

mediterranean
journal of
HUMAN RIGHTS

Volume 1 Number 1 1997

OBJECTIVE

The Mediterranean poses a unique and fascinating challenge to existing Human Rights charters. Conventional approaches to the enforcement of Human Rights often overlook the significance of cultural differences. A new approach is needed to address the tensions between institutional uniformity and cultural diversity.

The Mediterranean Journal of Human Rights is a response to this challenge. An interdisciplinary journal, the review explores the inter-relationships between Human Rights charters and their cultural and socio-economic contexts. Drawing on a broad academic landscape, the journal aims to stimulate debate on the restructuring of traditional Human Rights charters to reflect economic and cultural reality.

READERSHIP

The Mediterranean Journal of Human Rights is of interest to all those having an academic interest or practical interest in the enforcement of human rights in the Mediterranean region. The journal focuses on issues which are the common concern of lawyers, scholars and politicians.

FORMAT

Each edition of the Mediterranean Journal of Human Rights is a dossier of information on cross-cultural application of a specific area of Human Rights. *Politics, Law and Religion in the Mediterranean; Women's Rights; Ethnic Groups and Minorities; Environmental Rights; Political Participation and Immigration* are some of the themes that the Review deals with.

The Review is issued on a bi-annual basis. Papers, which may be submitted in any language, are published in English, French and Arabic.

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Published by Foundation for International Studies, Valletta, Malta

Printed by P.E.G. Ltd, San Gwann, Malta

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EDITORIAL FOREWORD

THE MEDITERRANEAN AND HUMAN RIGHTS

AN OVERVIEW BY SALVO ANDÒ AND SALVINO BUSUTTIL

Proliferating regional conflicts and emergency situations affecting millions of human beings call for a radical reconsideration not only of economic policies based on solidarity, but also of military politics which have guaranteed the security of the world after the Cold War in the context of the two great expansions of political thought: the communist one and the western.

However, this new international situation requires also a re-assessment of the principles and norms of international law, which in these last few centuries have given to the States the nearly exclusive role of actors in all matters concerning the international community.

Indeed, today the national State faces a dilemma. It seems to be too "small" and consequently inadequate, to cope with new and old situations of emergency afflicting humanity, and which cannot be attributed exclusively to one particular region of the world. One need only refer to environmental problems and to their impact on the life of whole populations.

Yet at the same time, the national State seems to be too "large" and remote to deal with the problems of individuals, who need effective protection to enable them to fully develop their own human personality.

Such personal needs require the intervention of a force which is nearer the territory, but at the same time decentralised from the power exercised by the national State.

Consequently, we should revisit many classifications of international law revolving around the concept of the State - the State understood as an essential subject of the international legal order, as a sovereign subject *par excellence*, on which peace and war in the world are dependent.

The individual and the nations are increasingly finding themselves in the centre of international affairs, and this new reality must inevitably leave its impact on the rules and collective actions which are essential for a well-ordered international community.

In short, the concept of the national State is to-day being challenged on all fronts.

Inevitably, the traditional prerogatives of the State have to be

questioned and its traditional powers eroded, as the international community will gradually no longer be able to limit itself to providing military protection to guarantee security in the world, as it did during the years of the Cold War. But at the same time, it must find a solution to all those individual and collective needs, which if ignored, would generate serious differences in the world, and consequently political instability in the States.

From this point of view, even the most localised crises can have repercussions, if not on the whole planet, at least on regions of the world which are very distant from the place where the crises originated.

As today's world is no longer only subject to two great political orders, it will inevitably become increasingly more articulate, complex and unstable, and has to be governed on the basis of principles commanding the consensus of all States. Accordingly, a new international order will have more controls and limits capable of restraining the actions of every single State, that is the duties of the States which can be effectively sanctioned.

Divisions due to different religious creeds, political ideologies, military alliances, plans of development and political regimes no longer justify the lack of respect which has prevailed towards international law. Consequently, a serious undertaking to guarantee respect for human rights cannot be limited to tedious rhetoric or to declarations of principle which often pervade international treaties, but it must concretely address the difficulties which arise, to ensure an effective exercise of fundamental rights.

