is, constitutionally independent orders - which however constitute an integral component of the same system of values and of rules established by the Constitution.[8]

   Along these same lines, for example, it is significant to consider Article 5 of the Italian Constitution, which states, "The Republic, one and indivisible, acknowledges and promotes local autonomies"; or Article 2 of the Spanish Constitution, ("The Constitution is founded on the indissoluble unity of the Spanish Nation, common and indivisible homeland of all Spanish people, and recognizes and guarantees the right to autonomy for all nationalities and regions"); as well as the Preamble to the Fundamental Law of the German Federal republic, ("Germans in every Lander...have obtained the right to free self-determination, unity and freedom of Germany").

b. Secondly, within multilevel constitutionalism, all institutional levels are granted an equal degree of institutional dignity, given that each level constitutes an essential component of said system, but also because all of them have been awarded constitutional validation.

2. Recognizing the autonomy of territorial communities: the main characteristics of the concept of autonomy

Why is it that constitutional systems are being arranged in accordance with the principle of autonomy? Even if the trend may be common, the reasons are various, just as the actual institutional solutions eventually adopted are: the same river is fed by many different tributaries.

Firstly, there is a tight connection between autonomy and recognition of cultural differences. Many commentators have identified the

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[8] G.Rolla (Cur.), (2003) *La Definizione Del Principio Unitario Negli Ordinamenti Decentrat*, Torino.

preservation of cultural diversity and plurality as one of the current reasons supporting federalism and regionalism. It is in fact true that the federal or regional State order seems to be the most favourable towards the enhancement of cultural, ethnic and linguistic diversity. From this viewpoint, autonomy becomes an organizational paradigm, promoting the creation of a national society composed of communities that preserve their individual uniqueness.[9]

The principle of autonomy has been called on when tackling issues and ethnic identity conflicts, both in consolidated democratic systems (Canada, Switzerland, Belgium, Spain, Italy), as well as in critical national scenarios, such as Israel, Bosnia, Kosovo, Chiapas. Then again, recognizing self-governing autonomy to limited territorial portions has been an institutional measure adopted by international treaties, with the purpose of safeguarding the right of specific ethnic groups to the enjoyment of their culture, as well as to manage livelihood and use of the resources within their own territories according to their particular concept of life.[10]

Secondly, autonomy embodies a community's power to self-determination, together with its role as institutional subject. Prior to being a model of state organization, autonomy constitutes the means through which specific communities acquire distinctive political representation, specialized bodies and structures for the care of their interests. Sovereign bodies - notwithstanding their *nomen iuris* - represent a territorially limited community, they promote its interests, they look after their development and they provide it with a political and legal identity.[11]

On this matter, it is significant to point out that the European Charter on local autonomy states,

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[9] See: Aa.VV. (2003) *Federalism, Decentralisation And Conflict Management In Multicultural Societies* , Montreal.
B.Baldi (2003) *Stato E Territorio. Federalismo E Decentramento Nelle Democrazie Contemporanee*, Bari.
A.Gagnon-J.Tully, (2001) *Multinational Democracies*, Cambridge.
L.Basta - T.Fleiner, (1996) *Federalism And Multiethnic States*, Friburgo.

[10] E.Ceccherini, (2006) *Un Antico Dilemma:Integrazione O Riconoscimento Della Differenza? La Costituzionalizzazione Dei Diritti Delle Popolazioni Indigene,*In (G.Rolla Ed.) Eguali,Ma Diversi, Milano, pp.58.

[11] G.Rolla, (2005) *L'organizzazione Territoriale Della Repubblica,*Milano, pp.33.

> *"For local autonomy we mean the actual right and authority of local groups to regulate and manage, in compliance with the law, under their own responsibility and in favour of the populations therein, a significant portion of public affairs".*

But the necessary connection between autonomy and a specific territory is revealed by the linguistic expression used by the Constitution, which for example, refers to "Comunidades autonomas" (Spain), to "Länder" (Germany) and to "Comuni" (Italy).

Thirdly, there is also a functional perspective to autonomy, which serves as organizational paradigm intended for minimizing the distance between governing authorities and citizens, as well as to promote their power to monitor and to participate.

According to this point of view, autonomy comes to represent an organizational principle, capable of implementing the subsidiarity criterion: through this, decisions must be made by the most decentralized authority existing, should this be justified and compatible with the need to ensure efficient and effective public action. Subsidiarity is a relations-promoting standard (as it introduces a rule determining competence and interrelations between institutional levels) and a preference-related standard (given it assumes decisions will be made by the most decentralized institutional level possible, should this be justified).

Consequently, subsidiarity constituted the main criterion for the distribution of powers within multilevel constitutionalism and hence it represents one of the fundamental principles that regulate inter-institutional relations in the European Union and in Federal States.[12]

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[12] A. Poggi, (2001) *Le Autonomie Funzionali Tra Sussidiarietà Vertical E Sussidiarietà Verticale*, Milano.
P.Vipiana, (2002) *Il Principio Di Sussidiarietà "Verticale"*,Giuffrè, Milano.
K.Nicolaidis, (2001) *Securing Subsidiarity: The Institutional Design Of Federalism In The United States And Europe*, Oxford.
L. Coen, A. Rinella, R. Scarciglia, (1999) *Sussidiarietà E Ordinamenti Costituzionali. Esperienze A Confronto*, Padova.
A.Ferrara, (1997) *Il Principio Di Sussidiarietà Come Criterio Guida Della Riforma Del Regionalismo E Del Welfare State*, In Regionalismo,Federalismo,Welfare State, Milano, pp 87.

Although its operative application has been diversified and still varies, the concept of autonomy is defined by a series of distinctive elements forming its *principium individuationis*.

In our opinion, these can be summarized as follows: firstly, the acknowledgment of autonomy requires the existence of genuine power to configure the characteristics that shape a distinctive legal order; secondly, it calls for participation of autonomous subjects to the State's decision-making process; thirdly, it needs adequate financial resources; finally, it compels efficient authority-intended safeguard measures.[13]

Specifically, regulatory power allows "self-configuration" within any territorial community, that is, the power to define its own governmental system, its political decision-making processes, as well as its operative and organizational rules.

The most evident example of said law-making authority is represented by "Special autonomy Statutes".[14]

On the other hand, the principle of participation comes into play when territorial communities join in several important decision-making processes, which are likely to qualify or to affect their independence. For example, participation is crucial when autonomy-defining characteristics are codified within a Constitution, or when they undergo revision: said participation may be indirect - thus realized by way of a Senate representing the territorial communities - or direct, when the decentralized communities are called on to ratify the measure.

Moreover, the principle of participation is summoned whenever a distinction must be made between matters to be devolved and matters to be reserved to central State regulation, when financial resources must be allocated, or when the administrative activity must be distributed between the State and decentralized institutional levels.

The main elements that characterize the principle of participation

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[13] G.Rolla, (2005) *L'organizzazione Territoriale Della Repubblica*,Milano, pp.51. G.Rolla, (2005) *La Costruzione Dello Stato Delle Autonomie*, In (G.Rolla, La Difesa Delle Autonomie), Milano, pp.15.

[14] M.Olivetti, (2002) *Nuovi Statuti E Forma Di Foverno Delle Regioni*, Bologna. C.Aguado, (1996) *El Estatuto De Autonomía Y Su Posición En El Ordenamioento Juridico Español*,Madrid.

are essentially represented by cooperation bodies and procedures involving different institutional levels.[15]

Besides, it goes without saying that financial autonomy is complementary to political autonomy, given that an agency may actually identify the measures required in response to public need, only if it is authorized to independently dispose of all necessary resources in the performance of its institutional duties. Being autonomous means being able to choose revenue-making methods and to assign expenditures according to the selected public needs.

Also, recognizing financial autonomy appeals to a general principle of responsibility, specifically, to a rule - implied in any legal system managed pursuant to fair administration criteria - according to which the operation of public functions must be generally ensured by the very same community involved, except for any exception made in name of economic fairness and social justice.[16]

Ultimately, autonomy is solid if the system allows for efficient safeguard mechanisms contrasting prejudicial actions affecting its authority. Constitutional protection of autonomy is usually implemented by following two different courses: constitutional jurisdiction and institutional mediation.[17] With regard to the judicial protection of autonomy, particular attention must be awarded to the fact that the introduction of constitutional justice is tightly linked with federalism, as the institution of the Constitutional Court in Austria and the initial case law of the US Supreme Court both prove. On the other hand, institutional mediation consists of conciliation procedures, which seek to reach a political agreement in the event of a contentious distribution of authority among institutional levels.

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[15] S.Gerotto, (2003) *La Partecipazione Di Regioni E Cantoni Alle Funzioni Dello Stato Centrale,*Genève.
E.Ceccherini, (2001) *La Partecipación Del Sistema Autonómico En La Formación De La Voluntad Del Estado,*Revista De Estudios Políticos, pp.173.
P.Carrozza, (1989) *La Partecipazione Delle Regioni All'attività Statale Di Indirizzo,*In (G.Rolla) Il X Anniversario Della Costituzione Spagnola. Bilancio, Problemi, Prospettive, Siena, pp. 143.

[16] F.Puzzo, (2002) *Il Federalismo Fiscale*, Milano,
V.Atripaldi, R.Bifulco(Cur.), (2001) *Federalismi Fiscali E Costituzioni*, Torino.
E.Bonelli, (2001) *Governo Locale,Sussidiarietà E Federalismo Fiscale*, Torino.
M. Berolissi, (1991) *L'autonomia Finanziaria Regionale.Lineamenti Costituzionali,* Padova.

[17] G.Rolla (Cur.), (2005) *La Difesa Delle Autonomie*, Milano.

These two solutions are not necessarily alternatives, as has been evidenced by the recent Spanish experience, which provides for an attempt at reconciliation prior to lodging the case before the *Tribunal Constitucional*.

3. The most important organizational expressions of the principle of autonomy: from homogenous regionalism to asymmetric regionalism

The principle of autonomy is put into practice and implemented by way of different methods and according to various characteristics, keeping in consideration the distinctive features of each constitutional system.

For example, there have been instances of widespread "regionalisation" comprising the entirety of the State's territory, and instances of "regionalisation" operating only on limited portions of said area. The first case occurred in Italy, in Germany, in Austria, in Spain. The second type of "regionalisation" instead shaped certain north European countries: in Great Britain, for example, it assigned specific authority to distinct regional areas, such as Scotland, Wales and Northern Ireland; also, Finland has awarded a particular form of sovereignty to Aaland Isles, on account of historical reasons pertaining to their strategic proximity to Sweden.

Another distinction may be made when considering political or merely administrative regionalisation, or rather, should a territory - based regionalisation compared to one founded on ethnicity and language - as it happened also in Europe, in Belgium.

However, the most up-to-date distinction sets apart a uniform regionalisation and a special, or asymmetric, one. The latter takes place whenever certain territorial communities are granted a special autonomy status, which involves the acknowledgment of broader law-making, financial and administrative powers. In general, the recognition of special autonomy is based on history and on tradition. Besides, an established opinion on the matter points to the cultural element as the feature that most validates the principle of autonomy, and at the same time, as the main factor contributing to its vitality. [18]

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[18] M.Croisat, (1999) *Le Fédéralisme Asymétrique:L'expérience Canadienne*,In Revue

Asymmetry may be functional in nature, namely when special autonomy aims at developing cooperative relations between different institutional levels, in light of the various economic conditions, or of the different degree of competition between specific territories (Germany, Austria). However, it can also be linked to identity, whenever its purpose is to enhance the cultural uniqueness of specific areas within the national territory (Belgium, Canada, Spain, Italy).

Moreover, asymmetry may stem from sociological and economic reasons (in the event of heterogeneous social, economic and cultural settings), or even from legal reasons (related to the acknowledgment of specific legal systems, such as established historical rights or the coexistence of *common* and *civil* law systems).

Undoubtedly, economic globalization has greatly affected asymmetry. Specifically, certain commentators believe that globalization is reducing the benefits that several developed communities may obtain as a result of their participation in a unitary, albeit economically heterogeneous, legal system.

As global markets are affected, the commercial benefits usually awarded to national States are slowly decreasing; therefore, central leadership in economic and social policies is progressively under discussion and often criticized, as the commercial relations linking different territorial communities tend to come undone.[19]

The economic reasons that have represented - and still represent - the foundation of federalism, of regionalism and of all other forms of autonomy are considered differently in relation to the degree of independence awarded to territorial communities: this is particularly true with regard to the law-making power regulating civil law, as well as commercial and procedural law.

In a regional, yet unitary legal order such as Italy, for example, the

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Francaise De Droit Constitutionnel pp.29.

R.Agranoff, (1999) *Accommodating Diversity : Asymmetry In Federal States*, Baden-Baden.

D.Bahry, (2002) *Rethinking Asymmetrical Federalism*, Kazan.

M.Burgess -F.Gress, (1999) *Asymmetrical Federalism In Canada, The United States And Germany: Comparative Perspectives* , Baden-Baden.

E.Fossas - F.Requejo, (1999) *Asimetria Federal Y Estado Plurinacional.El Debate Sobre La Acomodacion De La Diversidad En Canada, Belgica Y Espana*, Madrid.

[19] G.Rolla, *L'autonomia Costituzionale Delle Comunità Territoriali.Tendenze E Problemi*,Cit., pp.7.

assignment of regional authority likely to affect civil law relations and jurisdiction was ultimately deemed inadmissible, as it violated the principle of equality.

On the other hand, in federal and multinational legal systems like Canada, all civil law issues are delegated to the Provinces. More so, said system displays yet another peculiarity: not only are the differences related to provinces, they are also relevant to models. Specifically, the principles applicable in English-speaking provinces that have adopted the common law system live together with the unique nature of Quebec, in which civil law is inspired by the French legal tradition, to the point of having a distinctive civil code and civil procedure code.[20]

Several other decentralized legal orders - such as the Spanish one - lie in between these extreme examples: on one hand, said system protects and respects the historical rights of the "comunidades forales" - historic territories - reserving the right to their modernization to the Statues of the autonomous Communities. On the other, however, the Spanish legal order allows for exceptions when it comes to central law-making power on commercial issues, should this be required in view of the specific characteristics of each community's positive law.[21]

The difficult task of indicating the reasons that validate the designation of a territorial community's distinctive nature, as well as of listing the added prerogatives to be assigned to them is set aside for the Constitution.

With regard to the latter, a territorial community's special autonomy generally consists of:

a. The recognition of (legislative and administrative) authority for the promotion of a territory's particular cultural identity - specifically, in connection with language and religion.
b. The assignment of authority on economic matters.
c. Independent fiscal systems.
d. The definition of a special network of relations with the central government.

In addition, the unique characteristic of certain communities belonging to specific constitutional systems authorize the introduc-

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[20] T.Groppi, (2006) *Canada*, Bologna, pp.42.
[21] E.Aja, (2003) *El Estado Autonómico*,Barcelona.

tion of derogations to the constitutional rules that instead apply to the rest of the State's territory.

On this matter, take in consideration Canada and its *1982 Constitution Act*, which provides for two different sets of exceptions. The first kind protects the identity of autochthonous people, thus consenting "*inherent rights*" of indigenous people to prevail over certain universally recognized rights established by the Canadian Charter of Rights and Liberties, as well as awarding them a right to self-rule.[22]

The second kind of exceptions has been introduced to support Quebec's particular position within the Canadian Federation: according to these derogations, it is possible to postpone - for a maximum of five years - the implementation of the constitutional rules acknowledging important rights guaranteed by the Charter of Rights and Liberties within the territory of a specified Province - such as, for example, the right to expression, religious freedom, freedom of association, right to assemble, personal freedom, the right to equality. This is known as the "*override clause*", sanctioned by Article 33 of the Canadian Charter of Rights and Liberties.[23]

As a rule, the reasons that support the recognition of a special constitutional status can be taken back to what the Spanish call "*realidad natural*", that is, a number of cultural factors based on history that still influence present day life and are likely to project in the future given their inner force.

However, well-established democratic constitutional legal orders do not seem to favour asymmetry, as they do not encourage the recognition of a "distinct society" status to specified territories.

This is the case, for example, of Quebec, in which the tendency to consider it "a distinct society within Canada", "the homeland of the francophone element of Canada's duality" has been frustrated by several factors: first, by the passing of the *1982 Constitution Act*, which concerns all Canadians, from coast to coast; then, by the

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[22] E.Ceccherini, *Un Antico Dilemma:Integrazione O Riconoscimento Della Differenza? La Costituzionalizzazione Dei Diritti Delle Popolazioni Indigene*,Cit.,pp.58.

[23] G.Gerbasi, (2000) *La Clausola Nonobstant Quale Strumento Per La Tutela Dei Valori Delle Comunità Provinciali*,In (G.Rolla Cur.),Lo Sviluppo Dei Diritti Fondamentali In Canada, Milano, pp.135.

T. Kahana, (2002) *Understanding The Notwithstanding Mechanism*,University Toronto Law Journal, pp. 221.

refusal to submit the Constitution to the other Provinces' review, as they considered Quebec as "merely one Province, like the others"; and finally, by the negative outcome of the referendum deciding on secession and on the Supreme Court's case law with regard to the possibility of allowing the separation of Quebec from the rest of Canada.[24]

Likewise, similar considerations can be made in connection with the effort promoted by the autonomous community of the Basque Countries to approve a new autonomy Statute, aimed at revising the constitutional nature of its adhesion to Spain, thus transforming it into a free association relationship. The bill in favour of passing said Statute has not yet completed the mandatory procedure, as it was not approved by *Cortes* (the Parliament), and also because it was deemed contrary to the Constitution by a Constitutional Court ruling.

Other instances of asymmetrical regionalism can be found in Belgium, in Spain and in Italy.

Belgium's constitutional past is punctuated by conflicts for issues of language and religion: even the State's constitutional framework was planned in view of the country's ethnic differences. It is sufficient to consider, for example, that this federal State is subdivided in cultural communities (Article 2 of the Constitution) and in linguistic regions (Article 4 of the Constitution). Also, the elected members of the Parliament are also grouped in two different linguistic categories (Article 43 of the Constitution), while the Council of Ministers is composed by an equivalent number of ministers belonging to the two linguistic communities (Article 99 of the Constitution).[25]

In addition, each Region's linguistic distinctiveness affects its specific regulation, especially when it concerns the organization of its public administration, educational policies and cultural activities: ultimately, it is truly a federal State made up of special regions.

In Spain, the Constitution reveals a predisposition towards the affirmation of diversified regionalism, founded on the historic element and on the acknowledgement of certain "historical rights", which can be identified essentially in linguistic competence, in the

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[24] T.Groppi, *Il Canada Tra Riforma Della Costituzione E Secessione,*In (G.Rolla Cur.), Lo Sviluppo Dei Diritti Fondmentali In Canada, Cit., pp.19.

[25] L.Domenichelli, (1999) *Constitution E Règime Linguistique En Belgique Et Au Canada,*Bruxelles.

civil law, in the fiscal regime, in the insular quality and in the organization of local bodies.[26]

As a consequence, a special condition of autonomy has been recognized to insular autonomous Communities (Balearic, Canary islands), to the Communities characterized by nationalities (Catalunya, Basque Country, Galicia), to the Communities where historical rights are still in force (Navarra), and to the Communities situated across the Strait of Gibraltar (Ceuta, Melilla).

Likewise, there are five regions possessing special autonomy in Italy as well: three of these were created on account of the linguistic and ethnic distinctiveness of the people, as well as to solve complex territorial claims (Valle d'Aosta, Trentino-Alto Adige, Friuli Venezia Giulia); the other two instead were established in order to hamper separatist movements fueled by foreign political authorities (Sicily), or rather by specific conditions of isolation and of economic and social deficiency (Sardinia).[27]

The special nature of these five regions is essentially suggested by the fact that they have been awarded:

a. legislative authority in matters precluded to the other Regions;
b. specific political, administrative and judicial authority by the regional governing bodies;
c. autonomous and formally distinct procedures with regard to their interaction with the central State, on the matter of, for example, the determination of administrative functions, as well as of financial resources to be devolved to each single Region;
d. specific forms of participation to the central State's activity;
e. the possibility of forming their governing bodies allowing for the different ethnic and linguistic groups present. For example, the President of the Regional Council of Trentino-Alto Adige is chosen alternatively among counselors belonging to the Italian language and German language groups, while the Vice-president is a member of the opposing language commu-

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[26] E.Aja, (2003) *El Estado Autonómico,*Barcelona.

[27] A. Ferrara , G. M. Salerno (Cur.), (2003) *Le Nuove Specialità Nella Riforma Dell'ordinamento Regionale* Milano.
L. Antonini, (2000) *Il Regionalismo Differenziato,*Milano.

nity. Also, the members of the Regional Administrative Court of the city of Bolzano must be equally divided between the two main linguistic groups.

4. The drive towards differentiation and the search for unitary principles

The adverse fate of the theories asserting that the autonomous quality of a territorial community must be grounded on the concept of "distinct society" reveals how the positive outcome of the process of decentralization and of asymmetric autonomy are instead based on the ability of reaching a balance between the territorial communities' constitutional right to independence, on one hand, and the principle of equality (in the enjoyment of social and economic rights) and of solidarity (between territories), on the other.[28]

Specifically, in constitutional systems that favour welfare it is possible to identify general clauses requiring the central State's involvement in order to prevent the diffusion of autonomy, especially to avoid it from spreading in a way contrary to the affirmation of the duty of solidarity and to the principle of equal opportunity.[29]

For example, the 1967 *British North American Act* authorizes Canada's federal authority to intervene in the matters reserved to Provinces, should this be necessary to ensure "peace, order and good government in Canada".

Likewise, the Spanish Constitution awards to the State the exclusive legislative power regarding the fundamental conditions ensuring equality among all Spanish citizens in the exercise of their rights and in the performance of their constitutional obligations (Article 149). Article 117 of the Italian constitution instead recognizes exclusive parliamentary competence in the determination of the "essential levels of services concerning civil and social rights that must be guaranteed all over the national territory" (Article 117).

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[28] G.Rolla (Cur.), (2003) *La Definizione Del Principio Unitario Negli Ordinamenti Decentrati*,Torino J.Gonzalez Encinar, (1985) *El Estado Unitario-Federal: La Autonomía Como Principio Estructural Del Estado,* Madrid.

[29] G.Rolla (Cur.), (2003) *La Definizione Del Principio Unitario Negli Ordinamenti Decentrati*,Torino.

Secondly, although it may be extensive, autonomy must (still) develop within a unitary framework represented by constitutional principles and by the general legal order. Autonomy is in fact a different status compared to sovereignty and, consequently, independent parties cannot disregard the State's entire legal and economic organization.[30]

Generally, the recognition of constitutional conditions supporting autonomy is accompanied by the specific definition of measures authorizing the central State's governing bodies to intervene in defense of the system's unity, as well as to prevent that the reasonable differences existing between regional communities end up impairing the duty of solidarity among territories.[31]

Similarly, according to Article 72 of the German Constitution, the Federal government may decide on matters that are generally reserved to Landers, whenever a federal law is regarded as necessary to homogenize life conditions within the federal territory, or rather to preserve the legal and economic unity in the State's general interest.

Along the same lines, Article 138 of the Spanish Constitution sanctions the State's duty to guarantee the effective implementation of the principle of solidarity and to ensure an "adequate and fair" economic balance between the different territorial parties. In the Italian constitutional system, instead, Article 2 establishes the mandatory duties of political, economic and social solidarity, or rather the principle of solidarity as criterion for the allocation of financial resources between institutional levels and among the different territorial communities (Article 119).

From a non-European perspective, an analogous situation can be

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[30] E.Fossas, (2003) *Il Principio Unitario Come Riserva Di Competenza Allo Stato Centrale Secondo La Giurisprudenza Costituzionale,* In (G.Rolla Cur.) La Definizione Del Principio Unitario Negli Ordinamenti Decentrati ,Cit. pp.134.