The world in which we live has fortunately seen the end of the ideological conflict which has characterised nearly all this century. The conflict between communism and liberal-democracy was not merely a military and political conflict between two superpowers which slowly disseminated to the whole planet. Rather, it was a conflict which for millions of people appeared to be one between values; and they chose either one ideology or the other. However, the end of this ideological and political conflict does not mean that world peace has taken or is about to take place. New conflicts continue to emerge. It is true that they may be small conflicts, but they can cause great and prolonged suffering to populations who are already in need, and who perhaps have been for years oppressed by regimes intolerant of or openly hostile to any form of protection of human rights.

On the international scene which is being reshaped after the fall of communism, a new kind of ideological conflict is being generated, one that will inevitably engage different religious and cultural groups still believing in the existence of rich and poor societies.

In this sense, the North-South conflict is destined to be a characteristic of the new century, at the end of the second millennium.

Military resources will certainly not be able to bring peace in the world. Nor will this be achieved by the pretension of one, or more, superpower to impose on all nations cultural and political models which it unilaterally declares to be "superior".

One must strive in every way to establish an enduring and institutionalised peace. This objective cannot be reached by re-balancing relations of power, by perhaps allowing every nation to arm itself in order to safeguard its own security. It is necessary to create on a global level a new sense of trust, encouraging in any possible manner information about the problems of others, creating thereby a true culture of tolerance.

The "different" must not be an enemy to be destroyed, but only "another" individual or population with whom one must dialogue. We need to consider with tolerance the "other" social cultures, the "other" political regimes, the "other" religions, so that we may understand the other person's way of reasoning, without adopting an intolerant or superior attitude.

There is no one single culture or regime which can be identified as absolutely bad or absolutely good. Propaganda in this sense does not encourage neither democracy nor socio-economic development. Rather, it disseminates the seeds of resentment between nations, creating divisions and grudges which the passage of time will render irreversible. Or it may be intended to sustain regimes which are destructive of liberty - incapable of guaranteeing a minimum prosperity among nations - and which through their politics of military mobilisation want to conceal the poor level of democracy and well-being to which their citizens are condemned.

In a world where no single State has the responsibility of ensuring world security - because this duty is entrusted to all States - in a world which is no longer bi-polarised, the unsanctioned violation of human rights will inevitably provoke a successive chain of reactions, destabilise large areas of the world, and consequently negatively affect the peaceful cohabitation of populations in entire regions.

Undoubtedly, it is not easy to individualise an objectively universal core of human rights, one in which every human being can be recognised, and which could form the basis of the new international order.

This Journal will deal with human rights, encouraging an exchange of cultural and political experiences, especially between the northern and the southern shores of the Mediterranean, with a view to facilitating the comprehension and the solution of those serious questions which today render difficult a complete affirmation of human rights.

Hardly anybody dare question the so-called right of humanitarian

interference on the part of the international community, wherever and when the protection of human rights is at risk. The sovereignty of the national States must be one of the principal instruments for the promotion of human rights, and not an obstacle for their effective exercise. The Journal will discuss not only "traditional" human rights, but will also examine the emergence of "new" rights.

The crusades for the protection of rights are useful only if they do not stop at being a simple acceptance of solemn affirmations of principle. This Journal, instead, wants especially to develop, within its modest means, a monitorial system given the lack of uniformity in the protection of human rights.

Tolerance has its own price. And its price will be higher and higher as great masses continue to migrate across the world, and the old national societies will become increasingly "assorted" and full of diversity, and consequently of contradictions.

By allowing diverse groups to express themselves completely, the social State would be assuming more duties, in a moment at which many, for understandable reasons, demand that public expenditure be curtailed, entailing the possible regression of the social state.

Yet, the protection of human rights cannot be entrusted exclusively in the politics of the *laissez-faire*. It increasingly requires positive action, intended to guarantee equal opportunities to those who are different because unable in any case to achieve the state of normality; or because in any case they are disadvantaged due to physical handicaps, or due to the cultures and traditions of which they form part and which exclude them from society as a whole, or from the dominant culture to which they do not wish to conform.

This is the reason why the objective of the Journal is to encourage a pragmatic approach to the problem of human rights. For if these rights are to be taken seriously, there must be the necessary political courage to take the necessary decisions to reprimand and sanction the abuse, and to defend and promote the right.

A new international legality must now be defined; and it must be concentrated especially on the people and on their needs. In this sense, new ideas are required even at the level of legal science. But above all, there is a need of a lot of political clout in affirming the rule of law against abuse of power. Experience has shown that in this field no *realpolitik* can hold. *Realpolitik* not only causes the annihilation of the rights of the people, but in the long run even prejudices the rights of the States themselves.

Naturally, this does not mean that liberal-democratic values must be imposed by force everywhere and in any case. Democracy does not need

crusades, more or less genuine; but a slow and persistence exercise of persuasion.

It is only just that States can be judged and are judged, on the basis of the positive actions taken to protect human rights, irrespective of the religious faith of their people and of the prevailing political regime.

All this entails a true and proper Copernican revolution in the relations between States, and in the relations between States and the international community.

This Journal wishes to contribute through communicating opinions and notions which can in some way be conducive to that revolution.

Contemporary geo-political trends facilitate serious action on fundamental rights, guaranteeing in the first place their protection especially in difficult circumstances. This undertaking must be given priority especially in the Mediterranean region, historically a focal point of conflicts and tensions between the two opposite shores, the north and the south.

The great innovation of the XXI century should be cultural and economic cooperation with the aim of promoting human rights. In this context, the Conference of Barcelona of last year finally provided concrete means to enable the realisation of old aspirations and of perhaps actual utopias.

The Barcelona Declaration of November 1995 laid the ground-work for action. In making available considerable funds for the Euro-Med Partenariat, the European Union recognised that it is difficult to exercise human rights and to promote democracy in situations of relative penury. It has implicitly accepted that securing human rights is fundamental to security and stability within the region, at the same time accepting that the attainment of the full exercise of social and economic rights is a major objective of the Partenariat.

To that end, this Journal dedicates its efforts.

ARTICLES

LES DROITS DE L'HOMME: UN NOUVEL ENJEU POUR LE MONDE ARABE

ABDELWAHAB BIAD

La démocratie implique la volonté librement exprimée par les citoyens de déterminer le système politique, économique et social qui sera institué mais aussi leur pleine participation à tous les aspects de la vie de la Nation. Dans le Monde arabe, en dépit de professions de foi démocratiques exprimées par les gouvernants, dans le discours politique mais aussi à travers les mécanismes juridiques (Constitution, lois, organes de contrôle constitutionnels), force est de constater un retard considérable dans ce domaine. Fait plus grave, le Monde arabe est dans une position inconfortable en matière de respect des droits de l'Homme, n'ayant pas été en mesure de "gérer" ce nouvel enjeu des relations internationales.

Examiner la question des droits de l'Homme dans le Monde arabe, c'est d'abord s'interroger sur l'existence et la spécificité d'une conception arabe de ces droits. C'est aussi tenter d'évaluer les positions adoptées par ces pays à l'égard de la codification des droits de l'Homme au plan international. C'est enfin mesurer l'impact de la question des droits de l'Homme dans les rapports gouvernants-gouvernés dans le Monde arabe.

1. Charia et Droits de l'Homme: Entre Spécificité et Universalité

Lorsque on évoque la question des droits de l'Homme dans le Monde arabe, on ne peut occulter l'importance de la Chariâ comme code régissant

la société musulmane sur le plan spirituel mais aussi politique, social et moral. Les droits de l'Homme sont-ils opposés à ces règles d'essence religieuse? Deux concepts permettent de rendre compte de cette relation complexe entre la Chariâ et les droits de l'Homme: la compatibilité et la spécificité.

1.1. Le débat sur le compatibilité

Le débat sur la compatibilité entre la Chariâ et les droits de l'Homme oppose deux courants. Le premier insiste sur l'incompatibilité entre la Chariâ et les droits de l'Homme en s'appuyant sur l'idée que l'inexistence d'une séparation entre le politique et le religieux en Islam constitue un obstacle majeur au développement des valeurs démocratiques dans les pays musulmans.¹ Le deuxième souligne au contraire que l'Islam est fondé sur des principes démocratiques comme la Sunna (consultation), El-Ijma (consensus) et El-Ijtihad (autocritique positive).²

En principe, le concept de pouvoir absolu est inconnu en Islam. Le pouvoir du Prince doit en effet s'exercer dans le cadre du respect du Coran et de la Sunna, lesquels prônent les valeurs d'égalité, de justice, de tolérance et de solidarité, qui sont autant de valeurs qui fondent les droits de l'Homme.

En pratique, certains principes universels des droits de l'Homme, tels que la liberté de religion et de conviction ou l'égalité entre l'homme et la femme apparaissent comme incompatibles avec la loi islamique. A ce propos, l'Arabie Saoudite avait justifié son abstention lors de l'adoption de la Déclaration universelle des droits de l'Homme le 10 décembre 1948 par le fait que celle-ci faisait mention du droit de changer de religion.³ Ce pays invoque la spécificité face à l'approche universelle des droits de l'Homme.