[31] J.Garcia Roca, (1997) *Asimetrías Autonomicas Y Principio Constitucional De Solidariedad*, Revista Vasca De Administración Publica, pp.45.
E.Aja, (2003) *L'eguaglianza Dei Diritti In Spagna.Con Particolare Riferimento Alla Competenza Dello Stato Di Regolare Le Condizioni Fondamentali Che Garantiscono La Eguaglianza Dei Cittadini*, In (G.Rolla Cur.),La Definizione Del Principio Unitario Negli Ordinamenti Decentrati, Torino, pp. 163 E.Alberti Rovira, (1985) *Autonómia Política Y Unidad Económica*, Madrid.
J.M.Bano Leon, (1988) *Las Autonomías Territoriales Y El Principio De Uniformidad De Las Condiciones De Vida*, Madrid.

found in Article 1 of the Canadian Charter of Rights and Liberties: this provides for the State's entitlement to introduce reasonable limits to the enjoyment of constitutional rights, should this be necessary in a free and democratic society. In addition, an objective within the United States Constitution is to pursue general welfare, or rather, the promotion of common prosperity and the protection of tranquility and order, which the Swiss Constitution defines as a goal of the Confederation, along with the protection of tranquility and of the rights of the Confederates.

However, it is very important that the Constitution provides adequate behavioral and procedural rules so that all contact between autonomous communities and the State is inspired by the principle of constitutional or federal loyalty. In particular, constitutional loyalty implies that all institutional levels must abstain from performing in ways that may obstruct the correct and regular functioning of the system, or somehow cause to deteriorate the necessary cohesion that must exist among all parties that make up the whole.[32]

A system structured on the principle recognizing autonomy to all territorial communities can be effective only if all institutional subjects adopt a cooperative approach, which in the end becomes decisive for the system's overall efficiency. In other words, all State-Region relations - as well as all Region-local body relations - must be governed by cooperative standards.[33]

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[32] Cfr.,J.Laso Perez, (2000) *La Lealtad Federal En El Sistema Constitucional Aleman*, Cuadernos De Derecho Público, pp. 47.

[33] J.Poirier, (2001) *The Function Of Intergovernmental Agreements:Post - Devolution Concordats In A Comparative Perspective*, London.
E.Ceccherini, (2006) *Le Relazioni Intergovernative In Austria,Belgio,Germania E Spagna,* Amministrare, pp. 259.
J. Tajadura Tejada, (1996) *El Principio De Cooperacion En El Estado Autonomico*, Revista Vasca De Administración Pública, pp.177.
R. Bifulco, (1995) *La Cooperazione Nello Stato Unitario Composto*, Padova, pp. 218.
E. Alberti Rovira, (1986) *Federalismo Y Cooperacíon En Rfa*,Madrid.

In light of the different comparative law experiences, cooperation-promoting instruments may be subdivided in multilateral or bilateral instruments, or rather in organic or functional cooperation methods.

Multilateral cooperation is considered as the main instrument to promote homogenous political devolution; bilateral cooperation instead turns down a uniform autonomy approach, as it considers the reduction of differences the cause for the attenuation of territorial uniqueness.

Organic collaboration requires specific "mixed" bodies – that is, that represent both the State and territorial autonomies – while functional cooperation instead aims at promoting the participation of different parties to specific administrative procedures.

MANAGING CULTURAL DIVERSITY IN MODERN GREEK SOCIETY: THE IMPACT OF HUMAN RIGHTS EDUCATION

ARISTOTELIS STAMOULAS

The enormous flow of immigrants and the repatriation of co-ethnic nationals the past ten-fifteen years have brought about considerable demographic alterations in the composition of the population in Greece. Local society has turned rapidly from a relatively homogeneous and compact unit into a multicultural human mix and is being called upon to manage the effects of cultural diversity. The present article starts off by acknowledging the emergence of xenophobic and discriminatory attitudes of the resident population at the expense of vulnerable (minority) groups and proceeds to explain such attitudes in (among other parameters of socio-cultural and politico-economic nature) the lack of systematic human rights education. A comprehensive look at the evidence of such education in all levels of Greek public schooling (primary, secondary, tertiary) is provided and the prospects of establishing a human rights culture through formal education are equally considered.

1. Human rights: institutionalism and cultural consciousness in Greece

Greece tends to be referred to as the birthplace of democracy and moral ethics and ancient Greeks have been known worldwide for their unique achievements in art, literature, sports, philosophy, government and science (Singer 1985; Ketcham 1987; Gagarin and Woodruff 1995; Barker 2001; McCarthy 2003). In fact, many

countries have resourced considerable parts of the development and sophistication of their political and ethical systems from this cultural legacy. Ever since, Greek political history has been marked by long periods of unfortunate events, including the 400-year Ottoman occupation (starting from the fall of Constantinople in 1453 and lasting until the 19th century), the Balkan Wars (1912-1913), World Wars I and II, the Civil War (1946-1949), and the 7-year Military Dictatorship ("The Regime of Colonels", 1967-1974). The restoration of parliamentary democracy in the modern era has been a turning point for the re-embracement of democratic values and the accession of the country to the European Union (then European Community), membership to which is dependent (among other things) upon respect for human rights[1].

The issue of human rights is rather double-faced in Greek political and social reality. From the perspective of institutional compliance to the principles of the EU and other contractual obligations stemming from the signature of regional and international Conventions and Declarations, Greece can be described as a passionate recipient of initiatives for upholding human rights. The Constitution of the country includes enough clauses guaranteeing the protection of people's rights[2], the Presidential Decree 273 of 1999 has established the Greek Ombudsman as a medium between public administration and private individuals for the protection of citizens' rights, Law 2667 of 1998 gave birth to the National Commission for

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[1] The Copenhagen European Council (1993) concluded that membership criteria require that the candidate country must have achieved (a) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, (b) the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union, and (c) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

[2] The 1975 Constitution, following its revision on 6 April 2001, stipulates that every human being within Greece "shall enjoy full protection of their life, honour and liberty, irrespective of nationality, race or language and of religious or political beliefs" (art. 5, par. 2). According to art. 2, par. 1, the respect and protection of human dignity is the "primary obligation" of the state, while -according to art. 4, par. 1- "all citizens are equal before the Law". Art. 5, par. 1 finally provides that "all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, in so far as they do not infringe the rights of others or violate the Constitution".

Human Rights[3] with a consultative status to the state on issues pertaining to human rights protection and promotion, and finally there is a hospitable environment for private activity and collective expression and circulation of human rights ideas under the roof of freely operating NGO's.

From the perspective of the practical embedment of human rights values, on the other hand, some problematic areas deserve particular attention, mainly in relation to institutional and social behaviour towards vulnerable groups, i.e. people whose linguistic/ethnic origin and religious/cultural background constitute a minority compared to the resident population[4].

A number of surveys reveal that Greeks are relatively intolerant of other cultures and xenophobic. On November 2000, the publication of the related results of the European Commission's spring 2000 "Eurobarometer" survey showed that 38% of Greeks are disturbed by the presence of foreigners in their country. The EU average was 15% and the second highest percentage of xenophobia was among the Danes (24%).

Another, even more revealing result by the European Monitoring Centre on Racism and Xenophobia (EUMC 2003-2004) showed that, while 64% of EU citizens consider it a good thing for any society to be made up of people from different races, religions and cultures, only 36% shared that view in Greece (the second lowest percentage was 52% for Austrians), with 52% disagreeing with it (vs. 26% for EU citizens as a whole and 35% for the second highest percentage for Belgians). Generally speaking, despite its solid status as a constitutional republic and multiparty parliamentary democracy that overall respects the human rights of its citizens, Greece is plagued by a number of human rights abuses, especially regarding the treatment of migrants (many of which continue to face daily discrimina-

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[3] In accordance with the Paris Principles (1993), adopted by the United Nations and the Council of Europe.

[4] The Ministry of Public Order (supervising the Police and Border Guard), the Ministry of Merchant Marine (supervising the Coast Guard), the Ministry of the Interior (supervising Local Authorities and responsible for migration issues) define vulnerable groups according to the taxonomy adopted by the Ministry of Labour and Social Security to be used in the context of policies and projects aimed at combating social exclusion. Among the groups are Roma, repatriated ethnic Greeks, migrants, refugees, and cultural and religious minorities.

tions in employment, housing and in government services[5]), freedom of religion and worship[6], and widespread societal and governmental discrimination in employment and housing at the expense of Roma (who are estimated to consitute around 350.000), in addition to their becoming frequent targets of police brutality.

In a previous article (Stamoulas 2004), I had argued that problematic respect of the rights of vulnerable groups in Greece may be attributed to traditional socio-cultural and historical patterns that deviate from the standard philosophical liberal-individualistic platform of the Anglo-Saxon world upon which the notion of human rights was initially founded. The argument went as follows: the emancipation of human rights was triggered by the sophistication of western individualism through the accomplishments of the Renaissance, Reformation, capitalism, modern science, the Enlightenment, and the 19th century ideology of liberalism that came to wrap them up politically, contributing to the development of a self-centred idea of human nature. The 400-year occupation of the country by the Ottoman Empire, which coincided with the development period of these accomplishments in the western world, had been a suspending factor for the flourishing of the birth-giving elements of human rights in Greek culture. What is more, the lengthy Ottoman occupation strengthened the collective expression of the patriotic sentiments of the population against the foreign conqueror and rendered the Orthodox Church a major force for preserving the nation's language and religion. As a result, construction of the Greek culture has been influenced by collective values of belonging to and bearing

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[5] Migrants continue to experience bias before the courts and in dealings with police and prosecutors and in many cases no adequate translation is provided during judicial proceedings. There are quite a few reports of police brutality against migrants, who are rarely able to obtain adequate remedy for such abuses, while few policemen are convicted or held accountable on allegations of brutality.

[6] The Eastern Orthodox Church maintains its Constitutionally secured privileged status as the only official religion in Greece, creating a number of disadvantages for other religions. In December 1997, the European Court found that Greece had violated article 14 (prohibition against discrimination) and article 6(1) (right to fair and public hearing) of the ECHR by denying the legal personality of a Catholic church. Similarly, in February, the court found that Greece had violated article 9 (freedom of religion) of the ECHR by unjustly convicting Protestants for proselytism. On December 19, 1997, an association of the Church of Scientology was dissolved for having carried out business practices outside the scope of its statutes.

duties against a homogeneous and compact "whole" in a way that contrasts radically the western conception of the moral agent as an abstract individual in a plural society who has obligations to and rights against other such individuals and the state (Pollis 1987). Cultural collectivism has been mixed up with Orthodox faith to produce a powerful conception for national identity defined by the theory of the "threatening other" (Triandafyllidou 1997): religion, common ancestry and cultural tradition are the constituting elements of society. Whoever exempts himself form compliance to these elements is considered an agent threatening the coherence and stability of the community and must be treated accordingly[7]. In most cases, "threatening others" become victims of social stigmatisation and marginalisation because of their different linguistic/ethnic characteristics and cultural/religious endorsements, or they face serious administrative difficulties in freely expressing them[8].

Stangos (2006) uses the term "other" in a rather economical and political sense to relate discriminatory attitudes of the Greek population with the negative effects of immigrants' poverty. He justifies such attitudes due to difficult economic and political circumstances that emerged in Greece during the past fifteen years, including

a. government policies aiming to achieve convergence with the EU that occasionally had devastating consequences on Greek workers and their families,

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[7] Dimitrakopoulos (2004) and Baldwin-Edwards (2005) add up to this by claiming that Greeks have learned to feel not only different from, but also superior to all "others" (particularly the neighbouring Turks, Albanians, Bulgarians and Serbs) in terms of ethnicity and religion, because other nations could make no claim on the universally acclaimed classical Greek culture. For the two authors, the vigorous nation-building process since the achievement of national independence from the Ottoman Empire in 1830 was based on the ancient classical myth of Greeks and was defined as the expression of genealogical descent and in direct reference to the glorious past of Themistocles, Pericles and Alexander the Great. This national myth was transformed into a powerful irredentism that fuelled the successive expansions of the Greek state throughout the 19th and 20th centuries, while also serving as an internal political strategy to keep people's cultural morale high.

[8] As far as religious freedom is concerned, for example, an old Law of 1938 (still in use) subjects the establishment and operation of non-Orthodox places of worship to the approval of the ecclesiastical authorities and the Ministry of Education and Religious Matters. More than few Jehovah's Witnesses in Greece have reported considerable administrative difficulties in getting such approval and prosecutions by domestic courts for setting up "illegal" places of worship.

b. political instability in the early 1990's that led to the downfall of several successive governments, and
c. extensive insecurity and popular discontent due to the shift from a generous welfare state to a liberalised economy shaped by the forces of globalisation.

In these circumstances, Stangos claims, the Greek public incriminates "others" (newcomers to Greece in search of a better life) for their poverty and frequently expresses contempt for and/or superiority over culturally distinct minority groups.

Adding up to such interesting analyses that explain discriminatory attitudes at the expense of vulnerable groups from socio-cultural and politico-economic perspectives, the present article will debate conditions of a limited multicultural-friendly attitude across the Greek population by reference to the lack of systematic human rights education, defined by UNESCO as the type of formal training aimed at strengthening respect for human rights and fundamental freedoms, fully developing human personality and the sense of its dignity, promoting understanding, tolerance and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups, and enabling all persons to participate effectively in a free and democratic society governed by the Rule of Law. Evidence of such education will be sought in all levels of public schooling (primary, secondary, tertiary), light will be shed on problematic areas, and the need for enlarging the provision and bettering the quality of human rights education will be highlighted.

2. Primary and secondary education[9]

Education on human rights is increasingly considered to be an invaluable tool for building a global culture of human rights and preventing their abuse, enabling individuals and communities to understand and express their personal concerns in human rights terms, encouraging people to integrate human rights principles into both their individual lives and their social institutions, and finally for

[9] Data and information gathered from the websites of the Ministry of Education and Religious Matters (www.ypepth.gr) and the Pedagogical Institute of Greece (www.pi-schools.gr).

empowering people to use human rights as vehicle for social change.[10] The two levels of basic education, primary and secondary, are considered essential in providing children with their first learning experiences in an out-of-the-family environment and setting up the basis for cognitive development, socialisation and character formation. Nothing could be more important at these early stages than stimulating students' contact with human rights principles in order to facilitate informed awareness about multicultural co-existence and respect for the life and freedoms of other people.

2.1. Program of "cross-cultural education"

Greece is facing the economic and cultural tensions of globalisation and EU enlargement and at the same time has become host to nearly a million immigrants (including aliens and co-ethnic returnees, such as Pontiac Greeks and ethnic Greek Albanians) in less than a decade. This represents about 10% of the total resident population, a strikingly high percentage for a country that until only twenty years ago was a migration sender rather than a host (Triandafyllidou, Gropas 2005). Immigrant children in state secondary schools have increased from 8.455 in 1995/96 to 98.241 in 2002/03, the latter representing some 6,7% of the total secondary school population (Skourtou et all 2004). The progressive augmentation of the "new minorities" has marked the coming of a new era. Social diversity is an indisputable fact and the challenge presented to educators is how to develop appropriate educational material and pedagogical methods in order to help the newcomers integrate with local social patterns in a sensitive manner towards their own cultural background, while at the same time infusing Greek students with an intercultural approach to enable them to successfully manage cultural diversity at school.

The Ministry for National Education and Religious Matters laid the foundations back in 1996 of a system designed to meet the educational needs of groups with a particular social, cultural, linguistic, or religious identity. The Ministry adopted "cross-cultural educa-

[10] Extract from the "Human Rights Education Campaign" of Amnesty International (http://web.amnesty.org/pages/hre-intro-eng).

tion", a new form of education in Greece, as part of this policy. The program applies only in schools where repatriated Greek and/or foreign students account for at least 45% of the total student body and its purpose is to adapt the standard curriculum to meet the specific educational, social and cultural needs of the students attending them. The general inclination is to provide immigrant students with an education built on their language and culture, in combination with an essential Greek language competence, in order to receive comprehensible input and make adaptation to local circumstances easier. For some critics, however (Dimitrakopoulos 2004), the concept of cross-cultural education in Greece not only has not proved broad enough to be able to build bridges between communities and between individuals from diverse backgrounds, but also has been removed from its defining purpose to develop the ability of different groups to communicate with each other and gain insight into different cultures, in order to facilitate the assimilation of these different groups into a uniform (the prevailing domestic) culture.

This seemingly mono-dimensional and deficient approach to cross-cultural education is leaving unresolved the disturbing fact that children originating from vulnerable groups are severely ill-treated at schools. A survey entitled "Discriminations, Racism and Xenophobia in the Greek Educational System", carried out under the auspices of the Greek department of UNICEF (2001) five years after the launch of the cross-cultural education program, revealed that schools tend to become an arena for discriminations at the expense of foreign students, with parents, teachers and school headmasters being negative towards not only the presence of foreigners at school, but in the country in general. Similarly, the results of a spring 1999 survey (released in December 2000) carried out by the National Centre for Social Research (EKKE) showed that, on a composite index, 47%-54% of junior high and senior high school pupils, parents and teachers are xenophobic. Practical incidents indicative of such xenophobic attitudes include angry reactions by Greek parents and pupils to the carrying of the national flag during school parades by high achieving migrant pupils and also parents requesting the expulsion of foreign students from their children's classrooms on grounds that the presence of the former affects negatively the learning experiences and school progress of their offsprings.

Such phenomena of intolerant and xenophobic behaviour confirm that the experience of contact between Greeks and "others" after the

1990's did not necessarily entail any concerted governmental policy for the education of both sides as to similarities and differences in their linguistic, religious, cultural and national characteristics (Tsitselikis 2003). Mainstream public schooling does not really provide knowledge on immigrants, minorities, or any kind of otherness in Greece. The "civic education" course, which is taught in elementary schools (one hour per week in the fifth and sixth grades), as well as in high schools (third class of the Gymasium and second class of the Lyceum), outlines the political system of the state as well as the essential legal principles and institutions of Greece, but there is no serious encounter with conditions of multicultural living and the rights of aliens/immigrants in these conditions.

It would be accurate to claim then that Greek formal secondary schooling still suffers from a disability to turn from its "introvertive" orientation to a more "extravertive" one (Gousgounis 2002). Despite the launch of the cross-cultural education program, a mono-linguistic and mono-cultural policy is still the dominant model in the country and a new orientation of national education towards multiculturalism remains as such difficult to define. This is mainly because cross-cultural education has been designed with a limited scope (i.e. to serve pedagogical purposes of schools with a considerable body of foreign students), rather than being a nationwide project with protrusions in each and every schooling facility, which would establish better communication links between the two groups of students (resident-foreign) and enable comprehension of social and cultural pluralism even in schools with a smaller body of foreign students or no foreign students at all (Skourtou et all 2004). Although, as Ilias (2003) points out, cross-cultural education can be taken admittedly to address issues of integration of vulnerable groups into local society by offering equal opportunities and access to basic education for all, its limited scope

a. contributes to the reproduction of stereotypical biased views about the distinguished characteristics of culturally diverse groups, and
b. lacks the character of an all-encompassing, systematic educational campaign for the consolidation of human rights principles as part of the learning process at schools, which is expected to develop values of respect and tolerance among pupils.

From this perspective, cross-cultural education fits more into a broad and vague policy (along with government actions in other

fields regulating citizenship, housing, health and employment issues) for the integration of immigrants in Greek society, rather than into an explicit pedagogical framework for the teaching of human rights lessons with a view first and foremost to enable students appreciate multiculturalism.

2.2. The "schools for the application of innovative educational practices" program

Recognising the need to modernise and improve the output of primary and secondary education in order to respond to emerging challenges (rapid developments in science and technology, internationalisation of social, economic and cultural relationships and their impact on education, multicultural reality, strong competition in all sectors of social activity), the Ministry of Education brought into effect a pilot program for the application of innovative educational practices at schools.

The program lasted from 1997 until 2000 and its principal targets were the cognitive expansion of curricula, Information and Communication Technology (ICT) integration in education, the establishment of all-day schools and relating education outcomes with the labour market.

A small part of the program was intended for fostering attitudes against racism and xenophobia by enhancing student awareness on regional and international circumstances and offering multicultural experiences. This target, claims the Ministry, was achieved by means of teaching the subjects of "Greece, Balkans and Europe: Peoples and Cultures", "For Human Rights, Against Racism", "Conflict Management and Human Rights at School", and by establishing inter-cultural academic co-operation with schools in neighbouring countries.

The program, although veering towards the right direction, is difficult to assess in terms of its transparency and result-based orientation. The Ministry has only released some quantitative data about it (Pedagogical Institute 2001), i.e. the number of participating schools, the number of students and teachers involved in the process, the money invested, etc., that provide no answers of a qualitative nature about the extent to which students have comprehended human rights ideas, how much convincing were these ideas to replace previous biased conceptions against multiculturalism, what were their

feelings of those participating in these programs, how comfortable has the multicultural experience made them in attending classes together with children of a different language, race, religion, ethnic origin, etc.

In these circumstances, the program can hardly be given credit for its methodical foundations and effectiveness insofar as we do not receive information about its essential contribution to the formation of a human rights consciousness among students and the impact of this consciousness on their behaviour towards students belonging to vulnerable groups.

2.3. The "cross-thematic curriculum framework for compulsory education"

Ongoing topics of debate in secondary education in Greece include additional teaching courses such as health education, traffic and consumers' education, entrepreneurship for pupils, environmental education, ICTs, arts, music, drama and dance. The reform fits into the purposes of a long term strategic planning designed by the Pedagogical Institute for the gradual transition of compulsory education from traditional field-centred curricula to student-centred and creative learning teaching methods, with a view to promote the development of students' critical thinking, collaborative skills and creative activity.

Mrs Giannakou, Minister of Education, had announced almost a couple of years ago that human rights will be among the new courses to be included in the so-called "cross-thematic curriculum", however the issue still lies in the margins of the reform.

2.4. Concluding remarks

Overall, the state seems to be willing to respond to ongoing transformations in primary and secondary education triggered by the emergence of a new multicultural reality. Initiatives are struggling to take into consideration the effects and the new requirements of cultural diversity at school, but they do it in an awkward and disjointed way, producing results that are either poor, pending to be enforced, or lacking some sort of quality assurance regarding their effective-

ness. If the purpose is to foster understanding and tolerance towards cultural diversity in young minds, then human rights must be worked out as a special, stand-alone course to be included in school curricula, rather than appearing as a disguised sub-part of some all-in-one state educational initiative with ambiguous chances of success. Teaching human rights as part of the cross-thematic curriculum, although yet to be envisaged, is probably the most promising aspect of all ministerial initiatives in the field so far, for

a. it will set human rights in a nationwide educational perspective for the benefit of all students (native and immigrant alike), and
b. it will be a clearly discernible educational policy, the operational framework and the desirable outcomes of which will be methodologically easier to formulate and assess.

3. Tertiary education[11]

Human rights education at university level boosts domestic and international academic discourse, facilitates research in exploring new ways for protection and promotion, and contributes to the formation of a global culture of peace and democracy. For Volker Lenhart (2006), human rights education is also very much important for members of professional groups whose duties involve somehow dealing with issues in human rights. The work of primary/secondary education teachers, medical and police staff affects almost all areas of social activity and carries a huge sense of public responsibility for its impact on the well-being of citizens. It is essential, therefore, that these professionals develop through their education reflective conceptions on multiculturalism and a strong sense of equal and just treatment of those affected by the exertion of their duties.

3.1 Training of primary/secondary education teachers

Educating teachers on human rights is important not only for their preparation to be knowledgeably competent in teaching human

[11] Data and information gathered from the website of each university.

rights material at class, but also for invigorating their role as "social etiquettes" that will nurture children to value diversity at school and entrench multicultural respect for the rights of other people in their future lives as adults. To that purpose, according to Banks (2001), teachers must process reflective cultural, national, and global identifications themselves, if they are to help students become thoughtful, caring, and reflective citizens in a multicultural world society.

Primary and secondary teachers in Greece are public servants appointed by the Ministry of Education and can only be graduates of a state higher education institution (AEI) with a standard eight-semester (four-year) duration study cycle, comprising courses of general education and specialisation courses on their teaching subject. We were pleasantly surprised, while researching the study programs of all Departments of Education across the country, to see that teaching of human rights courses tends to expand. For obvious reasons, primary focus for the time being is on issues of multicultural education and management of cultural diversity at school and less on the international/political, philosophical, or legal dimension of rights. Currently, courses are taught on undergraduate level and there are no more than a couple of postgraduate programs specialised on human rights for those wishing to further their studies.