¹ Cette thèse est défendue par des auteurs occidentaux. Voir notamment HUNTINGTON, Samuel P. Will more countries become democratic in Samuel HUNTINGTON and Joseph NYE, ed. *Global Dilemmas*, Cambridge, Harvard University Press, 1985, pp 253 - 279.

² Voir notamment JAADANE Fahmi, *Nation of the State in Contemporary Arab-Islamic Writings*, in Ghassan SALAME ed. *The Foundation of the Arab State*, London, Croom Helm, 1987, pp 112-148.

³ Voir l'article 18 de la Déclaration universelle des droits de l'Homme. Pour une étude détaillée sur la position des pays arabes à l'égard de cette Déclaration, voir TAVERNIER, Paul, *Les Etats arabes, l'ONU et les droits de l'Homme*, Les Cahiers de l'Orient, 3ème trimestre 1992, n°19, pp 183-197.

1.2. La thèse la spécificité

Les arguments de la spécificité nationale et religieuse ont été souvent utilisés par les pays arabes pour se soustraire à des obligations dans le domaine des droits de l'Homme. D'autre part, "l'idéologie" des droits de l'Homme a été pendant longtemps perçue par ces pays comme d'essence néo-coloniale parce que visant à affaiblir la souveraineté des Etats du Tiers-monde.

L'argument de la spécificité religieuse est fondé sur l'idée de nécessaire respect de la tradition et de la doctrine islamique; la religion pouvant être un justificatif pour la limitation des droits de l'Homme. L'Arabie Saoudite et les Emirats du Golfe s'inscrivent dans cette perspective.

L'argument de la spécificité nationale fait référence à la nécessité d'un pouvoir politique autoritaire pour assurer le développement économique (dictature éclairée). Les régimes baathistes syriens et irakiens s'inspirent de cette argumentation.

Spécificité ou universalité des droits de l'Homme, voilà une question qui concerne non seulement le Monde arabe mais aussi toute la communauté internationale. A ce propos, la Conférence mondiale des droits de l'Homme réunie à Vienne du 14 au 25 juin 1993, tout en reconnaissant "l'importance des particularismes nationaux et régionaux et la diversité historique, culturelle et religieuse", a souligné néanmoins qu'il est du devoir des Etats, quel qu'en soit le système politique, économique et culturel, de promouvoir et de protéger tous les droits de l'Homme et toutes les libertés fondamentales".⁴

Ces questionnements sur la compatibilité et la spécificité n'ont pas empêché la plupart des Etats arabes d'adhérer aux accords internationaux relatifs aux droits de l'Homme.

2. Les Etats arabes et les accords internationaux relatifs aux droits de l'Homme: une mise en oeuvre difficile

On constate que l'attitude des pays arabes à l'égard des conventions et pactes internationaux relatifs aux droits de l'Homme se traduit par une diversification des positions. Même lorsqu'ils adhèrent à ces instruments internationaux régissant les droits de l'Homme, les Etats arabes semblent rencontrer des difficultés d'application.

⁴ Voir Document final de la Conférence mondiale des droits de l'homme, Doc A/CONF. 157/DC/1/Add. 1 parag. 3 du 22 juin 1993.

2.1. *Des positions diversifiées*

A l'occasion de l'adoption de la Déclaration universelle des droits de l'Homme, le vote des Etats arabes s'établissait ainsi: quatre votes favorables (Egypte, Irak, Liban et Syrie), une abstention (Arabie Saoudite) une absence de vote (Yemen). Il est utile de remarquer que l'Egypte et l'Irak ont contribué activement à l'élaboration de la Déclaration au sein de l'Assemblée générale des Nations-Unies.⁵

Au 1er janvier 1993, douze Etats arabes sur vingt-deux sont parties aux deux Pactes internationaux de 1966 relatifs aux droits civils et politiques et aux droits économiques, sociaux et culturels. Il s'agissait de l'Algérie, de l'Egypte, de l'Irak, de la Jordanie, du Liban, de la Libye, du Maroc, de la Somalie, du Soudan, de la Syrie, de la Tunisie et du Yemen.