Despite being in an embryonic level, efforts for the development of a potentially solid background for educating prospective teachers on human rights are multiplying. One could not expect of course to observe the lively teaching and research tradition we spot in Anglo-Saxon universities, nor their international reputation for the high-level institutional organisation, the quality depth of academic curricula, and the acclaimed educational expertise of professors. Teaching of human rights in Greek higher institutions has evolved during the past decade as a reactive measure for the management of cultural diversity that suddenly struck schools, rather that out of the spontaneous academic curiosity of professors and practitioners to study human rights in a multicultural context. Greek society has turned significantly multicultural only during the last ten-fifteen years. Before that, social diversity was restricted to minorities of relatively limited size and easily distinguishable features (mainly Gypsies), which did not actually incline professors to develop a research relationship with the phenomenon of multiculturalism the same way as western societies that encountered the effects of cultural diversity much earlier and to a greater extent did with their university tradi-

tion. Policy for the new multicultural era in Greece was quick to develop in terms of putting into practice stricter border controls and other enforcement measures for newcomers, but at the same time there has been a significant time lag in designing and implementing a more comprehensive framework for their integration across all sectors and areas of the host country (Triandafyllidou, Gropas 2005). Among these sectors, the university system of the country was not previously prepared to play its role as a social pillar for promotion of tolerance, embracement of cultural pluralism and the consideration of the positive aspects of migration, which somehow explains why a number of surveys find teachers at schools to react awkwardly towards their multicultural audience.

3.2. Training of medical staff

Greece preserves a sizeable public health system, free and equal access to the services of which is by Constitution and Law reserved for all Greek citizens, as well as for legally staying and working immigrants, repatriated Greeks and co-ethnic returnees. However, the quality of the received medical attention tends to be related frequently with the financial background, the educational level and the social standing of people, nationals and non-nationals alike. In particular, as far as members of vulnerable groups are concerned, there are noticed incidents of unequal access, low quality provision of medical services, discrimination, and unfriendly behaviour by medical staff, caused mainly by their different nationality, poor financial situation, lack of insurance, and ignorance about their social entitlements and rights (Kapsalis 2003, Maratou-Aliprandi, Gazon 2005). On an institutional level, improvement of the situation requires the co-ordinated efforts of multiple governmental agents (Ministries of Internal Affairs, Labour and Health), but training of medical staff on human rights is commonly accepted to be a contributing factor for battling the undesired consequences of biased conceptions against foreigners and their contemptuous treatment.

Medicine studies in Greece are of six-year duration (twelve semesters plus a long specialisation period) and courses are offered by the six public Medical Schools and Faculties of the country in the universities of Athens, Thessalonica, Patras, Ioannina, Crete, and Thessaly. All Greek Schools of Medicine have an international reputation for

their high standards of educational quality and for the distinguished skills and expertise of the graduating doctors. However, the focus is exclusively on the medical training (theoretical and practical) of students and there is absolutely no inclusion of human rights education in the associated programs of studies. Our research has come up with only one course of some sort of relevance to human rights entitled "Inter-cultural Nursing". The course is of one semester duration and is offered by the Faculty of Nursing of the Medical School of the National and Kapodistrian University of Athens.

3.3 Training of police staff

Greece is not immune from the worldwide tendency of law enforcement officials to abuse frequently the rights of citizens during arrests, interrogations, detention or imprisonment. Allegations about members of vulnerable groups being subjected to degrading and humiliating (sometimes violent) treatment by policemen "hit" the TV news bulletins and newspaper front pages from time to time[13]. Law enforcing can by nature be a professional duty of very high risk and the truth is that the limits between meticulous respect for the rights and dignity of the persons involved and police misbehaviour are quite often difficult to distinguish.

In a number of cases, however, as revealed by the NGO Greek Helsinki Monitor's "Joint Annual Report on Human Rights in Greece" (2000), use of police force escapes the boundaries of mere professional zeal and is deeply rooted in institutionalised racism against members of vulnerable groups.

There is a two-level system of police training in Greece. Police constables (low rank staff) are graduates of the Police Constables' School, which is equivalent to a public tertiary Technological Educational Institute (TEI) and provides a two and a half years (five semesters) study cycle. Police officers (high rank staff) are graduates of the Police Officers' School, which is equivalent to a public Higher Educational Institute (AEI) and provides a four-year (eight semes-

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[13] See the 2006 US Department of State "Report on Human Rights Practices in Greece", and the Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Hellenic Republic, 2-5 June 2002.

ters) study cycle. The last few years both Police Schools have come to include some basic education on human rights (one course of one semester duration each), but still this is quite a recent development and the police force remains staffed to a great extent by older officers and constables with no such education back in their study years, which somehow explains their tendency for misbehaviour.

It is interesting to note here that ever since the then called Royal Gendarmerie (*chorofylaki*) was founded (1833) in the free Greek state after termination of the Ottoman occupation, training of police staff was very much close to the military standards of iron discipline and conducted in harsh and almost inhuman conditions, with an aim to produce hard-boiled and iron-handed police officers (Kteniadis 1950, Antoniou 1965). The military spirit of training remained strong throughout at least the first three quarters of the 20th century and police officers were quite frequently asked by their superiors to carry out their duties in an unsentimental and rigid manner towards civilians. The Greek Military Dictatorship (Junta) is a characteristic example of how the "Regime of Colonels" utilized the police to handle violently and arrest protesting people. Before that period, the police had also been used by the repressive anti-communist state to sort all Greeks according to their socio-political convictions and loyalty to the regime (*fakeloma*) in order to determine their access to public services and structure various forms of exclusion. This concept carried connotations of traditional threats and forms of blackmail used by any authority figure to enforce obedience, thus reinforcing a mutual mistrust in state-citizens relations (Samatas 2005). The combination of old-style training methods with a long military-tailored fashion of duty performance had been determining factors of institutionalising the role of police officers as strict and unbending law enforcers at the expense of a more human, altruistic and sensitive approach to helping people sort out their everyday problems. It would be reasonable to claim that such a view of law enforcement was so strongly embedded, that passed from one generation to another through a mechanism of experience exchange between older and younger police officers. We can just expect to see such views fading out by setting new standards of human-centred training.

In the modern era, the Hellenic Police Chief and the leadership of the Ministry of Public Order, acknowledging that incidents of human rights violations by police officers during law enforcement are inappropriate in the context of a democratic member-state of the EU,

have embarked on a campaign to raise their awareness with respect to the prohibition of misbehaviour and discrimination especially at the expense of vulnerable groups. The campaign includes the circulation of the UN's "International Human Rights Standards for Law Enforcement: A Pocket Book on Human Rights for the Police", as well as an adult education (life-learning) program for the additional training of officers on issues pertaining to human rights. The third report of the European Commission against Racism and Intolerance (ECRI 2004) acknowledges the intensity of the efforts of the Greek state, stressing however that there is room for more action to end all instances of police misbehaviour, including ill-treatment of members of vulnerable groups.

4. Conclusion

The relatively rapid transformation of Greek society at the sunset of the 20th century from compact and homogeneous into polyethnic and multicultural has provoked confused reactions from the resident population, many of which are identified with discriminatory behaviour and xenophobia. Explanations for such behaviour can be found in socio-cultural and politico-economic studies that analyse the development mechanism of feelings of superiority against and contempt over culturally distinct groups.

At the same time, Lohrenscheit (2002, 2006) observes that states, international organisations and NGO's tend increasingly to consider education among the mechanisms in a society that can significantly contribute to the formulation of a human rights value system for the appreciation of cultural diversity and the facilitation of peaceful multicultural co-existence. At the second UN World Conference on human rights education held in 1993 in Vienna, a powerful new movement for human rights began to emerge. The Vienna Declaration and Program of Action strongly focused on the promotion of human rights education as a strategy for preventing their violation and fostering respect for human dignity. Similar international activities include also the two World Education Forums in Jomtien (1990) and in Dakar (2000) and the decade for "Human Rights Education" of the United Nations (1995-2004).

Greek educational structures seem to have responded with considerable delay to international initiatives for institutionalising a com-

prehensive network for the spread of human rights principles and ideas at school and university, despite obvious signs of a growing multicultural situation that challenged the homogeneity of the local social establishment and its mono-cultural ethics. The difficulty of the resident population and the instruments of the state to handle cultural diversity in a human rights manner is validated by the fact that Greeks are found among the most xenophobic peoples in the EU and many incidents of individual or administrative cultural racism in all areas of social activity are frequently reported. Although we can spot a traceable record of well-intentioned efforts across all levels of schooling, the quality and quantity of human rights education remains in embryonic level and quite a few steps are yet to be taken for its systemisation.

The primary and secondary curriculum of the country still suffers from the absence of a distinct course on human rights and the mapping out of a new multicultural orientation; and at tertiary level, the training machinery, although growing, is still limited to some undergraduate lectures and less than a few postgraduate programs. This meagre educational tradition has created conditions of human rights illiteracy among the population and has collaborated the flourishing of culturally biased conceptions against members of vulnerable groups. It is hopefully assumed that the educational system of the country will increase its reflexes and enlarge the provision of human rights education in order to orient institutional and social behaviour towards more multicultural-friendly ways of expression. It is anticipated that Greece, the southeast frontier of Europe, will keep its dynamics in attracting a multicultural flow of newcomers, peaceful co-existence with whom will largely depend on the extent to which a human rights culture will have expanded across the nation's consciousness.

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MARRIED COUPLES, DOMESTIC PARTNERSHIPS AND OTHER TYPES OF COHABITATION: A COMPARATIVE PERSPECTIVE

FILIPPO VARI

The essay examines the most significant regulations of married couples, domestic partnerships and other types of cohabitation in the Member States of the European Union. Some Member States of the European Union, such as Italy, have a special legislation in favor of married couples. Other Countries are taking legal action aimed at aligning the regulations for opposite-sex and same-sex domestic partnerships with those provisions intended for married couples. The author examines the legislation of states that allow homosexual couples to enter an institution defined as marriage and underlines that the introduction of such legislation comes as a result of terminological manipulation. The analysis is also directed to those states that have introduced public recognition for non-married couples based on the conclusion of partnership agreements following the French example of the so called *Pacs*. The essay is critical towards such legislation and underlines the reasons for which non-married couples cannot legitimately be given the same treatment and benefits attributed to families founded on marriage because of its unique role in society. These conclusions are supported by an enquiry into the development of European Community Law and an analysis of the jurisprudence of the Court of Justice of the European Union.

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1. Introduction

Family law is of fundamental importance for the development of any community.In this regard Costantino Mortati, a famous Italian Professor of Constitutional Law, referred to a "social (although non-public) function of the family."[1]

Indeed, the family is particularly important in two respects - the education and support of the individual, on the one hand[2] and, on the other, the assurance that society as a whole will continue and endure, in particular, by assuming these responsibilities.

As a result, the family represents the "point of intersection at which the public and private spheres or a certain public and intimate life come together, socializing people, while internalizing customs."[3] By teaching and passing on cultural, social, mental and religious values, the family represents the preferred place of an individual's development and well-being into his/her unique identity and, consequently, the growth of the community as a group of people.

However, these basic ideas are not unanimously accepted, either by the Member States of the European Union or at the level of community law. On the contrary, there is, without doubt, broad disagreement between Member States concerning current family law as well as legal provisions regarding domestic partnerships and - in countries where separate laws have been adopted - regarding same-sex domestic partnerships. Therefore, the establishment of a European *ius commune* is impossible with respect to the topic discussed here.

2. Different regulations concerning married couples, opposite-sex and same-sex domestic partnerships in the Member States of the European Union: Italy, France, the Netherlands, Spain and Germany

Some countries involved in the integration process - such as Italy - have a special regulation in favor of married couples compared to

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[1] Mortati, C., (1976), *Istituzioni di Diritto pubblico*, 9th revised edition, Padua: Cedam, p. 1165.

[2] Compare: Baldassarre, A., (1997), *Diritti della persona e valori costituzionali*, Turin: Giappichelli, p. 186.

[3] ibid.

domestic partnerships both at a constitutional level and at the level of ordinary legislation.[4] Domestic partnerships are only sometimes recognized, under certain circumstances and with respect to a certain purpose, and only if they involve different sexes.[5] In Italy, the basis for the preference of married couples is clearly and unmistakably based on Article 29, Subsection 1 of the Constitution, with the following wording: "The Republic recognizes the rights of the family as a natural union founded on marriage."

It has long been emphasized that the Article mentioned above expresses a clear and specific choice adopted jointly by the various positions represented in the Constituent Assembly: the statement of the canonic Roman principle *favor matrimonii*,[6] a principle that ultimately prevailed in the Italian legal system, similar to other principles of identical origin.[7]

However, part of the Italian legal doctrine[8] represents the view that the preferential treatment of married couples pursuant to Article 29 of the Constitution could be overridden based on the inclu-

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[4] With respect to *favor* regarding the legitimately founded family in the Italian legal system, see among others: C. Esposito, C. "Famiglia e figli nella Costituzione italiana", *Studi in onore di A. Cicu*, Milan: Giuffrè 1951 later in *La Costituzione italiana. Saggi*, Padua: Cedam 1954, p. 138; Grossi, P. F., (1996), "La famiglia nella evoluzione della giurisprudenza costituzionale", in dalla Torre, G., (editor), *La famiglia nel diritto publico*, Rome: Studium, p. 7; Baldassarre, A., (1997), *Diritti della persona* cit., p. 186; Loiodice, A., (2000), *Attuare la Costituzione. Sollecitazioni extraordinamentali*, Bari: Cacucci, pp. 37 et seq.

[5] Please see: Rossi, E., (2002), "La tutela costituzionale delle forme di convivenza familiare diverse dalla famiglia", in Panizza, S. - Romboli, R. (editors), *L'attuazione della Costituzione - Recenti riforme e ipotesi di revisione*, Pisa: Edizioni PLUS, pp. 109 et seq. for some examples.

[6] Please refer to: Dalla Torre, G., (2002), "Il 'favor iuris' di cui gode il matrimonio (cann. 1060 and 1101§ 1)", in *Diritto matrimoniale canonico*, I, Vatican City: Libreria Editrice Vaticana, pp. 221 et seq.

[7] Please see in particular: Baccari, R., (1984), *Elementi di Diritto canonico*, Bari: Cacucci, p. 20.

[8] Puleo, S., (1989), Art. "Famiglia, (II) disciplina privatistica: in generale", *Enc. giur.*, XIV, Rome: Treccani, p. 2.
With this in mind, see among others: Barile, P., (1977) "La famiglia di fatto: osservazioni di un costituzionalista", *La famiglia di fatto, Atti del Convegno nazionale* (Pontremoli May 27-30, 1976), Montereggio: Tarantola editore, p. 45; Busnelli, F. D., (1977), "Sui criteri di determinazione della disciplina normativa della famiglia di fatto", *La famiglia di fatto* cit., pp. 133 et seq.; Rescigno, P., (2000), "*Società naturale, esperienze contrattate*", *Memoria o futuro della famiglia*, Milan: Giuffrè, p. 170.

sion of Article 2 of the Constitution, which establishes the following: "The Republic recognises and guarantees the inviolable rights of the person, as an individual, and in social groups where an individual's personality develops."

Some authors think same-sex domestic partnerships should be given the same level of protection of rights as opposite-sex domestic partnerships, based on the view that they are characterized by the same attributes as opposite-sex domestic partnerships.[9]

The Italian Constitutional Court continues to counter the increasingly prevalent view of the legal doctrine by stating that Article 2 of the Constitution cannot be used to question the application of Article 29 of the Constitution: domestic partnerships cannot be equated with married couples.

The Constitutional Court has always insisted on the impossibility "of extending the regulation intended for married couples to domestic partnerships based on the simple equalization of both situations."[10]

By contrast, legal action is currently being taken in other European Member States aimed at equalizing the regulations for opposite-sex and same-sex domestic partnerships with those provisions intended for married couples.

In this respect, the regulations adopted by France, Germany and the Netherlands are particularly noteworthy. Moreover, there are harsh disputes about the recently introduced changes in the Spanish legal system.

As is generally known, detailed provisions about the family are non-existent at a constitutional level in France.[11] In fact the Constitution, dated September 27, 1946 merely includes a note regarding families in the preamble, which has been referred to in the Constitution of the Fifth Republic:

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[9] Rossi, E., (2000), "L'Europa e i gay", *Quad. cost.*, p. 405.

[10] See for example among a number of decisions: Corte cost., Judgment n. 313 of 2000, in *Giur. Cost.*, 2000, pp. 2367 et seq. This train of thought constantly reappears in jurisprudence of the Italian Constitutional Court.

[11] Please see: Tettinger, P. J., (2003), "La protección del matrimonio y de la familia fundada en el derecho constitucional. Una inversión estatal de cara al futuro que merece la pena", in F. Fernández Segado (editor), *The Spanish Constitution in the European Constitutional Context*, Madrid: Dykinson, p. 1799.

> *"la Nation assure à l'individu et à la famille les conditions nécessaires à leur développement" (the nation assures the individual and the family the conditions necessary for evolution).*

Law no. 99-944, dated November 15, 1999, introduced the following provision in the first volume of the French Civil Code, under heading XIII:

> *"Du pacte civil de solidarité et du concubinage" ("The civil union arrangement and cohabitation".)*

In Article 515-8 of the Civil Code, the *concubinage* (cohabitation) is determined as

> *"une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple" ("a de facto union, characterized by a communal life having the characteristics of stability and continuity, between two persons of different sex or the same sex, who live together as a couple")*

The term *Pacs* (*pacte civil de solidarité*) (*civil union arrangement*) is defined in Article 1 of the Law no. 99-944. On this basis Article 515-1 of the Civil Code was amended to read

> *"un contrat conclu entre deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune" ("a contract made between two individuals of legal age, of different sexes or the same sex, that establishes their living together").*

Based on this regulation, the agreement can refer to heterosexual or same-sex couples.

The *Conseil Constitutionnel (Constitutional Council)*[12] - called upon to provide a prior statement about the constitutionality of the

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[12] *Conseil Constitutionnel* 99/419 Dc, dated November 9, 1999.

law - emphasized that the "*vie commune*" is the condition for the applicability of the institution with a common domicile and living together as a true couple.

Although the *Pacs* can not be put in the same category as marriage, it grants same-sex and heterosexual couples entering into a *Pacs* agreement, some of the same effects as those related to marriage. Although the so-called *pacsés* enjoy a high degree of independence with respect to the regulation of the effect of the legal transaction entered into,[13] they have the right of support pursuant to Article 515-4 of the *Civil Code*.[14]

In the Netherlands, opposite-sex and same-sex domestic partnerships are entitled to be registered in a special registry. In addition, the law[15] allows homosexual couples to enter an institution defined as marriage,[16] based on a terminological manipulation discussed below. Although homosexual couples are not entitled to international adoptions, they are allowed to adopt minors residing in the Netherlands.

In addition to the regulation that became effective in Belgium in 2003, this model was adopted by a recently introduced amendment to the Civil Code in Spain. Sixteen articles of the Spanish Civil Code were amended as a result of the new regulation. Terms such as "marido" (husband) and "mujer" (wife) were replaced by "cónyuges" (spouses) and "padre" (father) and "madre" (mother) by the term "progenitores" (parents).

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[13] Vitucci, P., (2001), "'Dal dì che nozze ...' Contratto e diritto di famiglia nel pacte civil de solidarité", *Familia*, p. 717.

[14] "*Es partenaires liés par un pacte civil de solidarité s'apportent une aide mutuelle et matérielle. Les modalités de cette aide sont fixées par le pacte. Les partenaires sont tenus solidairement à l'égard des tiers des dettes contractées par l'un d'eux pour les besoins de la vie courante et pour les dépenses relatives au logement commun*". ("*The partners bound by a civil union agreement contribute mutual and material assistance. The methods whereby such assistance is contributed is established in the agreement.*

The partners are obligated jointly and severally vis-à-vis third parties for any debts contracted by either of them for the needs of daily life and for expenses relative to joint lodging ")

Regarding *Pacs* please also refer to: Probert, R., (2001), "From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarité", *The Journal of Social Welfare & Family Law*, p. 257 et seq.

[15] Law dated December 21, 2000, number 26672, entered into force on April 1, 2001.

Based on these amendments, same-sex couples are entitled to get married and to adopt minors.

These intentions were clarified with the introduction of the following provision into the Spanish legal system:

> *"El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo"* (*"Marriage will have the same requisites and effects when both contracting parties are of the same or different sex"*).

When taking into consideration Article 32 of the Spanish Constitution, this regulation is grounds for obvious concern with respect to its constitutionality:

> *"El hombre y la mujer tienen derecho a contraer matrimonio con plena igualdad jurídica" ("A man and a women are entitled to contract marriage with full legal equality ").*

In Germany, the *Bundesverfassungsgericht* (*Federal Constitutional Court*) has consistently insisted that the key element of a marriage is the union between a man and a woman. This excludes the applicability of the same institution to individuals of the same sex and prevents this exclusion from being considered discriminating against homosexual couples.[17]

In addition, the Federal Constitutional Court represents the view that there is no discrepancy between Article 6 *GG*[18] and the law, dated February 16, 2001, which came into effect on August 1 of the

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[16] Please see: Ceccherini, E., (2001), "Il principio di non discriminazione in base all'orientamento sessuale: alcune considerazioni alla luce delle esperienze straniere", *Dir. pubbl. comp. eur.*, pp. 39 et seq.

[17] With this in mind, please see: BverfGE (verdicts of the Federal Constitutional Court), vol. 105, pp. 313 et seq. (verdict dated July 17, 2002), in *NJW*, 2002, pp. 2543 et seq.

[18] With respect to Article 6 GG please see: Maunz, T. - Zippelius, R., (1985), *Deutsches Staatsrecht*, 26th edition, Munich: C.H. Beck , pp. 217 et seq.; Tettinger, P. J., *La protección del matrimonio y de la familia* cit., pp. 1800 et seq.; Badura, P., (2003), *Staatsrecht*, 3rd edition, Munich: C.H. Beck, pp. 155 et seq.

same year and concerns elimination of discrimination against same-sex domestic partnerships (*eingetragene Lebenspartnerschaften*).[19]

Because it is impossible to discuss the German regulation any further as regards its constitutionality within this scope,[20] I would only like to explain that *eingetragene Lebenspartnerschaften* can be founded by two people of the same sex who declare before the competent authorities that they intend to enter into a mutual lifelong *partnership*.

A number of consequences result from such agreements, which represent a clear alternative to marriage because this declaration is not valid if one of the two individuals is married.

These agreements include the right of support and the corresponding obligation to support, entitlement to the compulsory portion of the estate of the deceased partner, the right of succession to the rental agreement signed by the deceased, the right to refuse to testify against the partner, the right to adopt a common family name and the effects of separation corresponding to those of married couples.

Pursuant to the amendment of law that became effective on January 1, 2005, partners are entitled to transfer the family name of the other partner to their own offspring, provided he/she has parental custody and the child lives in the joint household.

3. The position of the European Parliament

The different regulations for married couples, opposite-sex and same-sex domestic partnerships have caused a number of disputes in the European Parliament which implicitly and sometimes even explicitly has asked all Member States of the European Union, on numerous occasions, to equalize all forms of cohabitation.

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[19] Please refer to: Tettinger, P. J., (2002), "Kein Ruhmesblatt für 'Hüter der Verfassung'", *Juristen Zeitung*, pp. 1146 et seq. for a convincing review of this verdict.

With respect to the impossibility to equalize other cohabitations with the family pursuant to Article 6, GG please see: Pechstein, M., (1994), *Familiengerechtigkeit als Gestaltungsgebot für die Staatliche Ordnung*, Baden-Baden: Nomos-Verlagsgesellschaft, p. 388.

[20] Please compare the Authors mentioned in the remark above.

In particular, notwithstanding the fact that the European Union does not have corresponding jurisdiction, the European Parliament adopted a resolution on equal rights for homosexuals and lesbians on February 8, 1994. The resolution moves that the Commission should submit recommendations concerning the elimination of "obstacles preventing the marriage of homosexual couples or the establishment of an equal legal basis by guaranteeing them the rights and advantages of marriage, including the possibility to register their union;" as well as the elimination of "any limitations on the entitlement of homosexuals to parenthood, adoption and guardianship of children."[21]

These directives were also included in a Resolution regarding respect of human rights in the European Union for the period 1998-1999. This resolution was introduced on March 16, 2000: the European Parliament requested "those States which have not yet granted legal recognition to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender" by referring to Article 13 of the Treaty establishing the European Community.[22]

This emphasized the necessity to bring about rapid progress towards the "mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU."