On constate que trois Etats arabes seulement (Algérie, Libye, Somalie) ont adhéré au Protocole facultatif du Pacte international relatif aux droits civils et politiques qui prévoit au Comité des droits de l'Homme la compétence d'examiner des communications émanant de particuliers.

En revanche, aucun pays arabe n'est partie au 2ème Protocole facultatif de ce Pacte visant à abolir la peine de mort. Rien n'est surprenant ici lorsqu'on constate que des pays dits démocratiques, comme les Etats-Unis, n'ont pas adhéré à ce protocole. La liste des pays abolitionnistes (dont la législation ne prévoit pas la peine de mort) ne comprend aucun Etat arabe.⁶

L'examen de l'état des adhésions à sept accords internationaux relatifs aux droits de l'Homme permet de classer les pays arabes en trois groupes suivant leur degré de participation à ces instruments.⁷ Le premier groupe est constitué par les Etats qui ont adhéré à tous les accords examinés; il s'agit de l'Algérie, de la Libye et de la Somalie. Le deuxième groupe comporte les Etats qui ont souscrit à au moins la moitié de ces accords, en l'occurrence l'Egypte, l'Irak, la Jordanie, le Liban, la Syrie, le Soudan, la Tunisie et le Yemen. Le troisième groupe est composé des autres Etats arabes qui, soit ont adhéré à un nombre limité d'instruments régissant

⁵ Voir TAVERNIER, Paul, Op-cit.

⁶ Voir Rapport annuel d'Amnesty international, 1992.

⁷ Dans notre échantillonnage nous avons pris en compte les accords les plus significatifs, soit: Pacte international relatif aux droits civils et politiques, Pacte international relatif aux droits économiques, sociaux et culturels. Protocole facultatif au Pacte international relatif aux droits civils et politiques, Convention sur l'élimination de toutes les formes de discrimination raciale, Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, Convention contre la torture et les autres peines ou traitements inhumains et dégradants, Convention sur les droits de l'enfant.

les droits de l'Homme, soit ne sont parties à aucun de ces instruments.⁸ Les difficultés de mise en oeuvre des accords relatifs au droits de l'Homme pourraient expliquer cette réticence arabe.

2.2. Une application problématique

On constate une certaine méfiance des pays arabes à l'égard des procédures et mécanismes prévus dans les accords internationaux relatifs aux droits de l'Homme. On en veut pour preuve le retard enregistré dans la transmission des rapports périodiques aux organes institués par ces accords mais aussi la réticence à accepter la compétence des dits organes à recevoir les plaintes d'Etats parties ou de particuliers. Ainsi, l'Algérie et la Tunisie sont les seuls Etats arabes à avoir accepté la compétence du Comité des droits de l'homme pour examiner les communications d'un Etat partie en cas d'allégation, de violation du Pacte international relatif aux droits civils et politiques.⁹

Le recours à la procédure de la réserve ou de la déclaration interprétative permet aux Etats arabes de souscrire à des accords sur les droits de l'Homme tout en s'aménageant une marge de manoeuvre dans leur application, compte-tenu notamment de l'impératif de respect de la Chariâ. On citera à titre d'exemple qu'à l'occasion de la ratification du Pacte international relatif aux droits civils et politiques, l'Algérie a déclaré "interpréter une disposition dudit Pacte concernant les droits et responsabilités des époux au regard du mariage, durant le mariage et lors de sa dissolution comme ne portant en aucun cas atteinte aux fondements essentiels du système juridique algérien".¹⁰ Cette déclaration se réfère au code du statut personnel considéré par les associations de femmes algériennes comme rétrograde dans ses dispositions relatives à la polygamie, au divorce et au droit de succession.

Le cas de l'Algérie n'est pas isolé puisque dans le plupart des pays arabes les règles régissant le mariage, le divorce ou le partage du patrimoine sont régies par la Chariâ. Le fait que bien souvent le législateur n'ait pas le droit de transgresser la loi islamique peut présenter des difficultés en matière d'application des normes universelles des droits de l'Homme par les pays musulmans.

⁸ On notera que les Emirats Arabes Unis et Omar ne sont parties à aucun des sept accords examinés dans l'échantillonnage.

⁹ Il s'agit de la procédure prévue à l'article 41 dudit Pacte.

¹⁰ Voir document du Comité des droits de l'Homme (Nations-Unies) doc.CCPR/C/2/Rev.3 du 12 mai 1992.