Similar motions were also included in the Decision regarding fundamental rights in the European Union, which was adopted by the European Parliament on September 4, 2003 with a slim majority.

It is obvious that the cases mentioned above are purely political documents that lack any legal effect with respect to the organs of the European Union as well as its Member States. Their sparse content also becomes evident from the comparison with the orientation of the Court of Justice which is discussed below.

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[21] Please refer to: Schlesinger, P., (1994), "Una risoluzione del Parlamento europeo sugli omosessuali", *Vita e pensiero*, pp. 250 et seq. for a review of this decision.

[22] The following is specified herein: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

4. Some objections to public recognition of opposite-sex and same-sex domestic partnerships

With respect to the tendency of publicly recognizing opposite-sex and same-sex domestic partnerships, it must first be noted that major discrepancies exist in this respect.

On the one hand, the family order is undergoing gradual "privatization,"[23] in which the social significance and dimension of the family is not recognized; on the other hand, the tendency is to ascribe a social dimension to structures that are not true families.[24]

In the case of opposite-sex domestic partnerships, the condition for being deemed equal to a married couple lies in the invalidation of marriage as the founding act based on the perception of marriage,[25] dating back to the Enlightenment, as a simple agreement[26] and in the allegation that "the family is no longer an institution that refers to a clear content and predetermined relationship,"[27] "because in the end, it is not a natural, but an *artificial* reality."[28]

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[23] Regarding the topic of gradual privatization of the family law based on the prevalence of individualistic opinions, please see in particular: Mengoni, L. (1987), "La famiglia tra pubblico e privato negli ordinamenti giuridici europei", *La famiglia e i suoi diritti nella comunità civile e religiosa*, Atti del VI Colloquio giuridico (Rome, April 24-26, 1986), Rome: Libreria Editrice Vaticana - Libreria Editrice Lateranense, p. 239. Busnelli, F. D., (1996),"'Persona' e sistemi giuridici contemporanei", *Roma e America. Diritto romano commune*, p. 137, mentions „the saddened remarks of a Swedish lawyer who talked about a ‚journey without a destination' a few years ago, when he noticed the legal confusion involving the personal status and the family law as a result of the so-called *deregulation*" (this refers to: Agell, A., (1981), "The Swedish Legislation on Marriage and Cohabitation: a Journey without a Destination", *American Journal of Comparative Law*, pp. 212 et seq.).

[24] Please compare: D'Agostino, F. - Dalla Torre, G. , (1994), "Per una storia del diritto di famiglia in Italia: modelli ideali e disciplina giuridica, G. Campanini (editor), *Le stagioni della famiglia*, Cinisello Balsamo: San Paolo, pp. 246 et seq.

[25] For an overview, please see: Vassalli, F., (1932), *Lezioni di diritto matrimoniale*, I, Padua: Cedam, p 72, nt. 1.

[26] Please compare: Zoppini, A., (2002), "Tentativo d'inventario per il 'nuovo' diritto di famiglia: il contratto di convivenza", in Moscati, E. - Zoppini, A. (editors), *I contratti di convivenza*, Turin: Giappichelli, pp. 1 et seq. regarding the topic of individualistic tendencies based on the contract doctrine which are widespread in family law.

[27] Zoppini, A., (2000), "Tentativo d'inventario per il 'nuovo' diritto di famiglia: il contratto di convivenza" cit., p. 6.

[28] D'Agostino, F., (2000), "Diritti della famiglia e diritti dei minori", *I figli: famiglia e*

Based on these conditions, one can conclude that "it is indeed possible to *invent* new, noteworthy, legal and family-like models governed by regulatory policies, namely based on individual needs, interests and tastes, which are not objectionable in principle and which deserve particular attention on the part of the legal system."[29] Accordingly, it is necessary to provide not one single family model, but several different ones.[30]

The tendency to put the family on par with same-sex domestic partnerships is on the horizon. The current dissemination of the so-called myth of "sexual indifference"[31] is thus quoted as an argument. What becomes evident is a boundless trust in the power of legislators who are able to overcome the barrier before which even the omnipotent British Parliament came to a halt: the possibility to transform a man into a woman and vice versa - as De Lolme so poignantly formulated it.

In fact, the possibility for same-sex couples to get married - as is possible in the Netherlands, Belgium and now also in Spain - is based on downright terminological manipulation.

The term marriage consists of a legal notion requiring certain characteristics.

If one examines the legal characteristics of this institution based on the "common facts provided by the law,"[32] one must admit that the term marriage - interpreted with methodical and terminological stringency, indispensable in an age which is plagued by terminological manipulations[33] - basically requires the union of a man and a

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società nel nuovo millennio (Atti del Congresso Internazionale Teologico-Pastorale, Città del Vaticano 11-13 ottobre 2000), Vatican City: Libreria Editrice Vaticana, p. 109. D'Agostino is very critical of this view.

[29] F. D'Agostino, *ibid.* again criticizing this view.

[30] Compare: Scalisi, V., (1986), "La 'famiglia' e le 'famiglie'", *La riforma del diritto di famiglia dieci anni dopo. Bilanci e prospettive*, Padua:Cedam, pp. 270 et seq.; Rescigno, P., "Società naturale, esperienze contrattate", loc. cit., 163 et seq.

[31] Compare: D'Agostino, F. - Dalla Torre, G., (1994), "Per una storia del diritto di famiglia in Italia" cit., p. 223 for a critical review.

[32] Grossi, P.F., (1991), *I diritti di libertà ad uso di lezioni*, I, 1, II edition, Turin:Giappichelli, pp. 286 et seq., annotation 8.

[33] The law that introduced abortion into the Italian legal system entitled „*Norme per la tutela sociale della maternità* e *sull'interruzione volontaria della gravidanza*" ("*Standards for the protection of motherhood and the voluntary interruption of pregnancy*") is deemed an example of such manipulation. In International Law we need

woman. This incontestable and uncontested fact of history of law[34] was defined early on by the Romans with the fitting definition of the term marriage by Ulpian. This definition was later readopted in modern law.[35] According to Ulpian, who defines marriage as an institution of the *ius naturale*, by which it is regulated, the term marriage mainly consists of the *maris atque feminae coniunctio*: i.e. the union Roman Jurists refer to as marriage (*quam nos matrimonium appellamus*, D. 1.1.1).[36] The *corpus familiae* (D. 50.16.195.2)[37] is the result of the *consortium omnis vitae, divini atque humani iuris communicatio* (D. 23.2.1), *individuam consuetudinem vitae continens* (Inst. 1.9.1).

The explanation becomes more complex regarding the various legal systems that introduced public recognition for non married couples based on a simple de facto union.

With respect to domestic partnerships, it should be noted that they

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to bear in mind that a number of ambiguous terms such as humanitarian interference or international police operation are used to describe markedly warlike actions. With respect to the latter topic, please see the recent publication by Walzer, M. *Arguing about War*, New Heaven: Yale University Press, 2004.
Regarding the significance of semantic values in jurisprudence, please see: Biondi, B., (1953), "La terminologia romana come prima dommatica giuridica", *Studi in onore di V. Arangio-Ruiz*, Naples:Jovene, II, pp. 73 et seq. [and later published in: *Scritti giuridici*, Milan:Giuffrè, 1965, 181 et seq.]; Orestano, R., (1981), *'Diritto' Incontri e scontri*, Bologna:Il Mulino, pp. 265 et seq.; 549; 737; Koselleck, R., (1979), *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*, Frankfurt a. M.: Suhrkamp.

[34] Please see among others: Schlesinger, P., (1994), *Una risoluzione del Parlamento europeo sugli omosessuali* cit., pp. 252 et seq.

[35] For an overview, please see: Stein, P., (1984), *Legal Institutions. The Development of Dispute Settlement*, London: Butterworths.

[36] With respect to Ulpian's definition, please see: Di Marzo, S., (1919), *Lezioni sul matrimonio romano*, I, Palermo, pp. 3 et seq.; Talamanca, M., (1993), "Recensione a M. Kaser," in *Iura*, pp. 272 et seq., pp. 290 et seq. See also: Baccari, M.P., (2000), *Concetti ulpianei per il "diritto di famiglia"*, Turin:Giappichelli, pp. 13 et seq. including an extensive bibliography.

[37] Within this context, I would also like to refer to the pre-Christian Roman teachings which the term "family" in the Italian Constitution is derived of: please see La Pira, G., (1974), "La famiglia, una casa costruita sulla roccia", *Il focolare*, No. 8, p. 5 regarding this opinion. In it, a "teleological" and a "biblical" reason are added to the "ontological and legal basis for the specification of marriage...: *Duo ... unum!* (*Genesis*, I, 26-27; II, 23-24; *Matt.* XIX, 3-6)" (see also: Catalano, P., (1995), "La famiglia sorgente della storia' secondo Giorgio La Pira", *Index*, No. XXVIII, p. 27).

are associated with a certain degree of freedom granted in all Member States of the European Union. Granting such partnerships the same treatment as married couples would be equivalent to "a violation of the principles of free decision of the parties,"[38] such as "the freedom to choose between marriage and other forms of cohabitation"[39] as was also declared by the Italian Constitutional Court.

Conversely, the argument that in some cases partners are unable to enter into marriage even if they wish to do so is therefore irrelevant.

In cases of the so-called forced cohabitation, i.e. a partnership that is characterized by the impossibility of getting married as a result of a ban imposed by legislators - a extremely rare scenario if one considers, in particular, the divorce regulations that apply in the European Union Member States[40] - equal treatment of non married couples and married couples would undermine the *ratio* of the provision that prevents marriage between the partners: "the legal recognition of such free structures would equal the recognition of a situation that is not only *extra legem*, but virtually *contra legem*."[41]

The question appears even more complex within legal systems that have introduced agreements based on the example of the *Pacs* granting same-sex and/or heterosexual partners family-like legal benefits.

In this respect, I would like to point out that regulations for the legitimate family are associated with advantages that significantly burden federal budgets and can sometimes have a direct influence on the rights of private persons - although only third parties with respect to the marital relationship.

Take for example tax breaks or tax exemptions in favor of families and various provisions such as the transferability of pensions to the husband or wife. Regarding the effects on rights of third parties with respect to the marital relationship, it suffices to single out one of

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[38] Corte cost., Judgment n. 166 of 1998, in *Giur. Cost.*, 1998, pp. 1419 et seq.

[39] Corte cost, Judgment n. 166 of 1998 cit.

[40] Especially with respect to Italy, see among others: Giacobbe, G., (1999), "La famiglia dal codice civile alla legge di riforma", *Iustitia*, p. 269. It is emphasized here that the Divorce Act "basically introduced a kind of *free divorce* into the Italian legal system".

[41] Trabucchi, A., (1988), "Morte della famiglia o famiglie senza famiglia ?", *Una legislazione per la famiglia di fatto?*, Naples:Jovene, p. 17.

many examples that concern the restrictions regarding disposal of property for inheritance.

Attempts to gain public recognition of cohabitation are basically aimed at obtaining similar significant economic advantages, rather than protecting the rights of freedom or fundamental rights of individuals. Indeed, with respect to cohabitation of any kind, the latter are now guaranteed in the legal systems of European Union Member States.

Accordingly, this issue is either associated with the demand to guarantee social rights, i.e. "rights for positive services," which, when fulfilled, "ultimately burden the community that is obligated to comply by imposing taxes or via public accumulation of debt or in any other way,"[42] or with the recognition of legal positions which can affect third parties with respect to cohabitation.

In this context, it is noted that the publicly perceived significance of the family and the corresponding recognition of its rights - ultimately affecting the whole community that assumes significant burdens for taking them on - is justified on the basis that the marital tie alone secures the 'duties' and obligations on which the family as an institution is based. These obligations and the associated inherent necessities justify special treatment granted to spouses.[43]

As mentioned at the beginning, the family fulfils an irreplaceable social responsibility. Although not always duly valued nowadays, in reality, it has always been recognized due to views deeply rooted in western society, according to which the family represents the basis of social and civil life.

Here, I would merely like to point out that it was Cicero who described the family as *principium urbis et quasi seminarium rei publicae.*[44] It is highly significant that the same term was reintroduced by Vico more than sixteen centuries later with the definition of the term family as *primulum rerum publicarum rudimentum.*[45]

The irreplaceable social value of the family becomes evident based

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[42] Sorrentino, F. (2004), "La tutela multilivello dei diritti", *Rivista amministrativa della Repubblica italiana*, Vol. I, p. 867.

[43] The Italian Constitutional Court rightly spoke out about the two institutions family and marriage within the meaning of an „inseparable hendiadys". Accordingly, please see: Corte cost, sent. n. 237 of 1986, in *Giur. Cost*, 1986, I, pp. 2056 et seq.

[44] Cicero, *De officiis*, I, 17, 54.

[45] G. B. Vico, *De uno universi iuris*, CIII.

on the fact that it was recognized in a number of basic laws that became effective after the last post-war era, both explicitly[46] and implicitly through statements granting it special protection within the constitutional system.[47]

If we accept the irreconcilability of potential agreements like the *Pacs* along with the transfer of the responsibilities and "duties" that are associated with the protection of family rights, then public recognition of cohabitation is ultimately founded on the appreciation of the *affectio* between the *partners*, i.e. the bond of affection that exists between them.

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[46] See in particular with respect to Europe: Article 41 of the Irish Constitution, based on which "1st The state recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law; 2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State;" Article 67 of the Portuguese Constitution: "The family, as a fundamental element of society has the right to protection by society and the state and to the creation of all conditions permitting the personal self-fulfillment of its members;" on a global scale, I would like to mention the following among others: Article 1 of the Chilean Constitution: "The family is the basic core of society ... It is the duty of the state ... to provide protection for the people and the family;" Article 4 of the Peruvian Constitution, stipulates that "the community and the government ... also protect the family and promote marriage; they recognize them as natural fundamental institutions of society.".
Finally, it needs to be mentioned that Article 16 of the Universal Declaration of Human Rights defines the family as "the natural fundamental group unit of society;" in the preamble of the Convention on the Rights of the Child - signed in New York on November 20, 1989 - family is recognized "as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children," where it is further emphasized that the family "should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".

[47] With respect to Europe, please see among others: the previously mentioned Article 6 GG; Article 39 of the Spanish Constitution with the following wording: "The public authorities shall assure the social, economic, and legal protection of the family;" Article 18 of the Polish Constitution, that stipulates the following: "Marriage, being a union of a man and a woman, the family, as well as motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."
In other parts of the world, the family is granted protection based on the following Articles among others: Article 14 of the Argentinean Constitution, which stipulates the following: "... The law ... shall grant full family protection"; Article 4 of the Mexican Constitution, where it says that "the law ... shall protect the organization and development of the family."

It is impossible to have recourse to the principle of equality, which is often invoked illegitimately, to overcome the bottleneck mentioned above.

At a prominent location and with respect to the principle of equality formulated in Article 3 of the Italian Constitution, Carlo Esposito declares that accordingly "citizens and people should be treated differently according to the different situations they are in" and that "they should be granted different benefits depending on whether or not they meet certain conditions."[48]

Only a society blinded by relativism and a nihilism reflected in its legal system is not able to recognize that opposite-sex domestic partnerships based on the free choice of the partner, and even more so, same-sex domestic partnerships - which for obvious and objective reasons clearly differ from opposite-sex partnerships - are unable to assume the responsibilities inherent to a legitimate family, irrespective of whether such partnerships are registered.

It is obvious that these considerations do not apply to the protection of the children, who are entitled always to receive the same treatment, regardless of whether their parents are married or not.

5. The Community Law and Article 9 of the Charter of Fundamental Rights of the European Union

When examining the Community Law, I would first like to emphasize that the Court of Justice of the European Communities[49] adhered to the view that "according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex."

The Court of Justice further declared that even in Member States where the registration of (hetero- and homosexual) partnerships is provided for, thus granting benefits similar to those associated to marriage - with the exception of the Netherlands (and now Belgium, Spain and England) - the difference between both concepts is clear.

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[48] C. Esposito, (1954), "Eguaglianza e giustizia nell'art. 3 della Costituzione", *La Costituzione italiana* cit., pp. 25 et seq..

[49] See Judgment of the Court of Justice dated May 31, 2001 (C-122/99 P and C-125/99 P), *D, Kingdom of Sweden v Council of the European Union*.

Based on this difference, the Court of Justice stated that the different regulations for married couples and registered domestic partnerships do not violate the principle of equality - in particular because different situations exist in this respect - and they do not constitute discrimination against sexual orientation.[50]

The recent jurisprudence of the Court of Justice takes the point of view, which implies that "the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, is either a matter for the legislatore to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on the grounds of sex, prohibited by Community law."[51]

Moreover, the Court of Justice believes that even a different regulation for married couples and opposite-sex domestic partnerships, on the one hand, and same-sex domestic partnerships, on the other, does not constitute discrimination which is prohibited by community law.[52]

A solution deviating from the above cannot be achieved by claiming the application of Article 9 of the Charter of Fundamental Rights of the European Union.

Article 9 stipulates that the "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." This basically corresponds to the provision of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[53] based on which "men and women of marriageable age have the right to marry

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[50] ibid.

[51] Judgment of the Court of Justice dated January 7, 2004 (C-117/01), *K.B. v National Health Service Pensions Agency and Secretary of State for Health.*

[52] Judgment of the Court of Justice dated February 17, 1998 (C-249/96), *Grant v. Soc. South West Trains Ltd.*

[53] Please see: Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza", D'Atena, A. - Grossi, P.F. (editors), *Diritto, diritti e autonomie tra Unione europea e riforme costituzionali. In ricordo di Andrea Paoletti*, Milan:Giuffrè, 121 et seq.; Ferrari Bravo, L. - di Majo, F.M. - Rizzo, A., (2001), *Carta dei diritti fondamentali dell'Unione europea*, Milan:Giuffrè, p. 22 for the jurisprudence of the European Court of Human Rights.
However, compare the remarks with respect of an *overruling* dated July 2002 in the paragraph below. With respect to the jurisprudence based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms - which protects the *Right to respect for private and family life* and stipulates the

and to found a family, according to the national laws governing the exercise of this right."[54]

According to the commentators, Article 9 of the Charter of Fundamental Rights allows two different interpretations: "i.e. that «the right to marry and the right to found a family» shall be interpreted as a unit, as if the latter right forms a whole with the first right and cannot be viewed as separate from the first; or, alternatively, that these rights can be viewed as functionally independent from one another."[55] If so, "the right to «found a family» is recognized, but a more exact definition is lacking and with respect to further details, reference is made to the respective national and «local» laws. In reality, this means that Europe as a political and economic unit considers the family to be an empty container."[56]

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following: "1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" - see: Van Dijk, P. - van Hoof, G.J.H., (1998), *Theory and Practice of the European Convention on Human Rights*, The Hague, London, Boston: Kluwer Law International, p. 504; Russo, C. - Quaini, P.M. (2000), *La Convenzione europea dei diritti dell'uomo e la giurisprudenza della Corte di Strasburgo*, Milan:Giuffrè, p. 103.

[54] Earlier precedents include Article 16, subsection 1, of the Universal Declaration of Human Rights that stipulates the following: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." Article 23, subsection 2, of the International Covenant on Civil and Political Rights says: "The right of men and women of marriageable age to marry and to found a family shall be recognized. "

[55] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., 117 including an extensive bibliography.

[56] E. g.: Donati, P., (2001), "La famiglia italiana 'si pluralizza': realtà, significati, criteri di distinzione", P. Donati (editor) *Identità e varietà dell'essere famiglia. Il fenomeno della pluralizzazione*, Cinisello Balsamo:San Paolo, p. 17. This author points out that the second interpretation "(would interrupt) a long tradition of civilization based on the family as it was previously provided for in the Universal Declaration of Human Rights of the United Nations (1948), as well as the Convention for the Protection of Human Rights of the European Council and in a number of other international supranational documents, which adjudicated an express and general preference for the legitimately founded family between a man and women in its continuity of their relationship with the children".

Rather, if the Charter of Fundamental Rights succeeds in achieving formal recognition in the future, a privilege which it is currently deprived of,[57] it would at least regulate the institutions of marriage and family as legally defined terms and refer to the common facts elaborated by the jurisprudence for the determination of the respective characteristics.

As mentioned previously,[58] we certainly cannot "derive the virtually precluded possibility of comprehensive and complete equality, the full and absolute, practical and terminological equity of appearances from the facts outlined above", such as domestic partnerships, on the one hand, and same-sex or transsexual domestic partnerships, on the other, "which are significantly unequal, and, better said, are essentially categorically different."[59]

For this reason, and contrary to the explanatory remarks by the Presidium of the Convention that approved the Charter, part of the Italian legal doctrine[60] insists that Article 9 of the Charter does not provide for the recognition of marriage between individuals of the same sex.

Even if one does not consider the fact that the Charter - pursuant to subsection 2 of Article 51 - does not introduce any new competences or responsibilities for the European Community and the Union and does not amend the competences and responsibilities stipulated in the Treaties, Article 9 of the Charter expressly entrusts the competence of regulating and exercising the right to marry and the right to found a family to the national legislators, on the basis of the undeniable presence of significant differences in the legal systems of the Member States.

The method of referring to national legislators, which is also used for other provisions of the Charter[61] - e. g. in subsection 2 of Article

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[57] Please see: Sorrentino, F., (2003), "La nascita della Costituzione europea: un'istantanea", *The Spanish Constitution in the European Constitutional Context* cit., p. 231 regarding the evaluation of the Charter in its validity. See also Judgment of the Court of Justice dated June 27, 2006, (C-540/03), *European Parliament v. Council of the European Union.*

[58] See top of paragraph 4.

[59] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., p. 121.

[60] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., p. 122.

[61] Please compare: García Manrique, R., (2003), "La Carta de los derechos fundamentales

10[62] or subsection 3 of Article 14[63] - ultimately provides domestic legislators with extensive discretionary powers to regulate the matter mentioned above within the stipulated limits.

It goes without saying that the individual Member States must adhere to the provisions of their respective national laws when exercising their discretionary powers.

6. Final remarks

I would like to refer to the approach taken by the European Court of Human Rights,[64] according to which the impossibility of a transsexual to get married to an individual of the same biological sex (but different from the sex whose external characteristics he has adopted) constitutes a violation of the provision of the previously mentioned Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms even though the same Court expressly refers to the impossibility to found a family based on this situation.[65]

In view of the remarks above, this decision is cause for concern. It is difficult to agree with the Court on the alleged limitation of the

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de la Unión europea. Análisis crítico de su contenido", L. Leuzzi - C. Mirabelli (editors), *Verso una Costituzione europea*, Atti del Convegno europeo di Studio, Rome 20-23 June 2002, Lungro di Cosenza:Marco editore, pp. 409 et seq.

[62] Accordingly, the following applies: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

[63] Accordingly, the following applies: "The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right."

[64] See Judgment dated July 11, 2002, *I. v. The United Kingdom*; Judgment dated July 11, 2002, *Christine Goodwin v. The United Kingdom*.

[65] Please see: Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., pp. 121 et seq. The author refers to the passage where both verdicts state the following: "*the Court observes that Section 12 secures the fundamental right of a man and a woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision*" (verdict dated July 11, 2002, *Case of I v. The United Kingdom*, § 78; verdict dated July 11, 2002, *Case of Christine Goodwin v. The United Kingdom*, §. 98).

quintessence of the right to marry based on the objected 'gap'. Limiting the examination to positive law: the provision of the Convention for the Protection of Human Rights, that the Court deems violated, expressly refers to the fact that the spouses are a man and a woman; furthermore, the decision does not take into account the fact that the provision itself leaves this matter to the jurisdiction of national legislators.