Il ne fait aucun doute que la référence dans les Conférences internationales aux "diverses formes de discrimination et de violence auxquelles les femmes continuent d'être exposées"¹¹ et les appels en faveur de la ratification par tous les Etats de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes¹² s'adressent en particulier aux pays arabes et musulmans.

Le Professeur Paul TAVERNIER faisait remarquer que "les Etats arabes sont confrontés à des obstacles particuliers du fait des exigences de la loi islamique" lorsqu'ils doivent mettre en oeuvre les dispositions des accords relatifs aux droits de l'Homme. Cependant, "ils n'ont manifesté aucune mauvaise volonté à cet égard, même si certains juristes islamistes ont défendu la thèse de la prééminence absolue de la Chariâ sur les textes relatifs aux droits de l'Homme".¹³

Ces difficultés de mise en oeuvre ne doivent pas nous faire oublier que les droits de l'Homme sont devenus un thème majeur du débat politique dans les pays arabes.

3. Les Droits de l'Homme dans le Monde arabe: entre revendication et appropriation

Depuis quelques années dans le Monde arabe, les droits de l'Homme sont devenus un enjeu, à la fois objet d'une revendication des gouvernés et objet d'appropriation des gouvernants.

3.1. La revendication

Aujourd'hui, les droits de l'Homme sont l'objet d'une revendication émanant de la société civile en phase de structuration. L'apparition et le développement du champ associatif dans les pays arabes s'accompagnent d'une demande de démocratisation. Cette demande émane soit d'associations de défense des droits de l'Homme soit d'associations professionnelles (avocats, journalistes) dont la vocation est de se préoccuper des atteintes aux droits et libertés.

Dans les pays arabes qui ont opté pour des formules de multipartisme, la revendication en faveur des droits de l'Homme devient un des thèmes majeurs du débat qui agite la société politique (Parlement, partis, presse).

¹¹ Voir le Préambule du document final de la Conférence mondiale des droits de l'Homme, op-cit.

¹² Ibid, 3ème partie II.C.4.

¹³ Op-cit.

Paradoxalement, on constate que c'est dans les pays en voie de démocratisation que les revendications démocratiques sont récupérées par des forces dont tout laisse à supposer qu'elles ne respecteront pas les droits de l'Homme au sens universel du terme. A ce propos, on notera que c'est pour empêcher l'arrivée au pouvoir de forces qu'elles jugeaient hostiles à la démocratie que les autorités algériennes ont décidé de suspendre le processus électoral et de proclamer l'état d'urgence en février 1992.¹⁴

A la revendication interne en faveur d'une meilleure protection des droits de l'Homme s'ajoute la pression externe. Si pendant longtemps les pays occidentaux ont accordé plus d'importance à la stabilité des régimes arabes qu'à leur caractère démocratique, avec la fin de la rivalité Est-Ouest, les priorités semblent s'inverser. Toutefois, on remarquera que les pressions américaines au lendemain de la guerre du Golfe en faveur d'une libéralisation des monarchies de la Péninsule arabique ont obtenu un succès très limité.¹⁵

On ne devrait pas non plus minimiser la pression externe émanant des organisations non gouvernementales à vocation internationale de défense des droits de l'Homme, telles que Amnesty international ou la Fédération Internationale des droits de l'Homme qui, par leurs missions et rapports périodiques, attirent l'attention de l'opinion publique mondiale sur les violations des droits et libertés dans certains pays, notamment arabes.

On constate une évolution intéressante dans l'approche du problème dans les pays riches au sein des organisations internationales (ONU, Banque mondiale, OCDE) qui consacre l'idée de lier la coopération et l'aide au développement à des conditions minimales de respect des droits de l'Homme. Dans une même perspective, la Conférence mondiale des droits de l'Homme avait invité "les principales institutions internationales et régionales de financement et de développement à évaluer elles aussi l'effet de leur politique et de leurs programmes quant à la jouissance des droits de l'Homme".¹⁶ Cette évolution n'est sans doute pas étrangère à la tendance constatée chez les gouvernements arabes de vouloir s'approprier le thème des droits de l'Homme.

¹⁴ Voir Comité des droits de l'Homme, Examen du rapport présenté par l'Algérie en application de l'article 49 du Pacte international relatif aux droits civils et politiques, doc CCPR/C/79/Add. 1 du 25 septembre 1992.

¹⁵ Mise en place par le Roi Fahd d'un Conseil consultatif.