The same must apply to a Judgment of the Court of Justice which adopted the view of the European Court of Human Rights,[66] according to which a transsexual's impossibility to get married to an individual of the same biological sex to which the transsexual still belongs despite surgical procedures, is deemed irreconcilable with the provision of Article 141 of the Treaty establishing the European Community.[67]

This interference in the regulation of conditions concerning the right to get married, which contravenes reference to the jurisdiction of national legislators pursuant to Article 9 of the Charter of Fundamental Rights, can be interpreted as a sign that the founding process of a European *ius commune* does not take into account the principles outlined above and is based on centralization typical of the 19th century, or, according to Weiler's definition, on "reversed regionalism."[68]

It is a pattern that not only discounts the fundamental differences that exist within this highly important and delicate area in the

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[66] Judgment of the Court of Justice dated January 7, 2004, loc. cit.
Please see: Sorrentino, F., (2004), "La tutela multilivello dei diritti" cit., p. 876 regarding this decision. The author examines the judgment within the scope of verdicts used as evidence for "the expansion of the Community Law from its natural arenas, justified by the Court of Justice based on the need to secure the respect of all cases in which its application is influenced by normative evaluations which are subject to the competence of the Member States."

[67] It stipulates the following:
"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
N/a."

[68] See: Weiler, J. H.H., (2003), *Un'Europa cristiana. Un saggio esplorativo*, Milan:BUR, pp. 168 et seq. regarding the corresponding risks.

European States, but also weakens the legitimacy and solidarity of the European Union.[69] An ancient saying reads: "*unius linguae uniusque moris regnum imbecille et fragile est*".

[69] Please see: Weiler, J. H.H., (2003), *Un'Europa cristiana* cit., pp. 168 et seq. for an overview. The author emphasizes in particular that the "reversed regionalism" tends to "weaken the legality of the Union," particularly if "the Community or Union interferes in areas that represent or are deemed to be traditionally 'national' responsibilities and which are associated with a symbolic value" and include everything from the "ridiculous (the traditional beer dose in Great Britain) to the sublime (the right to life in the dispute about abortion in Ireland)."

COMMENTS

ISLAMIC LAW BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS: WHITHER HUMAN RIGHTS?

LUCA PEDULLÀ

Beside the systems of Common Law and Civil Law, the presence of another distinguishable legal system of "Islamic law" is to be noted. Such latter system does not distinguish between the temporal and the spiritual and in this system the temporal derives its origin from the spiritual. This paper inquires into the existing relationship between the system of Islamic Law and human rights. The system of Islamic Law deserves, today more than ever, attention, not only because nearly 25% of the global population applies it but also because there is a renewed interest in its study as a result of the repeated, serious terrorist events that have aroused curiosity in it and, above all, the fear of islamization and its consequences on Europe. We have also seen that although various Muslim countries like Pakistan, Yemen, Malaysia and Nigeria had adopted legal codes based on Western ones in the past but that they are now gradually returning to the original Muslim laws they had although prior to colonialisation.

The two most widespread legal systems in the world are: the *Common Law* and the *Civil Law.* The legal systems of nation states can be classified in these same categories even though they have considerable differences. Alongside these two systems, we may notice, with persistency, another legal system known as *"the Islamic law"* that, as will be seen in the following paragraphs, does not distinguish between temporal power and spiritual power; on the contrary the first derives from the second. It is essential to understand the relationship between *Islamic Law* and human rights that still

remains an unsolved historical and conflictual relationship in many parts of the world.

It is important to understand some concepts. The *Civil Law* is not the "civil law" as a *corpus* that rules the relations among people and it is not the *ius civile* of the ancient Rome as well. It is the whole legal system of those states that find in Roman civil law the essential principles of their structure: reference here is made to Continental European countries, Latin America and Francophone Africa.

On the contrary, the *Common Law* is the legal system developed in England after the Norman conquest in 1066. In the modern law, the *Common Law* system is adopted in those countries where the law is based and developed upon the English model; though Scotland has conserved its own system with many influences of the *civil law*. Until now the Irish Republic and Northern Ireland have conserved their peculiar legal sub-system.

The countries which have the *Common Law* system are: the United States of America, Anglophone Canada, South Africa, New Zealand and all the countries taking part in the *Commonwealth*.

At present, the *Islamic Law* system deserves more attention because it is adopted by almost 25% of the world population and also because it is interesting to study it due to terrorist events - like that of September 11th 2001 - which have created interest and curiosity about a world that Europeans do not know well enough and that scares them. Clear examples of *"re-islamization"* are also observed which regard to different countries of Islamic cultural background such as *Pakistan, Yemen*, *Malaysia* and *Nigeria* that, after having adopted some Western codifications, have gradually re-adopted the Islamic law.

Moreover, the analysis we are treating has many practical implications: the birth of the "Islamic banks" for example - which have different kinds of investment and credit through the model of *profit/loss sharing* - ruled by a real Islamic law founded on the Koran that does not allow the practise of usury and the collection of interest just as the Catholic Church did in the past in Italy.

Before treating this *quaestio*, a question should be posed: can one really speak of a real *Islamic law*, and is it consistent with human rights? To answer these questions, it is imperative to compare the three different legal systems.

In the *Civil law* countries, like the case of Italy, the judge basis his decisions through interpreting the legal codes and using, if required,

some interpretative integrative criteria such as analogy or general principles of law. Consequently, in any case he has to decide the dispute, he has to find a solution to it because he cannot judge "*non liquet*" as the Roman judge did when the rule was not clear. Nowadays, this "lack of delivering judgment" might justify the "crime of omission" as a lawful act.

Consequently, in *Civil law* systems, the judge makes his verdict exclusively on the law code. To interpret the rule to apply to a specific case the judge is free to choose among other judgments which have been previously delivered. The "judicial precedent" can become binding when issued by superior jurisdictions. The judge can motivate his verdict mentioning the Supreme Court's jurisprudence especially if this Court has already ruled upon the *quaestio* in an unequivocal manner (e.g. by reference to n. *3275/1983* Supreme Court verdict). On the contrary, as highlighted in 1983 in n. 7248 Supreme Court verdict, the judge who wants to deliver a different verdict from past ones, has to justify his verdict by reference to suitable and convincing reasons in order to motivate his different judgement.

On the contrary, the *Common law* rules are not found in a code that collects the rules but derive from the jurisprudential principle of *stare decisis*, the "judicial precedent" - which represents an inductive procedure developed by the judge. It consists in a comparison between a particular juridical problem with other similar cases already ruled upon, especially if they happen to have been decided by the *Superior Courts* whose judgments are considered to be more authoritative.

However, in *Common Law* systems, there are also written laws like *Acts of Parliaments* or *Statutes* - on the one hand, they are different from the jurisprudential law and, on the other hand, they are strictly interpreted. They are very different from *Civil Law* rules and are based on the literal meaning and not on extra-textual criteria.

It is very important in *Civil Law* systems to consider the so-called drafting history, in order to comprehend the lawmaker's will, but this approach cannot be used in the *Common Law*. In the latter legal system, in fact, it is the opposite principle that applies: the judges are not required to understand what the lawmaker's intention was but to understand the real meaning of what the lawmaker has said: *legislator qui voluit dixit, qui noluit tacuit.* Consequently, if a law does not contain a rule to solve a specific case, this gap cannot be solved through the application of different interpretative criteria such as,

for instance, the *l'analogia legis*. In the case of "jurisprudential precedent" that is, in the Anglo-Saxon system, we use a real *source of law*. However, the strict principle of the literal interpretation of the law is linked to the principle of "reasonableness" that does not accept the enforcement of a law that is different from the so-called "*diritto vivente*".

This *modus operandi* of the *civil law* systems is the opposite to the Common Law as civil law systems have a deductive reasoning. The judges research the justice in every single case using written laws and other integrative tools to interpret possible legal gaps.

Following this introduction, I examine the *Islamic law* legal system.

In the Italian legal system it is essential to take into consideration the choice of a state independently from the choice adopted by confessional codes: "*Date a Cesare quel che è di Cesare e a Dio quel che è di Dio*" explains the separation in the Western world between the temporal and the spiritual spheres. In Western countries the Enlightenment heritage posits the human being at the centre of the legal system and this applies both to *civil law* and to *common law*. The legal rule is considered as the product of man's reason and because of this rational element the law is considered to be binding. In the Muslim world the source of law is God - the only lawmaker - and there is no separation between confessional and spiritual powers.

It is interesting to illustrate the analogy between the Islamic and Eastern traditions where there has never been a separation between the moral and the juridical spheres. In Eastern countries, in fact, apart from their written laws there are also unwritten laws based on ethics and custom that were so important that they have complemented the written law. In China, for example, since the end of 70s, there has been a "Western transformation process" concerning its law that has adopted some European codes as their model such as the German and Italian codes. For a long time, the main view was the *Confucian* as opposed to laws and courts. In the Maoist period anyone who wanted to rule his life following the law was prosecuted. In Islamic countries faith and education are more important than codification because they are essential to progress in civil life and in social stability. A right education of everyone with the help of families, mosques, schools and Universities allows them to interiorize such values and to understand how to behave.

In the Muslim and Asian countries it can be evidenced how impor-

tant is the system of custom and social relations, for example, in the case of an agreement. In these legal systems, stability and mutual confidence are essential (where they are seen as a "relational" function) because durable economic exchanges are based on mutual confidence and moral obligation. On the contrary, in Western countries, the rule of law has the primacy in comparison to other rules such as ethical, moral, religious etc., rules. In the Muslim world, where the source of the law is God, the religious rule has also a juridical content but it is not only juridical. It comes directly from Allah and it is not modifiable by men. Consequently, the Muslim legal system is much more than a simple legal system that rules human actions. This system rules, in fact, every aspect of human life. This can be seen in those countries like Saudi Arabia where Islamism is the only official religion in the country. Contrariwise, in the countries where the Islamic religion is not the only religion followed like, for example, in Kenya or Nigeria, the Islamic law cohabits with other laws, producing legal *pluralism.*

The Muslim law is not a simple legal system linked to codes but it is independent from a *corpus* of law. It is similar to the *common law* system with the difference that it is not the product of the "*stare decisis* rule" and "judicial precedent", but it is the result of a "doctrinal production". The written sources of the Islamic law - the *Koran and the Sunna* - have a limited number of juridical prescriptions. They are included in *fatwa* opinions by "law doctors" and they become juridically binding upon believers when there is a community "*consent*", and when the most part of the outstanding doctors share them. Besides these three sources, a fourth has to be added, the "analogical reasoning". This source is the most controversial because the analogy is the result of a human process based on the interpretation of a divine rule in order to extend its meaning to other similar cases. The analogy has always been, since the past, a cause of debate between jurists and theologians because it is considered to be irreligious to fill a divine gap by the human reason.

It is evident that there is no uniform Muslim law for all Islamic countries; it is even clear how next to the official sources of Islamic law there are other principles, probably not so broadly diffused which integrate the previous sources in different ways from one country to another. Some examples are: the *common good* criteria, the *customs* and the *royal decrees*. These differences in most of the Islamic codes are further accentuated by the adoption of other Western codes intro-

duced by colonization. This forms the phenomenon called *acculturation* of the Islamic law. An example is: the Libyan situation where the severity of the *shari'a* is mitigated by the hybrid Gheddafi doctrine in his famous book *The Green Book* where he lists Libya's essential principles that are alternatives to capitalist and communist principles.

The attempt to introduce in the *Civil Law* a typical *Common Law* institute can be very difficult and *a fortiori* the same can be said if it were to be introduced in the *Islamic Law* system. If we examine the *trust* institute, that many *civil law* countries have tried to introduce in their codes, they have not obtained the result they longed for because of their modifications to this institute in order to insert their own connotations. There are many examples especially in so far as contract law is concerned such as in the case of *factoring, franchising, forfeiting,* and location contract, family code, inheritances, and, in general, the juridical laws and court warranties.

It is wrong to believe that the Muslim law is a coherent and uniform *corpus iuris* valid for all Muslims because it is not the only legal reference in Arabic-Muslim countries. Those countries where the Muslim law is the main legal source have also created some hybrid juridical systems that take on board rules of classic Muslim law mixed with rules of Western law. This can create some conflict, often a very violent one, among different countries, like in Tunisia where the *Personal statute code* has innovated the family code giving women a series of rights that no Islamic country recognizes.

It can be observed how the three juridical systems can be reconciled. On the contrary, in Anglo-Saxon countries there is still a use of law based on unwritten principles and on creative jurisprudence - called *case law*. In continental countries, the court verdicts, especially those of Supreme Courts, are important in the solution of controversies. Islamic law countries receive both *civil law* and *common law* model rules. Examples exist of different juridical systems that "coexistence" in the same state - this is called a *'mixed-jurisprudence'*: for example in Louisiana, in the United States of America, there is a *civil law* system integrated in the *common law*.

The *Islamic law* in comparison to *Civil and Common Law* systems is replete with religious meaning, and Allah is at the centre of the universe. It can represent a critical challenge for democracy because when a "religious state" imposes itself upon the population, there is the possible danger of suppressing the religious freedom of minorities. What should be asked is whether *Islamic law* will place the

human being at the centre of the universe as Western constitutional tradition does. Consequently, it could further be asked, whether *Islamic law* wants to introduce limitations to the exercise of power in order to defend human rights. In other terms, what is being asked again to debate is the relationship between the religious dimension and the political and regional dimension, starting from the imperative principle of separation of powers in order to defend the individual rights.

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THE CONTINUUM OF SAFFRON SECULARISM[1]

ANUSHREE TRIPATHI

The Sikh Riots in 1984, the Mumbai Riots in 1993, the Godhra Riots in 2002... all these events mark important milestones in the history of India. The memory of these days fills the common and the 'uncommon' man's heart with memories so dark that they are better not prodded. And the question is, what is the common factor that can be taken as the cause of the pogroms and their aggravating factors? Partisan Political Leaders, Spineless Bureaucracy, Aficionado Police and a Helpless Judiciary? The limbs of the largest democracy in the world have displayed nothing more than mere tokenism in either combating causes of communal tension or in helping people overcome the aftermath of the tension, let alone taking efforts to remove the causes. People of various communities live in India. Now in the religious spheres the environment is charged with religious fanaticism and religious conflicts. Gradually this religious fanaticism has manifested itself in a dreadful way, disturbing the peace and tranquillity of the social order. The assigned task of the various state players is not to get swayed by their communal passions and derive as much benefit as possible from this disease but to put a stop to the endless requiems that still remain to be sung at the loss of the many more lives if the communal ardour is not dampened. However, as far as communal passions are concerned, one has nothing to offer as a solution...

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[1] Research paper on State-sponsored communal genocide with special reference to the role of governmental organs in the riots of 1984, 1987, 1992-93, 2001-02 and 2006.

Gandhi repeatedly declared:

> *"Religion is the personal affair of each individual. It must not be mixed up with politics or national affairs."*

1. Introduction

With the onset of the 21st century, mankind has come full circle. We struggled against arbitrariness and insecurity. Through gradual evolution we brought orderliness into our lives. After centuries of struggle, we devised rules to govern ourselves. We fought against dominance in various forms. We also formulated a philosophy to change the world. And this progress was what led to Constitution making, in itself a major step towards transparent governance.

Communalism emerged as a result of the emergence of new, modern politics based on the people and on popular participation and mobilization. It made it necessary to have wide links and loyalties among the people and to form new identities. This process was bound to be difficult, gradual and complex. This process required the birth and spread of modern ideas of the nation, class and cultural-linguistic identity. These identities, being new and unfamiliar, arose and grew slowly and in a zigzag fashion. Quite often people used the old, familiar pre-modern identity of caste, locality, sect and religion to grasp the new reality and to make wider connections and to evolve new identities of nation, nationality and class have prevailed. Unfortunately, in India this process has remained incomplete for decades, for the last 150 years or more a nation-in-the-making. In particular, religious consciousness was transformed into communal consciousness in some parts of the country and among some sections of the people. The question is why did this happen?

If a modern Diogenes were to hunt out for Indians with his lantern in these days, he would be sure to come across fervid Hindus, bigoted Muslims and fanatical souls deeply engrossed with the problem of tirelessly finding out how unjustly their own particular community was being treated, and he would have to ask in sorrow: "Where are the Indians?" Today every party, every political leader is competing to rouse this communal passion and to derive as much benefit as possible from this disease. What do we do about it?

It is no secret that one of the biggest challenges facing the Indian

body politic today is the challenge of communalism. The challenge is to the secular credentials of the Constitution. It is also no secret that the challenge comes from the ruling parties who head the ruling combine at the Centre.

The guarantee of maintaining communal harmony is at the heart of a secular Constitution. Multiculturalism, respect for all cultures equally and the right freely to practice religion, without fear of being put to death, must surely form the basis of any civilised constitution.

"We will not tolerate..." one has to proclaim. But exactly what should one mean by "We"? The inspiring opening words of the Indian Constitution, "We the People of India..." or, "We, the *Hindutvawalas*...?" That is the question?

Though the Constitution recognises the plural character of our society, issues of plural societies are never confronted and resolved democratically by any of the institutions functioning under the Constitution.

All the courts up to the apex court were not geared to deal with such large-scale genocidal violence. Nor were the innumerable commissions of inquiry set up for such purpose. The police bureaucracy down to the constable was suffering from a Hindu perspective and the criminal justice system was no exception.

The apex court differentiated between the persons responsible for the carnage and the persons involved in the carnage, the planners and the perpetrators and the "wanton boys", the conspirators and their instruments.

Notwithstanding the indignation at the failure of every institution of the State, the prosecution is directed only against the perpetrators. In our criminal justice system the principal culprit is either not prosecuted or let off if prosecuted.

Considering these facts and the distinct tendency and trends that mass crimes committed against marginalized groups have taken in past years, it is a grave lapse on the part of the Government of India, which has, to date, not enacted any law in compliance with Article V of the International Convention on the Prevention and Punishment of the Crime of Genocide, 1948. What happened in 2001-02 in Godhra, in 1993 in Bombay, and in 1984 with the Sikhs are genocides, and courts, as enforcers of International Covenants, ought to have taken serious note of these blatant transgressions of human rights and devised jurisprudential and procedural tools to deal with this situation.

A magniloquent attack on lawlessness is hardly a substitute for doing justice to the wronged. A court which innovatively protected propertied interests by devising the concepts of prospective overruling and basic structure could have devised a concept for disqualifying a chief minister or other ministers as having been constructively responsible for the carnage by redefining a writ of *quo warranto* for meeting these situations. If the chief minister Modi had been disqualified on the principle of constructive responsibility, Rule of Law would not have become the fugitive that it has become now.

The system on its own does not intervene to deliver justice, condemn discrimination and slaughter; it has to be pushed to do so. It has been rare that our system has delivered in the case of communal carnage and crime.

These are not random thoughts that occurred in one's mind one day. These are thoughts voicing the unvoiced and even un-pondered mulling of the billions of Indians who face these problems at the hands of the biased and incompetent state players everyday. The worst part is, both the Indian law and the International law condemns these acts and makes them punishable and yet the law is continued to be taken for granted and the law-makers, enforcers and the interpreters allow it.

The inspiration for this paper commenced with the communal flare-up in Vadodara (Gujarat, India) with the demolition of the 300-year-old shrine of the Sufi saint Syed Rashiduddin Chisti on Fatehpura-Chappaner Road, Vadodara's old city. The police had warned of a communal outbreak during the demolition. But the municipal corporation was insistent on knocking down the dargah.[2]

But, unlike the pogrom of 2001-02, this was only a riot. The violence of 2001-02 was a far more widespread, state-sponsored. There were reports of continuous police inaction, and the steps taken by the government was nothing more than tokenism.

Today at a time when our nation is bereft of political leadership, when leaders of industry have proved spineless in times of social cri-

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[2] The start of the violence began, as the bulldozers closed in. A crowd started gathering and throwing stones and trying to stop the demolition. The police burst tear gas shells and later fired on the mob. Two people were killed. That was when things took a turn for the worse. The angry crowd went on the rampage in other areas close by. It stormed the Nyay Mandir (District Court) and burned vehicles outside. Curfew was imposed by 1 p.m. Two people were stabbed. The violence went beyond control.

sis, when the police in every state have been partisan in upholding the law and when bureaucrats have betrayed their oath to the Indian Constitution in support of venal executives, we need to keep reminding ourselves of how close many sections of society are to slipping into the tribalisation that Yeats deplored in his "Meditations in time of Civil War"; "We have fed the heart on fantasies, the heart's grown brutal from the fare... More substance in our enmities, than in our love..."

2. On Communalism

The Oxford Dictionary defines *'Communal'* as a *feeling of togetherness; where people share the same feeling, language and culture.* People of various communities live in India. Religion, in India, is taken as a private matter of the individual. *Religious fanaticism is termed as communalism.* Gradually this religious fanaticism has manifested itself into a dreadful state, disturbing the peace and tranquillity of the social order.

3. Genesis Of Communal Violence In India

The British imperialism sowed seeds of dissention as a deliberate design. British adopted the policy of *'Divide and Rule"*[3] treating Indians basically not as Indians but as members of religious commu-

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[3] The question arises that why was communal violence needed by the state? The British officials clearly state the reason why they needed it: Divide and Rule
Sir Henry Cotton wrote referring to the Partition of Bengal in 1905: *"For the first time in history, religious feud was established between them (Hindus and Muslims) by the partition of province. For the first time, the principle was enunciated in official circles: Divide and rule. The Mohammedans were officially favoured in every possible way."*
Lord Minto wrote to Morley: *"I think that caste and religious differences, certainly in respect to the two great groups of Mohammedans and Hindus, are showing signs of weakening, and that in the next generation there is a great prospect of the disappearance of the separation of castes and religions in deference to the calls of political aims."*
Source: *History of Modern India*; Bipin Chandra; 8th Reprint Edition; NCERT; New Delhi (2000)

nities and exploiting religious differences between Hindus and Muslims to perpetuate their imperialistic policy. Communal political encounters were made by British imperialism to appease the religious fundamentalists, from communal suffrage of 1909 (Morley-Minto Reforms for Muslims), of 1919 Montague-Chelmsford Reforms for Sikhs), to the Partition of India in 1947 and then the Sikhs Creation of Pakistan. These led to communal riots, migration of population, Gandhi's assassination on the 30th of January 1948 and the rise of political parties and the organization with strong communal orientation and parties coming in existence. These included the Muslim League, Vishwa Hindu Parishad, Rashtriya Swayamsewak Sangh, Hindu Mahasabha, which encourages its members to create disharmony. Subordination of national interests to narrow sectarian loyalties took place along with the rise of religious intolerance. In order to destabilize India, neighbouring countries and some Western Powers propagated communalism. They trained separatist and terrorist elements. They also helped with arms and ammunitions and capital. Communalism has its roots in the modern colonial socio-economic political structure. How bizarre this seems to one while reading from the past. Writing in the quiet seclusion of a prison in 1944[4], Jawaharlal Nehru contemplated "the diversity and unity of India":

> *It is fascinating to find out how the Bengalis, the Malayalis, the Sindhis, the Punjabis, the Pathans, the Kashmiri, the Rajputs and the great central block comprising of Hindustani-speaking people, have retained their particular characteristics of hundreds of years, have still more or less the same virtues and failing of which old traditions of record tell us, and yet have been throughout these ages distinctively Indian, with the same national heritage and the same set of moral and mental qualities.*

It is necessary to look at both the text of the Indian Constitution as well as the practice of the ruling parties, which have a self-professed Hindutva agenda.

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[4] His ninth term of imprisonment for revolting against the British.

The devastating consequences of this agenda have only recently been witnessed, leaving thousands dead or devastated, in what was nothing short of genocide. The conscious spreading of communal propaganda, the equally conscious incitement of religious sentiments was unconstitutional. The guarantee of maintaining communal harmony is at the heart of a secular Constitution. Multiculturalism, respect for all cultures equally and the right freely to practice religion, without fear of being put to death, must surely form the basis of any civilised constitution.

4. On Genocide

The **Convention on the Prevention and Punishment of the Crime of Genocide** in Article II defines the crime of Genocide as:

> *Genocide means any of the following acts committed with the intent to destroy, in whole or in part a national ethnical, racial, or religious group, as such:*
>
> *Killing members of the group; causing serious bodily or mental harm to the members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; forcibly transferring children of one group to another group.*

The Convention has also enumerated the offences that are punishable[5]: Genocide; Conspiracy to commit genocide; Direct and public incitement to commit genocide; Attempt to commit genocide; Complicity in genocide.

Under the Convention, it is a responsibility of member states to

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[5] To prove the crime of genocide, there has to be evidence of the physical destruction of a section, community, and racial or ethnic group as well as the evidence of mental harm. At the crux of it all, the evidence needs to point to an "intention" to destroy and harm; it is a crime not computed in numbers of dead or harmed but in the intention and desire to commit it - the sheer planning, pre-meditation, extent and thoroughness of the killings.

make legislation to give effect to the provisions of the present legislation; and to provide penalties to persons responsible to be tried by a competent tribunal of the state or such international penal tribunals whose jurisdiction the contracting party may have accepted.

The Gujarat carnage was especially coloured by state complicity in the violence, premeditation and planning behind the attacks on the lives, dignity, livelihoods, businesses and properties of the population a selective assault on their religious and cultural places of worship.

The Chief Minister of Gujarat, Shri Narendra Modi has been held by this Tribunal to be directly responsible, along with cabinet colleagues, and organisations that he leads and patronises For all these reasons together there is no way that the post-Godhra carnage in Gujarat can escape being called squarely what it was - Crimes against Humanity and Genocide.

It is a grave lapse on the part of the government of India, which has, to date, not enacted any law in compliance with Article V of the International Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

5. Why Are The Ruling Circles And Their State Organizing Communal Violence Today?

Whose interest does Divide and Rule policy serve today? Who are they trying to divide and what for? What is this diversion today for? Communal violence today is being organized for the following reasons:

> *To weaken the resistance of the Indian people against neo-liberal globalization, privatization and handing over of public resources to financial oligarchies and monopolies and domination of India by imperialism, to weaken the movement against Prevention Of Terrorism Act*[6]*, To use it as a diversion from basic problems facing the people, To sort out conflicts amongst various sections of the ruling elite themselves; for the control of the state*

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[6] Violence against the State was christened terrorism and to contain terrorism lawless laws were enacted; the latest is known by its acronym POTA.

machinery and resources, With the United States imposing its dictate for a unipolar world and its ambition to dominate Asia, this anarchy and violence also suits US.[7]

6. The Hindutva Agenda In The Context Of The National Political Parties

The Supreme Court of India has declared the basic feature of our Constitution as unalterable and not amendable. The Hindutva ideology of the RSS *parivar*, namely, India is Hindu and Hinduism is nationalism, of the ideal of a Hindu state within which Hindutva is seen as constituting the national mainstream or cultural nationalism, a state in which Muslims and Christian are minorities and second-class citizens and can live only if they win the goodwill of the majority, cannot be implemented in India through the constitutional system we have. Both cannot co-exist. This is a direct subversion of the Constitution and presents a permanent threat, which if not defeated will destroy the Constitution itself. In its multi-faceted offensive against the secular and democratic character of the Indian State, certain political parties have also forged an alliance with other non-party fundamentalist organizations, according to these groups, successive Indian governments have been following a policy of appeasement towards minorities. Virtually every single officially appointed judicial commission to probe into the cause of riots in different parts of the country has found the RSS and other majoritarian communal outfits guilty.[8]

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[7] They also use these differences to strengthen their positions by supporting the communal violence of the Indian state and also use it to get more concessions from the Indian state as they did in the past. It suits imperialism to play the communal card. In their geopolitics they also want to use Hindu India against China and Pakistan as well as other Islamic countries. Communal politics also suits their interest in many ways.

[8] Some of the notable Committees are:
- The Justice Jagmohan Reddy Commission of Inquiry investigating the Ahmedabad riots of 1969
- The Justice DP Madon Commission of Inquiry into the Communal Disturbances at Bhiwandi, Jalgaon and Mahad of 1970
- The Commission of Inquiry, Tellicherry Disturbance, 1971, Justice Joseph Vithyathil

7. Servile Service

In the aftermath of the grim birth of a Indian nation in 1947, the leaders of the struggle for Indian Independence had resolved to retain a powerful bureaucracy inherited from the colonial legacy of governance. Their expectation was that it would act as a sturdy bulwark, a 'steel frame' to strengthen the unification of the land. In the decades that elapsed after Independence, the corroded 'steel frame' dissolved in the 'laboratory of hindutva'. The various carnages have proven that the Indian Administrative Service, which heads the law and order machinery in India, can not be trusted to act with fairness and objectivity as it willingly allows itself to be governed by the local politicians.

8. The Aficionado: The Police

The National Human Rights Commission (NHRC), New Delhi, has commented on the functioning of the police during communal violence and has adversely commented on distorted FIR, extraneous influences, lack of transparency and integrity. There was widespread lack of faith in the integrity of investigating process and ability of those conducting investigations. Atrocities against women including acts of rape are not recorded and investigated. Investigation and prosecution of crimes are not free from extraneous political and other influences and, therefore, the NHRC called for investigation by the CBI of the very worst incidents of murder, arson rape and other atrocities.

The issue of investigation in communal case trials were deliberately subverted by the police so that the names of the influential and

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- The Commission of Inquiry into the Communal Disturbances at Jamshedpur, April 1979
- Justice Venugopal Commission of Inquiry into the Kanyakumari riots of 1982 (prolonged confrontation between Hindus and Christians)
Source: Combat Communalism, August 2004 http://www.sabrang.com/cc/archive/2004/august04/cover1.html
Also See: http://www.sabrang.com/cc/archive/2004/august04/cover2.html;
and http://www.sabrang.com/cc/archive/2004/august04/cover3.html (From the archives of the home ministry, government of India.)

powerful politicians are not recorded in FIRs, the charge-sheets and all other documents are unsubstantiated and repeated pleas by witnesses under section 173(8) of the CrPC for re-investigation are ignored.

In Gujarat and Mumbai riots of 1992-93 several cases were closed. The police even manipulate the case diaries. The Madon Commission appointed to inquire into the Bhivandi-Jalgaon riots of 1970 strongly reprimanded the police authorities for forging daily diaries and manipulating its contents. It is not as if the political classes are unaware of the inherent vulnerabilities of the Indian police as constituted under the Indian Police Act of 1861 that make it open to misuse and manipulation by the State, which really means, in the current situation, the political party holding office.

9. Judiciary And Communal Violence

What happened in 2001-02, in 1993, and in 1984 are genocides, and courts, as enforcers of International Covenants, ought to have taken serious note of these blatant transgressions of human rights and devised jurisprudential and procedural tools to deal with this situation. A magniloquent attack on lawlessness is hardly a substitute for doing justice to the wronged. The pogrom against Sikhs in 1984 in the nation's capital, or the post-demolition pogrom targeting Muslims in Mumbai in 1993; have escaped judicial condemnation.

Within six months of the carnages across several districts, two of Gujarat's lower courts acquitted all accused of the slaughter of 70 human beings in the village of Pandharwada, The state of Gujarat did not file any appeals against the acquittals. It was only after the country experienced Zahira Sheikh's sensational testimony in a press conference organised by Citizens for Justice and Peace, Mumbai that the true import of the situation in Gujarat became real and was addressed by the courts.

Within weeks of the Gujarat carnage, or genocide, as some of us plainly put it, citizens at different levels had petitioned the highest court in the land, praying for a judicial pronouncement on the utter constitutional breakdown in that state. Unfortunately, the courts preferred to wait, possibly to see if corrective action was forthcoming from the executive and legislative arms of the state.

Only the higher judiciary, especially at the Supreme Court level

provides relief to the victims of the communal violence. The Supreme Court rightly ordered the Modern Bakery case to be tried outside Gujarat. But for the Supreme Court the victims would have had to reconcile itself with gross injustices in the land of Hindutva. The Judge concerned of the Fast Track court also did not make efforts to find out why the witness had turned hostile. *"The High Court"*, the Supreme Court observed,

> *Made unwarranted reference to personalities and their legitimate moves before competent courts, despite knowing it could not deal with such matters. Decency, decorum and judicial discipline should never be made casualties by adopting such intemperate attitudes of judicial obstinacy.*

The Supreme Court in its remarks even reminded the people of "modern day Neros."[9] The Supreme Court judges observed in their judgment,

> *The modern day Neros were looking elsewhere when Best Bakery and innocent children and helpless women were being burnt and were probably deliberating how the perpetrators of the crime can be saved or protected.*

Even more forthrightly the learned judges of the Supreme Court observed,

> *Law and justice become flies in the hands of these wanton boys. When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest becomes martyrs and monuments.*

If the victims of earlier bouts of communal violence or pogroms did not have the satisfaction of a resounding judicial verdict in their

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[9] It is very apt reference to Nero though it is not clear whom the highest court has referred to as Nero. Nero was one who sent several Christians to death and was condemned to death by the Roman senate in 68 A.D.

favour, it doesn't speak well of the role of the police and the state and the existing legal and justice system. Our Constitution remains on paper. Rarely do our courts initiate *suo motu* action on issues of mass homicide and rights atrocities.

10. Anomie In Governance: Death Of Dissent And Societal Outrage

The framework of governance arms governments with the necessary illusions to take up cudgels against people for lawlessness when they are actually struggling for social change. One can have a Constitution without working it and by allowing parts of it to fall into desuetude. if the people are trained not to use rights, or look at the exercise of these rights as a futile endeavour, at a time when globalisation and market forces fail to enhance the quality of our lives as a human collective, we would have forgotten the art of collective protest. This state of affairs can only be described as anomie. The Constitution proceeds on the assumption that the State is likely to be the only violator of our freedoms. But all major assumptions of a liberal State have disappeared. The State under these circumstances corresponds to some extent with the 'Exceptional State' conceptualised by Nicos Poulantzas:

> *Law, to put it briefly, no longer regulates; arbitrariness reigns. What is typical of the Exceptional State is not so much that it violates its rules, as that it does not even lay down rules for functioning. It has no system for one thing, i.e. it lacks the system to predict its own transformations. This is evident with the fascist State.*

There is an urgent need to save ourselves from this enveloping anomie. We have to try and reinstate the fast vanishing social cohesion without undermining the plural character of our polity.

11. What Is The Way Out?

What guidelines have the state players set out for preventing recurrence? Should they not set out guidelines to ensure that religion

does not enter the sphere of political government? Should they not have set down a principle of trial of these cases under the chapter on public tranquillity read with the Genocide Convention of 1948 to render complete justice? All these acts leading to the carnage satisfy the principal ingredients of a terrorist act under Section 3 of Prevention of Terrorism Act. If justice is to prevail, a necessary condition for this must be created through the dismissal of the Modi government and other governmental organisations akin to it, under Article 356 of the Constitution.[10]

It is strange that in a democratic society a citizen has to be afraid of his best-endowed fellow citizen. We must build unity in action of all those forces for democratic renewal and unite all those who are fighting against communal violence of the Indian state irrespective of their religious and political views or affiliation.

Democratic renewal of Indian society and empowerment of the people is the way forward.

12. Enactment Of Law

A step has been taken by the administration towards curbing the menace of fanatical propagation of religion through conversions, which are mostly forced upon citizens. The Rajasthan Dharma Swatantrya Bill, 2006; passed by the Assembly on April 7 is the new piece of legislation that bans religious conversion. Offences under the new law are non-bailable.[11]

In pursuance of the U.N. Universal Declaration of Human Rights (1948), a penal law must be enacted for the protection and safeguard

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[10] There is legitimate apprehension among many about the use of Article 356, lest it set a precedent for the Centre to get rid of governments in Opposition-ruled states. But the Gujarat case is an exceptional one in so much as the state government has been seriously implicated by the NHRC and even the Supreme Court, in what are perhaps the most inhuman, horrendous and unconstitutional acts in the history of post-Independence India. Statements by serving policemen that have been made public clearly show that; orders were issued by none less than the present chief minister Narendra Modi that, minorities who resist or protest be exterminated. Put together, the imposition of Article 356 in Gujarat is warranted not only on grounds of humanity and constitutional propriety, but also for the maintenance of the country's unity, integrity and secular fabric.

[11] Source: http://www.frontline.in/fl2307/stories/20060421004410600.htm

of citizens against the onslaught of powerful groups. Similarly, there should be provision for relief and rehabilitation to the victims. The role of voluntary associations in providing relief and rehabilitation should also be specified the in proposed law.

The Protection of Human Rights Act, 1993 should be amended to the effect that the recommendations of the NHRC, be accepted like a judgement by both Centre and state. The NHRC should be so empowered under Section 18 of the protection of Human Rights Act, (1993) that the commission's report after inquiry is accepted in toto, and it is not for the state or central government to interpret the recommendations for its convenience.

Finally, penal action must be provided for serious dereliction of duty on the part of government servants for failing to control communal violence.

13. Conclusion

It looks as though we have turned a full circle and returned to the Hobbesian state of nature where life was depicted to be "nasty, brutish and short". Instead of progressing towards an egalitarian society we have been busy completing the task left unfinished by Hitler and Mussolini.

There is urgent need for police reforms and maintenance of communal harmony depends upon the acceptance of the legitimacy of social and political institutions, administrative machinery including the police, and meeting the aspirations of the people. Our institutions should be capable of providing justice to all without discrimination, and our political institutions should be so managed that it makes 'violence as a political tactic both unnecessary and unrewarding.'[12]

As far as communal passions are concerned one has nothing to offer as a solution. We can only continue to push ourselves; in the words of Auden in 'the Shield of Achilles'; to, *"a world where promises are kept; and one could weep because another wept."*

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[12] The Report of US National Commission on Causes and Prevention of Violence (1969; 68).

IS CHILDREN'S PARTICIPATION A RIGHT OR A FAVOUR?

HELLA TURKI BEN CHEIKH

Apart from suffering from a list of problems such as poverty, shortage of financial support, of basic services and facilities and of understanding, children suffer also from lack of participation. Historically, social policy did not consider children as persons with a voice but rather as objects of concern. Young people were marginalized from participation processes and limited in their ability to affect decision-making. This article addresses the theory of children's right of participation. The purpose is to argue whether children's participation is a right or a favour. The first part focuses on the different theories and approaches dealing with the concept participation. The next section explores the right to participation in the United Nations Convention on the Rights of the Child (UNCRC) and especially Article 12. Then, there is an emphasis on the crucial role that Non-Governmental Organisations (NGOs) have in promoting children's participation. Finally, there is a focus on children's mechanisms such as ombudsmen, juvenile courts and youth parliaments.

"Your children are not your children ... and though they are with you yet they belong not to you. You may give them your love but not your thoughts, for they have their own thoughts".[1]

Khalil Gibran

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[1] Gibran, KH. (1926) *The Prophet.* London: Heinemann, p 13.

Introduction

Despite a changing approach to the status of childhood, there are still people who believe that children are miniature adults whose position depends on adults' decisions. There are also a lot of children discriminated against in society and within their families. Indeed, in the past, society did not recognize children as full individuals for cultural, social or historical reasons, that is why there is a need to "free" the child. For many children of all cultures and classes, childhood is a period in which they lack control over their lives. Some adults perceive them as essentially irrational, irresponsible and incapable of making informed choices on matters concerning them. Moreover, young people have little real opportunities to express their views in the family, at school, in their local community and in politics. Youngsters should no longer be considered as the property of adults but as autonomous members of society. They deserve to be considered as full members in society.

Although children's experience of being seriously heard proved to be poor, this did not affect the belief in the importance of enabling youngsters to express themselves. In fact, it could be argued that children's experience of being ignored or undermined has to make us more determined to have their views respected and to spread the principle of choices in childhood. There are certain necessary actions to take to improve children's rights. We have to treat children fairly, ?make sure they are loved ?and listened to and consider young people as young adults. Children should have a voice in all issues that have a direct impact on their lives; they should also be treated as citizens. This could be achieved if governments establish mechanisms that promote children's right to participation.

Participation has long been considered a desirable goal. The fact of promoting such a concept introduces a radical and profound challenge to traditional attitudes, which assume "that children should be seen but not heard"[2]. If there is some truth in this general adage, it certainly describes many of our attitudes towards children. Youngsters must be seen, they must be visible as public beings, as political actors. In observing and listening to them, it is important to respect and value the cultural heritages of youth and the communities to which they belong.

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[2] Source: www.savethechildren.org.uk Website.

The special nature of childhood should no longer be ignored and as Jane Fortin states "Children should be allowed to be children"[3]. In fact, it is high time that a real children's rights culture emerged, a culture where the child is a full individual and a potential participant. In addition, programmes that are for children also need to involve and include them in the planning and execution of activities according to their age and maturity.

This article addresses the theory of child participation, suggests different levels of participation and presents examples of how children can contribute to their own protection and development. It also shows how important the right of the child to participate is and focuses on the crucial role of states' mechanisms. In fact, mechanisms are needed to follow up on the views expressed and proposals made by children, and adults need to learn to give them due weight, including in the context of legal and administrative proceedings. Children are to be offered protection when needed but are also to be given greater opportunities for participation and in exercising responsibility over decisions affecting their lives. In fact, there should be a balance between concern for their growth to independence and respect for their rights as individuals.

As indicated in the United Nations Convention on the Rights of the Child, it is necessary to foster children's active participation at all levels. Moreover, non-Governmental Organisations (NGOs) explore both the rationale for this claim and describe a range of different ways in which children's voices might become more influential in shaping policy.

However, there are some questions put to children and young people: How much do children and young people know about their rights? What is it like being young today? How well do states understand and respect children's rights? What would young people do if they had the power to improve their own status?

This article is an attempt to enquire whether we have a culture of children's right to participation that enables people to listen to young children and take their voice seriously. This can be possible if we look at some examples and opportunities that have been created for children to participate which are a proof that children's participation is a right and not a favour.

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[3] Fortin, J. (2003) *Children's Rights and the Developing Law.* London: Hubbs Ltd, p 5.

1. What Kind of Right is Participation?

The first question to ask when tackling the issue of participation is what kind of right is participation? The expression 'child participation' has been utilized in numerous senses in different bodies of literature. In fact, it can be argued that, rather than having well defined boundaries, this phrase has been used as an umbrella term to designate a vast array of attitudes and behaviours.

The multiplicity of approaches proposed as manifestations of child participation reflects the richness of the concept and its potential for a large scope of applications. Participation rights include the freedom to express opinions, to have a say in matters concerning the child's life and to increase the opportunity to contribute in the activities of society[4].

Roger Hart defines participation as "the process of sharing decisions which affect one's life and the life of the community in which one lives"[5]. Participation refers to young people taking an active part in a project or process, not just as consumers but also as key contributors. Adapted from Sherry Arnstein's "participation ladder", Hart's model identifies degrees of children's participation by recognizing their developing capacity to participate. This children's model is subsequently adapted for the youth context. The ladder specifies degrees ranging from non-participation to participation. Indeed, Arnstein outlines the difference between participation and non-participation through the image of a ladder. There are eight rungs on the ladder and each rung represents a greater degree of citizen involvement in decision-making. For example, the lowest rungs of manipulation and therapy represent non-participation, whereas the highest rung of citizen control turns over ultimate decision-making ability to the participants. The powerless citizens typified by the non-participation levels are contrasted with the powerful.

Participation is fundamentally about the capacity of individuals to feel themselves as citizens engaged in the tasks that influence the development of a culture and a society. It is about being counted as a

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[4] CRC: Articles 12 and 13.

[5] Hart, R. (1998) Children's Participation: The Theory and Practice of Involving Young Citizens in Community Development and Environmental Care. London: Earthscan Publications, p 11.

member of the community; it encourages children's agency, the expression of their self-defined needs and interests. The other reason for involving children is that they need to be aware of their own rights, to know what their rights are, what they mean and how they can be attained.

Gerison Lansdown gives five reasons showing why participation is important. He believes that respecting children's voices is a vital element in protecting human rights as a whole and that engaging children and young people leads to better-informed decision-making. Furthermore and as already indicated in the CRC, children have the right to be listened to and their involvement makes them acquire skills and competencies. The last reason recommends that commitment to participation relies on a belief that democracy works[6].

Participation is beneficial for the child. These benefits can be classified into two major groups; those referring to cognitive abilities and those linked with social skills and personal enhancement. The main goal to be attained in the domain of child participation is that children themselves actually exercise this right in their everyday lives. The child is no longer a spectator just waiting for adults to settle everything for him/her. S/he needs to truly exercise participation and has to play an active role and to foster his/her rank in society which is why we should give children the opportunity to communicate with society. Young people are the experts on their lives and so hearing their voices should be central to procedures that affect them.

Participation is central to children's development whether it is within the family, school and the wider community. It is only through participation that children acquire skills, build competencies and gain confidence. That is why there is a need to listen to children and recognize them as agents of their own development. Every child, regardless of age, has views. Even infants express their feelings through body language and verbal cues. Obviously it is important to listen to them to understand what might best contribute to their development. As children grow older, they learn to express themselves verbally or in writing or in art. Even though the Convention defines the child as every person under eighteen years, it sets no minimum age at which children can begin expressing their views freely,

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[6] Lansdown, G. (2001) *Promoting Children's Participation in Democratic Decision-Making*. New York: UNICEF Innocent Research Centre, p 214.

nor does it limit the contexts in which children can express their views. However, children's participation depends on the age and maturity of the child.

The age group we are concerned with in this article is adolescence. It is sure that children of all ages have the same rights, including the right to participation, but babies for instance can express their feelings of happiness or anger and cannot participate in expressing their opinion about their right to vote. In a manner consistent with the child's age and maturity, there are various ways of creating the right atmosphere to enable the child to freely express his or her views.

Indeed, we should strengthen strategies and mechanisms to ensure children's contribution in the decisions affecting their lives within the family, the school or the community, and to ensure they are heard in legal and administrative proceedings concerning them. Empowering children and young people today will encourage them to stay active in the future and to voice their opinions in later life. Moreover, we are trying to build an inclusive society and young people's participation is central to this as clearly expressed in the Convention on the Rights of the Child.

2. The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child, which was established in 1989, holds profound significance within the international community because of its unique construction of children's rights. Though rooted in earlier Declarations[7], the Convention breaks new ground in the international movement for children's rights in at least three significant respects. First, it goes beyond previous recognition of children as direct holders of rights by acknowledging new prerogatives specific to them. Accordingly, children are viewed as individuals who are entitled to equal status with adults as members of their societies and the global community, not as possessions of parents, or states. Second, it unites civil, political, economic, social, and cultural rights within a holistic framework. A third way that makes the CRC advance children's rights is that it attempts to

[7] The Geneva Declaration of 1924, the UN Declaration of the Rights of the Child in 1959, and the UN Universal Declaration of Human Rights in 1948.

bring into balance the crucial importance of safeguards for children's unique vulnerabilities and recognition of their personhood and self-determination rights. Beyond protection from abuse and exploitation and rights to survival and proper development, it puts forth the vision of children as empowered individuals with voices and the right to participate in society.

The Convention covers four broad areas of rights. The survival rights that contain adequate nutrition, housing and access to medical services. The second kind which is the development rights comprises education, access to information, play and cultural activities and the right to freedom of thought, conscience and religion. The third category includes protection rights that cover exploitation, arbitrary separation from the family and abuse in the criminal justice system. Finally participation rights incorporate the freedom to express opinions and have a say in matters concerning the child's life.

The CRC establishes participation as a statutory right for children. It places in law the right of young people to have their opinions on matters that affect them, taken into account in accordance with their maturity. The philosophy behind the Convention is that children, too, are equals; as human beings they have the same value as grown-ups. It provides a framework for addressing rights relating not only to children's needs for care and for an adequate standard of living, but also for contribution to social life[8]. Moreover, this instrument enshrines the innovative axis of participation, which demonstrates a shift in the traditional image provided of children. In that way, children become the subjects rather than the objects of their rights.

According to Mickael Freeman, broadly speaking what the CRC does is not simply setting up a list of rights for children and imposing a correlate set of duties on others such as parents and the state. It goes further than that in presenting a framework whereby the very social and political status of children, their relationship to their parents and adults in general may be viewed very differently. It imposes duties on states to provide the necessary resources with which children can grow to realize their potential and can themselves contribute to social and political change throughout the world. In fact, by ratifying the CRC, States Parties commit themselves to

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[8] The CRC: Articles 3, 12 and 27.

respect the rights set forth in the document and so to listen to children and involve them in decision-making as stipulated in Article 12.

The CRC asserts the improvement of the status of the child in society. It pledges the child's freedom of expression, of association and peaceful assembly and of thought, conscience and religion. According to Article 12 of the Convention, children have the right to express their opinion; it recognizes the child as an active subject of rights.

Article 12 declares that

> *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative*[9].

It is true that this article promotes exclusively children's right to participation, however, its respect depends on states. For instance, when the British Government ratified the Convention on the Rights of the Child in 1999, it committed itself to ensuring the rights of the under 18 years-olds. Several Non-Governmental Organisations have committed themselves to the same mission and have been encouraged by the government. For example, Save the Children Fund is viewed as the United Kingdom's biggest international children's charity and a rights-based organisation. It raises awareness that children's rights need special recognition and believes that children need concrete recognition of their rights as members of their families and citizens of their states.

That is why it designs programmes and allocates resources to provide children with opportunities to participate in decision-making and to develop their skills[10].

According to Article 12, the principle of participation should be promoted in all levels of government, centrally and locally. Cooperation

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[9] The CRC: Article 12.

[10] Source: www.savethechildren.org.uk Website.

with governmental and Non-Governmental Organisations in the area of participation is another point to be covered in the following section of this article.

3. Non-Governmental Organisations

Childhood requires a massive and coordinated effort by professional researchers, practitioners, and political allies. All professionals working with children, including the members of Non-Governmental Organisations, need to work together as advocates for and with children to highlight their environmental needs.

Since the adoption of the Convention on the Rights of the Child, many NGOs have emerged as advocates for children or for particular groups of children. In a growing number of countries, coalitions of NGOs have been formed to promote full carrying out of the principles of the CRC. In fact, Article 45 of this instrument recognizes the monitoring role of NGOs.

In most countries, NGOs play a key role as defenders and promoters of human rights. NGOs have a special role to play in the development of a universal culture of human rights. By their very nature, they have a freedom of expression and a flexibility of action that, in certain circumstances, allow them to perform tasks that governments and intergovernmental organisations are unable or even unwilling to perform. They even complement the development efforts of states and civil society.

These organisations believe that young people have the right to participate positively by submitting programmes and developing activities in schools and youth centres and cultural places. In this way, they contribute to the interaction between children and society and, above all, create the conditions that will enable such interaction to emerge.

Children's participation is an essential component of exploring new alternatives. We argue in this article that youth are meaningfully redefining practices of participation through these organisations that are developing critical strategies for community development work. These institutions commit themselves to young people to operationalize key elements of deliberative participatory planning such as respectful dialogue, advocacy, critical education and cooperative organizing.

NGOs play a vital role in providing space for young people; they have a strong influence and stimulate individuals to contribute to discussions and encourage full and active participation and exchange of ideas. They organize awareness workshops. These meetings play a major role in providing information and promoting ideas.

For sure, no one ignores that today's main pillar of international assistance to children is the United Nations International Children's Emergency Fund (UNICEF) , which was created in December 1946 by the United Nations[11]. to help the children of World War II. In 1953, the organisation became a permanent part of the UN after it became evident that children all around the world suffered.

The UNICEF is the world's largest children's rights organisation working globally to help every child reach their full potential. It is one of the specialized United Nations bodies and agencies and the most influential Non-Governmental Organisation which is making young people one of its main priorities and will continue to do so in the years to come. It has become an essential actor in the field of human rights in general and children's rights in particular. It incorporates the principles of the United Nations Convention on the Rights of the Child and continues to work to strengthen and promote adherence to international standards for the protection of children's rights.

This organisation believes that children have the right to be masters of their own decisions[12]. Consequently, more efforts should absolutely be done to make them develop their abilities and capabilities. Actions should also be taken by states and each government has to develop a culture respectful of children's rights. Every country should develop an infrastructure for participation and consider it as a granted right and not a favour.

Mechanisms should also exist on the national and local level to coordinate policies and to monitor the implementation of the Convention. While others have set up Committees to monitor progress towards realization of children's rights, new spokesman for children were appointed to accommodate the child's interests. In fact, children can have the right to be appointed an Ombudsman[13].

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[11] Source: www.unicef.org.uk Website.

[12] Source: www.unicef.org.uk Website.

[13] The term Ombudsman can be used interchangeably with "Commissioner", "Rapporteur", "Watchhdog", "Officer" and "Delegate".

4. Children's Mechanisms

The first mechanism to focus on in this section is the appointment of children's delegates. In fact, there is nowadays an Ombudsman or a similar institution for ombudswork for the rights of the child; the intention in most such cases is to ensure a system of independent monitoring[14]. This special rapporteur is appointed to investigate individual complaints against public authorities. Ombudswork for children is a broad term that has been adopted by some commentators to cover all aspects of child advocacy and watchdog functions, both governmental and non-governmental.

Norway was the first country to appoint an Ombudsman for children in 1981. The belief was that a national Commissioner could prove vital for the promotion of children's rights and child participation and protection indicators were being developed. Consequently, the world's first legislation establishing an office of children's Ombudsman was passed by the Norwegian parliament in 1981. According to Eugeen Verhelen, the Norwegian Ombudsman for children is a strategy "within the context of the children's rights movement, aimed at changing social systems, institutions and structures in order to maximize the children's possibilities of self-determination"[15].

Why do we need an Ombudsman, this special spokesman for children? Ombudsmen act as mechanisms whose specific task is to operate as watchdogs that monitor the conditions of children and better their situation. Their fundamental task is to represent children and young people, to be their voice, to assert their point of view and insist on respect for their human rights.

According to Malfrid. Grude, Flekkoy, an Ombudsman is a kind of Commissioner for children who "aims at changing social systems, institutions and structures in order to maximize the children's possibilities of self-determination"[16]. His/Her mission is to promote the

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[14] Flekkoy, M. G. (1991)*A Voice for Children: Speaking out as their Ombudsman.* London: Jessica Kingsley Publishers, p 15.

[15] Verhelen, E. (1997) *Monitoring Children's Rights.* Dordrecht, Boston, London: Martinus Nijhoff Publishers, p 19.

[16] Flekkoy, M. G. (1991) *A Voice for Children: Speaking out as their Ombudsman.* London: Jessica Kingsley Publishers, p 15.

rights of children. This would primarily be done in three ways, namely by influencing policy-makers and practitioners to take greater account of children's rights and interests. Then, by promoting compliance with the minimum standards set out by the CRC and other relevant international treaties or arrangements and finally by seeking to ensure that children have effective means of redress when their rights are ignored.

Independent from the government, their aim is to focus on the problems regarding children living under complex conditions and needing special help and care. The purpose is to find new ways to work for the interests of children by protecting and improving them. One of the biggest initiatives is to encourage children to complain and so to ensure that their voices are heard and taken into consideration. The office of children's ombudsperson is a social-policy innovation established to advocate and implement children's rights and interests. S/he can be seen as a social right whose ultimate goal is to promote a child's well-being and security through enforcement of rights and protection of interests.

The fact of appointing an ombudsman to promote the rights and interests of children was an action from the part of some governments to raise awareness of the need for such an independent body among politicians. A Children's Rights Commissioner for a state signifies a serious commitment on the part of the government to protecting the rights and best interests of ALL children and young people.

These Officers have powers as well as a number of duties under the law. Since they are champions of children's rights, they must implement and have regard to the principles of the Convention on the Rights of the Child. They also have the duty to conduct investigations, produce information about the rights and best interests of children, provide advice or information on any matter concerning the child and make recommendations about young people to authorities. They can even criticize and publicize, but not reverse administrative action or revoke administrative decisions.

Their responsibility is to create and promote new innovative opportunities for young people to make their views heard. They should work to improve the means of communication with children and young people. This could be achieved by supporting the establishment of children's forums. They cooperate with a number and variety of authorities, organisations and individual persons and coordinate safety promotion activities for children and young persons so

that their views can be heard more clearly and acted on.

The Ombudsman experience demonstrates how a monitoring mechanism can work without any relation to an international instrument. Further efforts are needed to ensure that all children in all countries have a powerful independent institution with legal powers and duties. The UN system has acknowledged that everyone needs such an institution[17]. Each government should establish special machinery devoted to the promotion and protection of human rights and particularly children's rights and to enhance the establishment of independent monitoring mechanisms to endorse, defend and implement the rights of the UN Convention.

The appointment of a Commissioner is one specific mechanism that was instituted to monitor and address the difficulties that children face and to promote children's participation. In some countries, Non-Governmental Organisations have also styled their advocacy for children as Ombudsman activities. Indeed, both mechanisms proved to be beneficial in involving children and bettering their status in society. Their mission is not only to aware children of their rights but also to foster children's status in society by implementing the principles of the Convention on the rights of the Child.

There is another way of involving children introduced by Scottish that is a radical and unique system of juvenile justice in which children have the greatest opportunity to participate in decision-making. This initiative is called the Children's Hearing System[18] and is based on the philosophy of justice for children; it is the greatest opportunity for children to be listened to.

As far as the Hearing is concerned, it is directed to try to obtain the views of the child, the parents and any safeguarder on what arrangements would be best for the child. This system not only demonstrates that it is possible to involve children as participants in the decision-making process, but that participation is an essential element in the system. It is a combined system of juvenile justice and child welfare in which reporters receive over 60.000[18] referrals annually about children who have either committed an offence or have been ill-treated. According to the Scots law compulsory measures of

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[17] Freeman, M. D. A, & P. Veerman (1996) *The Ideologies of Children's Rights: How Preserving Families Can Cost Children's Lives.* New York: Basic Books, p168.

[18] Source: www.un.org.uk Website.

supervision are necessary in respect to the child. It is a unified system responsible for meeting the needs of children; it offers them the opportunity to participate in deciding for themselves. Established in Scotland in 1971, it states that it shall "discuss the case of the child and afford to the said child, parent and representative, if attending the hearing, an opportunity of participating in the discussions"[19]. It deals with children who are both in need of care and protection and children who have committed offences.

The Children's Hearing System promotes a conception of children's rights which includes giving children the right to be treated with decency and respect in a system that is ultimately concerned with their well-being. The system not only demonstrates that it is possible to involve children as participants in the decision-making process, but that participation is an essential element. This system is based on the philosophy of justice for children. It is not simply a justice system designed to deal with children who commit offences. Rather it is a system of justice for children in which the welfare of the child is the key concern.

In certain states, there is a lot of progress concerning children who are now asked about their needs and preferences and about the meaning of human rights to them. They can be represented in court by having a lawyer in case they make an offence or need help. They have the right to witness, to choose their adoptive parents and to have their views taken into account.

As already indicated, in order to achieve their full potential, adolescents should be able to benefit from a range of policies and programmes that support them in several areas, such as ensuring their participation in decisions that affect their rights, providing them with safe and supportive environments, developing their capacities and values and ensuring that they have access to basic services and opportunities. For instance several states have promoted another way that enhances children's right to participation which is the creation of a Parliament for children. This Parliament enables youngsters to be listened to and heard by adults, to have their questions answered and their needs provided. Young people come together to talk about what matters to them and to have a good time doing play-

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[19] Freeman, M. D. A, & P. Veerman. (1996) The Ideologies of Children's Rights: How Preserving Families Can Cost Children's Lives. New York: Basic Books, p168.

ful and creative projects. It also attracts adults to learn more about children's rights and citizenship. The child Parliament is a forum for dialogue. Children can organize themselves within a space for dialogue in order to express their opinions on rights issues and to practise the exercise of responsibility. They even cultivate their sense of civics and promote their child rights culture. Children's Parliament demonstrates how youngsters, when given the opportunity and an informed choice, can make a valuable contribution to society.

The creation of the children's parliament as a place for dialogue enables children to be responsible and allows them to express their views over their rights. Its purpose is to spread the culture of participation and to educate and train youngsters to make them citizens capable to fully assume their responsibilities in all duties and at all levels.

Conclusion

After exploring the issue of participation and its role in instituting children's position in society, we notice an increased growth in respect of the fully-fledged legal position of the child. Nothing is nobler than providing a better future for all children in this world, but this cannot be achieved if children are not involved. The emphasis should shift from protection to autonomy and from nurturance to self-determination.

This changing culture of childhood should continue to change and change rapidly. Hopefully, the climate nowadays, is right for reforms and thus more efforts should be done on the part of everyone. The growing recognition of children's right to participate in local or national decision-making processes and to contribute to the development of their own societies has been among the most significant advances of the last decades.

Moreover, no one ignores the worldwide effort to promote children's right to participation made during the World Summit for Children in 1990 and the Global Movement for Children in 2002. In fact, both events have given children the opportunity to participate and have established children's right to participation as a goal that enables every society to build a World Fit for Children.

However, we cannot rely only on the advancement of the legislation concerning children; there should also be a more focus on the

promotion of children's participation. This means that there should be a symbiosis between what the legislation does and the degree of involvement of the child. Such participation needs to be further developed in the coming decades so as to be more fruitful and successful and as Hart says "Children's Participation isn't just a strategy, it's a mindset, an ideology, a value, a life philosophy that applies to everything you do"[20].

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CORAL BLEACHING - MATTER OF GLOBAL CONCERN

NEETIKA YADAV AND T PRIYADARSHINI

The destruction of coral reefs is often looked at with a blind eye whereas in reality it could have disastrous consequences for both human and marine life. Coral reefs are considered as one of the most productive ecosystems on the earth, but human activities continue to be the primary cause of the global coral reefs crisis. The first part of this paper looks at the importance of coral reefs to humans and the human caused-threats to reef ecosystems. Secondly, it focuses the link between human rights and the environment (very often the marine enviroment and its resources are considered the basis of local culture). International laws address coral reef preservation and underline the State responsability for using their biological resources in a sustainable manner, although mere compliance with existing international covenants would not suffice to ensure legal protection to this critical global resour.

1. Introduction

The last word in ignorance is the man who says of an animal or plant: "What good is it?" If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of

intelligent tinkering[1]. With every passing day, another new specie is nearing extinction with an appalling speed. Another new organism to be added to the list of endangered and threatened are the coral reefs. The gravity of the issue is well brought out by the fact that its not a single organism but an entire ecosystem at stake. Coral reefs are dying at an alarming rate. Millions of people depend on coral reefs for their sustenance and livelihood, yet these vital resources may soon be lost. Absent effective safeguards against global warming and human over-exploitation, continued coral reef destruction threatens the viability of marine resources and coastal people. Coral reef destruction is particularly severe for species that depend on coral reefs for several important functions.

The question addressed is whether the current legal protections for coral reefs are adequate and enforced. Part I of this paper explains the importance of coral reefs to humans and the human-caused threats to reef ecosystems. This Part also describes the condition of coral reefs and the difficulty in understanding their perilous situation. Part II looks at international laws that currently address coral reef preservation and other conventions that mandate protection of reefs. Part III details the distribution of coral reefs in India and examines efforts in India to preserve coral reefs and potential sources of legal assistance for reef conservation. The conclusion sets forth recommendations for increased legal protections for coral reefs in the light of the crisis that confronts the existence of reefs across the world.

2. Corals - A Preface

To the untrained eye coral reefs may look like a bunch of rocks, but they are actually extremely complex ecosystems of plants and animals that occur primarily in shallow tropical waters[2]. The process

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[1] Aldo Leopold, Round River 146-47 (1993).

[2] See MARK SPALDING ET AL., WORLD ATLAS OF CORAL REEFS 15 (2001). Reefs are typified by the presence of large stony corals growing in profusion and by an often-bewildering array of species growing or moving among them. They are almost entirely confined to areas of warm, shallow water, and it is their skeletons, essentially built of limestone, which are critical to the formation of coral reefs. Over

of reef formation occurs over hundreds or even thousands of years. Only tropical rain forests rival coral reefs in terms of their diversity, though rain forests cover twenty times more area than reefs.

Most corals are small animals (called polyps) that live in colonies and form reefs. They obtain food in two ways: first, by using their tentacles to catch plankton and second, through tiny algae that live in the coral tissue. Several species of zooxanthellae may occur in one species of coral. They are generally found in large numbers in each polyp, living in symbiosis, providing the polyps with their colour, energy from photosynthesis and as much as 90% of their carbon requirements. Zooxanthellae receive essential nutrients from the coral and transfer up to 95% of their photosynthetic production to the coral. In reef-building corals, the combination of photosynthesis by the algae and other physiological processes in the coral leads to the formation of the limestone skeleton. The slow build-up of these skeletons, first into colonies, and then into a complex three-dimensional framework allows the coral reef to harbour numerous species, many of which are important to the livelihoods of coastal people and communities.

2.1. The Vanishing Ocean Rainforests: Threat faced by Coral Reefs

The destruction of coral reefs is often looked at with a blind eye whereas in reality it could have disastrous consequences for both human and marine life. Billions of people depend on coral reefs in one-way or another. Coral reefs often referred to, as the "rainforests of the oceans" are a critical global resource, both biologically and in

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centuries or millennia the active growth of these corals (alongside other organisms such as coralline algae, which also lay down calcium carbonate skeletons) leads to the building up of vast carbonate structures. In this way a coral reef is built. Only a tiny fraction of the growth of individual corals is converted into upwards development of a reef structure, and so their formation takes place over geological time scales. The most rapid periods of reef "growth" have shown upwards accumulation of reef structures reaching 9-15 meters in 1000 years in some areas, but much lower figures are probably more normal. Reef-building corals are highly dependent on a symbiotic relationship with microscopic algae (zooxanthellae), which live within the coral tissues.

socioeconomic terms. They are also the sources of medicines and are considered as one of the most productive ecosystems on the earth. Coral reefs provide food and wealth from the fish that thrive in their shelter, to tourism, to the harvesting of corals, shells, and tropical fish[3]. One-fifth of all protein consumed by humans comes from marine environments, and one billion people in Asia alone depend on reefs for their food. Reefs all over the world protect shorelines from hurricane waves and serve as breakwaters for islands. Reefs also provide a major source of income around the world in the form of tourism. Ten million tourists visited the Great Barrier Reef in Australia in 1997 alone, producing over $ 700 million in tourism revenue. Florida had $ 1.6 billion in revenue annually in the early 1990s from reef tourism. Tourism provides half the total gross national product for countries in the Caribbean, whose beaches and reefs are the major attractions. If the reefs fail completely, an important food and medicine source and the bulwark of Island economies would be devastated.

The United Nations Environment Programme's World Conservation Monitoring Center estimates that *fifty-eight percent of all reefs are currently threatened by human activity*, with reefs "degrading faster than data can be collected." The latest report from the Global Coral Reef Monitoring Network estimates that *by 2010, forty percent of the world's coral reefs may be lost and another twenty percent may perish by the year 2030*. This means that sixty percent of the world's coral reefs are threatened with destruction over the next thirty years. Some experts are even more pessimistic and believe that coral reefs, in their present form, may not survive past 2020. These observations and predictions demonstrate that the present and likely future state of coral reefs demand our immediate attention and action.

2.2. Factors responsible for coral bleaching

As time progresses reefs are experiencing excessive natural and anthropogenic stresses, causing massive coral bleaching and degradation. The multiple stressors that cause bleaching are:

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[3] Interview with Robert Ginsburg, Professor, Rosenstiel School of Marine and Atmospheric Sciences, in Miami, Fla. (Jan. 27, 1998) (notes on file with the Harvard Environmental Law Review).

- High sea temperature
- High levels of ultraviolet light
- Low light conditions
- High turbidity and sedimentation
- Bacterial infection
- Crown-of-thorn starfish predation
- Anthropogenic toxicants.

The 1997-98 El Niño and a subsequent 1998 bleaching has worsened the position. Rising sea levels and sea temperatures due to global warming reduce this diversity and productivity. Human activities exacerbate the natural global warming process by increasing the concentrations of greenhouse gases and contributing new pollution sources. As global warming continually damages coral reefs, the world's attention must focus on protecting the coral reef ecosystem.

3. Coral Bleaching and Subsequent Human Rights Violation

The destruction of coral reefs has serious implications. According to the Intergovernmental Panel on Climate Change's Second Assessment Report (IPCC) in 1995, the most pronounced impacts of global warming will be related to water resources[4]. Entire species will shift to new locations and adapt to new habitats, or face localized and potentially widespread extinction[5]. Under either scenario-moving or dying-coastal people face a serious threat. In addition, as species respond to climate change, the productivity of ecosystems such as coral reefs declines. This result in the reduction of marine biodiversity, the services marine ecosystems provide marine life, and the services marine ecosystems provide human society.

Food shortages in nations affected by climate change could result in food riots and the mass movement of hunger driven migrants[6].

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[4] Intergovernmental Panel on Climate Change (IPCC), Second Assessment Report, 3 (1995) at 3.

[5] Lakshman Guruswamy, Climate Change: The Next Dimension, 15 J. LAND USE & ENVTL. L. 341, 351 (2000).

[6] Lyn Goldsworthy, CLIMATE CHANGE: SECURITY IMPLICATIONS FOR THE PACIFIC REGION, 9 (1994).

This diminution in food supply near-shore is particularly devastating for coastal areas and island nations because of their heavy dependence on coral reefs for the supply of food. One-third of the world's marine fish species are found in coral reefs[7]. Fishermen catch ninety percent of the world's fish within two hundred nautical miles of the coast, and the majority of the catch is within the first five miles. These statistics are significant because coral reefs are usually found in relatively shallow, near-shore water[8]. Reef fish make up ten percent of the global fish catch, and with other reef foods, support thirty to forty million people. More than three billion people-the majority of humankind-occupy coastal regions. This figure is expected to double by 2050. By the end of the century, two-thirds of the population of all developing countries will live along coasts. Half of the world's shorelines are in the tropics, and a third of those coasts are associated with coral reefs.[9]

In the Federated States of Micronesia, for example, the marine environment and its resources are considered the basis of local culture. Besides using the ocean for recreation and cultural events, Micronesians rely on coral reef resources for in-shore and near-shore fishing. Locals trade fish as part of the nation's commerce and consume it as an essential source of nutrition. However, fish stocks in certain reef areas in Micronesia are now already seriously depleted, forcing locals to find alternative sources of fish and other foods.

4. State Responsibility Under International Law

Damage to the coral reefs would affect the corresponding rights provided under *International Covenant on Economic Social and Cultural Rights,* for instance, Right of people to food (Article 11)[10],

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[7] Lucy Johnson, Pacific Islands Shiver at the Idea of Global Warming, INTER PRESS SERVICE, Apr 16, 1993.

[8] Robin K. Craig, Coral Reef Task force: Protecting the Environment through Executive Order, 30 ELR 10343, I. Coral Reefs: The Basics (2000).

[9] Biliana Cicin-Sain & Robert W. Knecht, INTEGRATED OCEAN AND COASTAL ZONE MANAGEMENT: CONCEPTS and PRACTICES 15 (1998).

[10] Article 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living con-

Right to protection of environmental hygiene (Article 12)[11], Right to work (Article 6).[12]

The right to a healthy environment is now to be found in a number of regional human rights instruments around the world. *Article 11 of the Additional Protocol to the Inter-American Convention on Human Rights* (1994) popularly known as the San Salvador Protocol, states that

(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services;

(2) The state parties shall promote the protection, preservation and improvement of the environment.

The Convention on the Rights of the Child (1989) in article 24(2) (c) requires State parties in the matter of combating disease and malnutrition to take into consideration, 'the damage and risks of environmental pollution.' *The African Charter on Human and People's Rights 1981 proclaims in Art. 24(1)* a right to 'a general satisfactory environment favourable to their development.'

The first principle of the 1972 Stockholm Declaration declares that:

> *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*

Almost twenty years later, in resolution 45/94, the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts towards ensuring a better and healthier environment. In the mid

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ditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[11] Article 12 (2) (b) The improvement of all aspects of environmental and industrial hygiene.

[12] Article 6 (1): The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

1990s, recognizing the urgent need and importance of deepening the link between human rights and the environment, and of exploring ways to achieve a better collaboration, harmony, and complement the agendae of different United Nations institutions working on both subjects, the UN created the position of Special Rapporteur on Human Rights and Environment.

In the absence of petition procedures pursuant to environmental treaties, cases concerning the impact of environmental harm on individuals and groups have often been brought to international human rights bodies. For example, *the Committee on the Elimination of Discrimination Against Women linked environment to the right to health in its Concluding Observations on the State report of Romania*, expressing its "concern about the situation of the environment, including industrial accidents, and their impact on women's health."

The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, provides for minimum core obligations. It states that violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as

> *a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.*

Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

By virtue of being a party to the abovementioned treaties the State has a responsibility to protect and respect the human rights of people. By not taking an action to combat coral bleaching they will fail to comply with the essence of the treaties.

The Convention for Biological Diversity reaffirms that *States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner*. It recognizes that science is discovering new uses for biological diversity in ways that can relieve both human suffering and environmental destruction. It

is to be accepted that much of the diversity is being irreversibly lost through extinction caused by the destruction of natural habitats, again especially in the tropics.

Relevant provisions incorporating responsibility on States under the Convention for Biological Diversity (CBD) to protect ecosystems like that of coral reefs are as follows:

> *Article 8(d) of the CBD states that contracting parties shall, "as far as possible and as appropriate," "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."*

Article 10 of the CBD builds on this idea, stating that each contracting party, as far as possible and as appropriate, shall "integrate consideration of the conservation and sustainable use of biological resources into national decision-making".

The *Preamble* states that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population, for which purpose access to and sharing of both genetic resources and technologies are essential.

The Convention mandates in-situ conservation, which refers to the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

Therefore, conservation and protection of ecosystems is given high priority by the International Community and these obligations have to be complied with by the State Parties. *The International Coral Reef Initiative* addresses the rapid global decline of coral reefs after they were recognized and accorded a high priority for protection in *Agenda 21, at the 1992 United Nations Conference on Environment and Development.* Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which humans impact on the environment.

Principle 7 of Agenda 21 states that States shall have to act in a spirit of Global Partnership to restore the health and integrity of

Earth's ecosystems[13]. Further, *Principle 10* mentions that environmental issues must be handled with the participation of all concerned citizens, at the relevant level[14].

The *Ramsar Convention* when dealing with conservation, production and sustainable use of fisheries resources adopted Resolution IX.4: which specifically refers to coral reefs and associated ecosystems in para 14, 15 & 35[15].

The Convention Concerning the Protection of the World Cultural and Natural Heritage aims to conserve cultural as well as natural heritage, which are of outstanding interest and therefore need to be

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[13] Principle 7: States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

[14] Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

[15] Para 14. RECOGNIZING that coral reefs are amongst the most complex, species-rich and productive of marine ecosystems, covering less than 1% of the ocean's area yet home to one-third of all marine fish species, that coral reef fisheries are estimated to yield 6 million metric tons of fish catch annually, with one-quarter of the total worldwide fish production being in developing countries with coral reefs, and that they provide a habitat for a significant proportion of marine biodiversity; Para 15. RECOGNIZING that several environmental benefits/services are provided by mangrove ecosystems including coastal protection, nutrients and sediments retention and carbon dioxide sink, their special relevance as nurseries of various aquatic species, and their protective role to the existing associated ecosystems such as coral reefs and sea grass beds, and Highlighting the importance of mangrove ecosystems, including their associated tidal flats, and estuaries as a source of fisheries resources to several coastal communities; Para 35. URGES each Contracting Party with coral reef, sea grass beds and other associated ecosystems in their territories to implement national programs for the protection of these ecosystems through the establishment of effective protected areas, monitoring programs, awareness programmes and cooperation for innovative coral reef, sea grass beds and associated ecosystem restoration projects.

preserved as part of the world heritage of mankind as a whole[16]. Subscribing to the definition given under *Article 2*, it can be categorically seen that Coral reefs form a part of the natural heritage.[17]

It imposes obligations on the State having the Heritage[18] within its territory to ensure protection, conservation and transmission of the heritage to the future generations. Article 5 and Article 6 of this Convention states that each party shall endeavour to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory.

Further, the Convention Concerning the Protection of the World Cultural and Natural Heritage says that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the *protection of the cultural and natural heritage of outstanding universal value*, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto.

Coral Reefs are Complex Ecosystems which undoubtedly are of "universal value" and therefore, it is necessary that the international community as a whole works towards the achievement of restoration and conservation of coral reefs.

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[16] Refer Preamble of The Convention Concerning the Protection of the World Cultural and Natural Heritage

[17] Article 2: For the purposes of this Convention, the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

[18] Article 4: Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

5. Conclusion

Legal protection for coral reefs has begun relatively recently. In addition, existing protection consists of laws and conventions that serve either directly or indirectly to protect only certain coral reefs. By all scientific accounts, coral reefs are at a crisis point, and their preservation requires more coordinated measures to protect these treasures both nationally and internationally.

The Report of International Coral Reef Initiative (ICRI) states in The Status of Coral Reefs of the World 2004 report how human activities continue to be the primary cause of the global coral reef crisis. The report details many new initiatives aimed at reversing this degradation such as by conserving the biodiversity, the economic value and beauty of coral reefs. If reefs are to survive as our natural heritage, we need to act locally to reduce direct human impacts and, globally, to combat greenhouse emissions. It is estimated that only *three percent* of the world's coral reefs are within a security zone, and at least forty countries have no legal protection for their reefs. The areas that do protect reefs tend to be very small, many of them only a square kilometer in size. Only a few very large sites such as the *Great Barrier Reef, the Florida Keys National Marine Sanctuary, and the Ras Mohammed Park Complex in Egypt* are truly substantially protected. Even designated areas may exist merely as "paper parks" where "legislation is not enforced, resources are lacking for protecting these areas, or management plans are poorly conceived." Given the prediction that as much as sixty percent of the world's reefs will be gone in thirty years, UNESCO should expand the protection to reefs offered by the World Heritage Site designation. *The World Heritage Committee could add the most endangered reefs to the List of World Heritage in Danger under Article 11.* Article 11, paragraph four of the World Heritage Convention provides that property facing

> *threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; [or] major alterations due to unknown causes*

may be included on the World Heritage List. The World Resources Institute estimates that *twenty-five percent* of all reefs in the world are

at high risk of disappearance, with the reefs in Southeast Asia-"a global hot spot of coral and fish diversity"-most endangered, primarily from "coastal development, over fishing, and destructive fishing practices." Those reefs at high risk in Southeast Asia and elsewhere should be included on the World Heritage list. Under *Articles 19 and 22, a state party containing a designated reef is eligible to request international assistance in the form of technical cooperation, loans, and even grants*. These funds may be used in a variety of ways, ranging from training staff to providing experts, and even supplying equipment.

UNEP has already identified a number of coral reefs that it would like to see added to the World Heritage List, including reefs found in the Red Sea, Indonesia, and Fiji. It should add to its list by incorporating the results of the international collaborative study titled "*Reefs at Risk*," which has classified the major reefs of the world in terms of their biodiversity and level of threat from human activity. UNESCO's World Heritage Program already highlights the threats to a variety of ecosystems. Given that coral reefs are the second most diverse ecosystem on the planet, UNESCO should give them equal priority. The best hope for coral reefs so far seems to be in establishing more marine protected areas. Such areas refer to an existing patchwork of local, state, and national efforts to protect corals.

The inference drawn from this research is that mere compliance with existing international conventions would not suffice. By giving the issue of coral bleaching a human rights perspective, the authors of this paper want to highlight the need for international collaboration to avoid the inevitable menace.

APPENDIX 1

Treaties and Conventions referred in this text are:

1) Convention (No. 169) concerning Indigenous and Tribal People in Independent Countries, entry into force 5 September 1991.

2) Convention on Biological Diversity.

3) International Covenant on Economic, Social and Cultural Rights entry into force 3 January 1976.

4) Stockholm Declaration of the UN Conference on the Human Environment, June 16, 1972, 11 ILM 1416 (1972).

5) United Nation Conference on Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, princ.2, 31 I.L.M. 874.

6) United Nations Framework Convention on Climate Change, opened for signature May 9, 1992,31 I.L.M 848.

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هل مشاركة الأطفال حقّ أم معروف؟

هيلا تركي بن شيخ

يعاني الأطفال من شتى المشاكل كالفقر و قلّة الدعم المالي وقلّة الخدمات الأساسية والتسهيلات وقلّة الفهم، كما يعانون من قلّة المشاركة. فتاريخياً، لم تعتبر السياسة الاجتماعية الأطفالَ أشخاصاً لهم صوت وإنما اعتبرتهم عنصرَ همٍّ. فهُمّش الأطفال الصغار بعيداً عن عمليات المشاركة وقدرتهم على التأثير في عملية صنع القرارات محدودة. ويتطرق هذا المقال إلى نظرية حقّ الأطفال في المشاركة، ويتساءل هل مشاركة الأطفال عبارة عن حقّ أم مجرّد معروف. فالجزء الأول من البحث يركز على النظريات والنهوج المختلفة لمبدأ المشاركة، بينما يبحث الجزء التالي الحقّ في المشاركة طبقاً لاتفاقية حقوق الطفل للأمم المتحدة، وبخاصة المادة الثانية عشرة. ثم يشدّد البحث على الدور الحاسم للمنظمات غير الحكومية في تشجيع مشاركة الأطفال. وفي الختام يشير البحث إلى الآليات الخاصة بالأطفال كأمناء المظالم ومحاكم الأحداث وبرلمانات الشباب.

"إنّ أولادكم ليسوا أولاداً لكم... ومع أنهم يعيشون معكم فهم ليسوا مُلكاً لكم. أنتم تستطيعون أن تمنحوهم محبّتكم، ولكنكم لا تقدرون أن تغرسوا فيهم بذور أفكاركم، لأن لهم أفكاراً خاصة بهم." جبران خليل جبران

نيتك يدوا
ت. بيادرشيني

سبّب دثأر المرجام نتايج مجلبة على حيوة الانسان.
نشر هذا جزء أهمّيّة المرجان لأ لأنسان.
نشر الجزء الا رتباط بين نواميس الانسان و الطبع.
غار ففة مهللة على وقاية المرجان,

الأسلامية، وهو نظام لا يفرّق بين العنصر الدنيوي والعنصر الروحي، وحيث العنصر الأول يستمدّ أصله من العنصر الثاني. ويبحث هذا المقال العلاقة بين نظام الشريعة و حقوق الإنسان. ولا بدّ للشريعة أن تحظى اليوم أكثر من أي وقت مضى بالاهتمام اللائق بها كونها النظام القانوني لربع سكّان المعمورة ونظراً للاهتمام المتجدد في دراستها نتيجة الأحداث الإرهابية الخطرة التي أثارت الكثير من الفضولية حولها، بل نظراً للخوف من انتشار الإسلام و نتائجه في أوروبا. كما رأينا في الماضي أن عدداً من الدول المسلمة، مثل باكستان واليمن وماليزيا ونيجيريا تبنّت أنظمة قانونية على الطراز الغربي ولكنها تعود الآن تدريجياً إلى القوانين المسلمة التي كانت مطبّقة قبل الاستعمار.

اطّرادية العلمانية الزعفرانية

أنوشري تريباثي

شكّلت أحداث شغب السيخ (عام 1984) ومومباي (1993) وغودرا (2002) مراحل تاريخية هامة في تاريخ الهند. إنها أحداث تملأ قلوب الإنسان العادي، وغير العادي، بذكريات مريرة يُفضّل ألا تُثار. والسؤال المطروح: ما هو القاسم المشترك الذي سبّب تلك الاضطهادات وعواملها المشددة للعقوبة؟ الرد: زعماء سياسيون حزبيون والبيروقراطية غير الفعّالة وشرطة منحازة وسلطات قضائية مغلوبة على أمرها. فأكبر ديمقراطية في العالم لم تتخذ سوى إجراءات شكلية في مكافحة أسباب التوتّر المحلّي وفي مساعدة الشعب على التغلب على عاقبة ذلك التوتّر، دون اتّخاذ الإجراءات اللازمة للتخلّص من جذور المشاكل. ويتعايش في الهند أناس ينتمون إلى جماعات مختلفة، وعلى الصعيد الديني يتّسم الجوّ بالتعصّب الديني والنزاعات الدينية. وبلغ هذا التعصب، تدريجياً، حالة مخيفة تُقلق سلام وطمأنينة النظام الاجتماعي. إن مهمّة الزعماء والمعنيين في الهند لا تكمن في الانجرار في العواطف المحلية القوية والاستفادة بقدر الإمكان من هذه الآفة، ولكن عليهم أن يضعوا حدّاً للمآتم التي لا نهاية لها مالم تُثبّط الهمّة المحلية. أما بالنسبة للعواطف المحلية القوية فلا يمكن للمرء أن يأتي بحلّ لها.
صرّح الزعيم الهندي مهاتما غاندي مراراً أن الدين مسألة شخصية تخصّ كلّ فرد، ويجب ألا يُورّط الدين في السياسة أو في الشؤون الوطنية.

الأزواج المتزوجة والمعاشرة بدون زواج وأنواع أخرى من المعايشة: منظور مقارن

فيليبو فاري

يبحث المقال أهم الأنظمة للأزواج المتزوجة وللمعاشرة بدون زواج ولأنواع أخرى من المعايشة في دول الاتحاد الأوروبي. ولبعض الدول، مثل ايطاليا، تشريع خاص لصالح الأزواج المتزوجة. أما دول أخرى، فتتّخذ إجراءات قانونية تهدف إلى مواءمة أنظمة المعاشرة بدون زواج المتكونة من فردين ذوي الجنس المختلف من جهة وذوي نفس الجنس من جهة أخرى لتكون منسجمة مع الأحكام الخاصة بالأزواج المتزوجة. ويبحث المحرر تشريع الدول التي تسمح للأزوج من نفس الجنس بأن تدخل نظاماً تسمّيه زواجاً ويقول إن إدخال مثل هذا التشريع جاء نتيجة التلاعب بالمصطلحات. كما يخصّ البحث تلك الدول التي أقدمت على الاعتراف العمومي بالأزواج غير المتزوجة، بناء على اتفاقات معاشرة طبقاً للمثال الفرنسي المسمّى "باكس". وينتقد البحث هذا التشريع ويؤكّد على الأسباب التي في ضونها لا يمكن للأزواج غير المتزوجة أن تُعامل قانونياً بنفس المعاملة وتُمنح نفس الفوائد المخصصة للأسر المؤسسة على الزواج. ذلك لأن للأسرة دور فريد في المجتمع. وتدعم هذه الاستخلاصات دراسة استقصائية بشأن تطوّر قانون الاتحاد الأوروبي وتحليل حول قضاء محكمة العدل للاتحاد الأوروبي.

الشريعة الإسلامية بين نظامي القانون العام والقانون المدني: أية حقوق الإنسان؟

لوكا بيدوللا

لا بدّ للمرء أن يأخذ بعين الاعتبار نظاماً قانونياً آخر بالإضافة إلى نظامي القانون العام والقانون المدني. فالنظام المعني هنا هو القانون الإسلامي، أي الشريعة

تنمية الإقليمية اللا متناسقة ومبدأ الحكم الذاتي في الأنظمة الدستورية الجديدة: نهج مقارن.

جيانكارلو روللا

أنشأت الدول الاتحادية رداً على الرغبة في الوحدة ، غير أنه في الواقع يشهد الميل إلى القوة الجاذبة نحو المركز، الذي اتسمت به الحركة الاتحادية الأصلية تحدّياً ناجماً عن ميل إلى القوة النابذة، أي القوة الطاردة من المركز، بغية تشجيع الحكم الذاتي والتمييز. وهناك عدّة أسباب لهذا الاتجاه، من بينها الصلة بين الحكم الذاتي والاعتراف بالاختلافات الثقافية، وكون الحكم الذاتي وسيلة تحصل مجموعات معيّنة من خلالها على تمثيل سياسي، وميل الحكم الذاتي إلى تقليل المسافة بين السلطات الحكومية والمواطنين. وتكمن النتيجة الإيجابية لعملية اللامركزية في القدرة على التوصّل إلى توازن بين مبدأ الحكم الذاتي الدستوري ومبدأ المساواة (في التمتّع بالحقوق الاجتماعية والاقتصادية) ومبدأ التضامن (بين الأقاليم).

إدارة التنوّع الثقافي في المجتمع اليوناني المعاصر: أثر تربية حقوق الإنسان

أريستوتيليس ستامولاس

تسبّب التدفق الهائل للمهاجرين والإعادة إلى الوطن للعناصر من ذات العرق اليوناني خلال السنوات الخمس عشرة الماضية في تغييرات ديمغرافية ملحوظة في تركيبة سكّان اليونان. فالمجتمع المحلي تغيّر من وحدة سكانية متجانسة ومتراصّة نسبياً إلى خليط إنساني من خلفيات ثقافية متعددة، وأصبح على هذا المجتمع أن يعالج آثار التنوّع الثقافي. ويستهل المقال بالاعتراف بظهور مواقف تتسم بكراهية الأجانب والتمييز للسكّان المحليين على حساب الفئات الضعيفة (الأقلية) ويشرح هذه المواقف في إطار غياب تربية منتظمة موجّهة نحو حقوق الإنسان، مع الإشارة إلى معايير اجتماعية ثقافية و سياسية اقتصادية أخرى. ويلقي البحث نظرة شاملة على أدلة هذه التربية على مختلف المراحل التعليمية اليونانية (الابتدائية والثانوية والثالثة)، كما تؤخذ بعين الاعتبار التوقعات فيما يتعلق بتأسيس ثقافة حقوق الإنسان من خلال التربية الرسمية.

تنمية أدوار نضالية نسائية في الكفاح المسلّح المعاصر: قضية كولومبيا

كاتيرينا شانتال أرينا

يركّز هذا البحث على مشاركة النساء في الكفاح المسلّح ويضفي الضوء بوجه خاص على أدوارهنّ بصفتهنّ وكيلات للعنف السياسي. وأحلّل بالتحديد مشاركة النساء في الكفاح المسلّح ضمن المجموعة المتمردة المسمّاة "القوات المسلحة الثورية الكولومبية". وتشكّل النظريات النسائية الإطار النظري لهذا التحليل. أما النقطة المركزية للبحث فتتمحور حول ضرورة فهْم حاجات النساء المكافحات، مع الأخذ بعين الاعتبار الصلة بين مشاركتهنّ في الكفاح المسلّح، والأهداف المعيّنة التي حققنَها على صعيد المساواة بين الجنسين ضمن المجموعات المسلّحة، والدور الذي يمكن للمجتمع أن يخصّصه لهنّ في عملية إعادة البناء عقب انتهاء الصراع. كما يبيّن البحث أنه يتم اللجوء إلى الخرافات حول نساء مكافحات لجذب النساء إلى الكفاح. ولقضايا المساواة بين الجنسين دور أساسي في تأطير المشاركة النسائية. ومع ذلك، فتواجه النساء، ضمن المجموعات المتمردة، الصعوبات في مواجهة القوالب النمطية القائمة على التحيّز الجنسي الراسخة في الثقافة المحلّية والتي قد تؤدّي إلى استبعاد النساء عن عملية بناء السلم، مما يسفر عن سوء فهْم خاصّياتهنّ كنساء وكمكافحات.

حقوق الأرض وحقوق الإنسان في الدول الانتقالية

بين تشيغارا

"وكان بنو نوح الذين خرجوا من الفلك ساما وحاما ويافث... هؤلاء الثلاثة هم بنو نوح. ومن هؤلاء تشعبت كل الارض. وابتدأ نوح يكون فلاحا وغرس كرما". (سفر التكوين 9: 18-20)

يبحث هذا المقال مشكلة طالت معالجتها منذ زمن: مشكلة الأرض. أنوي أن أقوم بما يلي: أولاً سأتطرّق إلى مشكلة الأرض بصفة عامة، وثانياً سأضع مشاكل الأرض في إطار قضية الأرض التي تخصّ "جماعة افريقيا الجنوبية للتنمية" وبحث قضية زمبابوي المتعلقة بالأرض. وفي الختام أتقدم باستراتيجية لحلّ قضية زمبابوي المتعلقة بالأرض التي سبّبت الكثير من المعاناة في زمبابوي بالذات وفي المنطقة المجاورة لها وأبعد منها.

جريمة التجسّس في القانون المالطي ومقولة "لا جريمة بدون نصّ أكيد": تطابق أم تنازع؟

كيفين أكويلينا

يحلّل هذا البحث جريمة التجسس من منطلق مبدأ "لا جريمة بدون نصّ أكيد" التابع لقانون حقوق الإنسان. فهذه الجريمة تأتي في حُكمٍ واحدٍ فقط لقانون الأسرار الرسمية المالطي وهي جريمة واسعة لدرجة تسمح بالتدبّر في آلاف التغييرات الأساسية لها، دون أن يشمل ذلك حالاتٍ يُنظر فيها إلى هذه الجريمة من وجهة نظر عمل تمهيدي أو محاولة أو مؤامرة وتحريض للقيام بالجريمة المذكورة. وإضافة إلى ذلك، فالمادة 3 (2) والمادة 5 للقانون تساهمان في توسيع نطاق هذا الحُكم الذي يتّسم بسَعَته. إن هذا الغموض في تفسير الحُكم المطروح للبحث لا يوافق المادة 39 (8) لدستور مالطا ومادة 7 للاتفاقية الأوروبية لحقوق الإنسان. ولذا فيجب اتخاذ التدابير التشريعية لضمان تحديد جريمة التجسس بطريقة حذرة حتى لا تُنتهك المقولة التابعة لقانون حقوق الإنسان: "لا جريمة بدون نصّ".

ديمقراطية الكسكس: العدالة في حالة عبور في عهد محمد السادس في المغرب

عبد الإله بوعسرية

يبحث هذا المقال الوضع الراهن لما يُنشر حول حالة التغيير في المغرب، بإيجابياته وسلبياته، فيما يتعلق بلجنة المساواة والمصالحة. ويأتي هذا البحث بعد سنوات طويلة من العمل الميداني والمقابلات التي أجريتُها إبان عملي بصفتي محرّر أخبار لدى "إذاعة ساوا" في مدينة واشنطن. ويحلل البحث مجموعتين من الآراء تخصّ قضية حقوق الإنسان في المغرب. فالمجموعة الأولى تعتقد أن البلاد تمرّ بفترة "ثورة مخملية"، بينما تتبنّى المجموعة الثانية الموقف المتشائم مردّدةً الشعار "لا شيءَ يتغيّر!".

مجلة البحر المتوسط لحقوق الانسان

الملخصات باللغة العربية

A Mediterranean Voice (MedVoice) for a Cross-Cultural Dialogue

Some time ago, four graduates from the Mediterranean Master's Programme in Human Rights and Democratisation, University of Malta, decided to initiate a dynamic tool for inter-cultural dialogue, the Mediterranean Voice Website (www.medvoice.org), as the first step towards the fulfilment of their long-term project, which is the establishment of a Mediterranean Documentation Center for Human Rights.

The main concern of the Mediterranean Master's Programme graduates, was to ensure the continuation of the unique chance for a Mediterranean dialogue that they were offered during the course and furthermore attempt to contribute in the promotion of the human rights awareness within the Mediterranean basin, in accordance with the Programme's aims.

MedVoice – the new website

As an initial step they decided to concentrate their efforts on the creation of a website, which includes all relevant information regarding human rights in the Mediterranean (NGOs, IGOs, journals, law, media etc), until the suitable circumstances for the assignment's total application are shaped. The site, both in English and Arabic, includes a collection of selected articles, country information, as well as an exhaustive list of opportunity links (jobs, internships, programmes, etc.). In view of the promotion of human rights and the launch of a fruitful dialogue in the area, as first raised issue in their 'Opinion' forum, the floor is set for a 'Reform Debate concerning the Arab world', calling for ideas and comments.

MedVoice – the Documentation Center

Their ultimate ambition, however, still remains their long-term project, the creation of a Mediterranean Documentation Center for Human Rights. The aim is to establish a body empowered to mediate among relevant human rights institutions (e.g. EU, universities, NGOs, etc.) and young human rights experts from southern Mediterranean countries working at the local level through flexible mini-projects.

Despite the obvious necessity for settlement of justice and order in the concerned areas, young people especially, and in particular those who have both a personal and professional interest in human rights, face difficulties in having their voice heard in a "Mediterranean dialogue," due to lack of facilities and formal linkages. MedVoice seeks to give such people a voice. Commissioned by the University of Malta, the MedVoice team completed a large database of human rights experts from southern and eastern Mediterranean countries.

MedVoice – need for support

MedVoice is currently going through a strategic planning process in which the MedVoice team is trying to find organizations and academic institutions interested in hosting the website and project or through a concrete support.

For more information: www.medvoice.org
Contact: medvoice@medvoice.org

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