¹⁶ Voir Document final, op-cit, 3ème partie, Point I, 2.

3.2. *L'appropriation*

Sous l'effet de la revendication interne et externe, les pays arabes sont contraints de prendre en charge, dans le discours mais aussi dans la pratique, la question des droits de l'Homme. Cela va se traduire par la mise en place de procédures et mécanismes censés promouvoir et garantir les libertés du citoyen. Ainsi, la plupart des Etats arabes se sont dotés de constitutions qui proclament la nécessité de respecter et protéger les droits et libertés de leurs citoyens. La Constitution algérienne du 23 février 1989 ne consacre pas moins de 28 articles aux droits et libertés. L'article 31 stipule par exemple que les libertés fondamentales et les droits du citoyen "constituent le patrimoine commun de tous les Algériens et Algériennes, qu'ils ont le devoir de transmettre de génération en génération pour le conserver dans son intégrité et son inviolabilité". Le préambule de la Constitution tunisienne du 1er mai 1959 se réfère aux "valeurs humaines essentielles qui constituent le patrimoine commun des peuples attachés à la dignité de l'Homme".

Certains Etats arabes ont mis en place des structures officielles de protection des droits de l'Homme: Ministère des droits de l'Homme en Algérie (1991) et au Maroc (1993); Observatoire national des droits de l'Homme en Algérie¹⁷, Comité supérieur des droits de l'Homme et des libertés fondamentales en Tunisie¹⁸, Commission consultative pour les droits de l'Homme au Maroc. Ces structures officielles complètent le travail des associations indépendantes de défense des droits de l'Homme lorsque celles-ci sont autorisées.¹⁹

Cependant, rares sont les pays arabes qui ont établi un système de contrôle de constitutionnalité dont nul n'ignore l'importance en termes de garantie pour le respect des droits de l'Homme. A ce propos, le Conseil constitutionnel algérien a rendu en 1991 un arrêt restreignant le recours à la procuration de vote entre époux, ce qui a été salué comme une avancée pour les droits de la femme en Algérie.²⁰

Ainsi, "les droits de l'Homme apparaissent comme un enjeu

¹⁷ L'ONDH, crée en 1992, succède au Ministère des droits de l'Homme algérien institué en 1991, premier à être créé dans le monde arabe.

¹⁸ Présidé par S.E. l'Ambassadeur Rachid DRISS.

¹⁹ Des associations indépendantes (Ligues ou organisations de défense des droits de l'Homme) exercent leurs activités avec plus ou moins de difficultés en Algérie, en Egypte, au Maroc et en Tunisie.

²⁰ L'usage abusif de la procuration de vote aurait ainsi selon des analystes profité aux partis islamistes lors des élections municipales de juin 1990.

d'appropriation sur la scène arabo-musulmane parce que à la fois devenus source incontournable de légitimité des actions sur la scène politique intérieure et internationale et objet sur lequel se cristallisent les conflits et les contradictions des sociétés arabo-musulmanes".²¹

4. CONCLUSION

Pour une culture des droits de l'Homme

L'absence d'une véritable culture des droits de l'Homme dans le Monde arabe constitue la principale explication de la faillite des transitions démocratiques dans cette partie du monde. Le passage d'un régime autoritaire à un régime démocratique ne repose pas essentiellement sur la volonté du Prince mais nécessite la mobilisation d'une société civile acquise aux principes des droits de l'Homme.

On ne soulignera jamais assez l'importance que jouent des associations dynamiques et une presse libre dans l'émergence d'une culture des droits de l'Homme. La promotion d'une culture des droits de l'Homme passe également par l'éducation des citoyens aux valeurs démocratiques au nom du principe que la connaissance par les citoyens de leurs droits et libertés constitue en soi un droit de l'Homme.

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²¹ Projet de recherche conjoint intitulé "Les droits de l'Homme et le droit humanitaire dans le monde arabo-musulman" conçu dans le cadre de l'accord programme de coopération interuniversitaire algéro-française. Co-responsables du projet: Pr. Paul TAVERNIER (Université de Rouen) et Mr. Abdelwahab BIAD (Université de Annaba).

THE CONSTITUTIONAL FUNCTION OF HUMAN RIGHTS

AUGUSTO BARBERA

1. Three Tendencies

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

1.1. *The First Tendency*

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

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

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

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

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

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

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

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

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

1.2. The Second Tendency

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

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

1.3. The Third Tendency

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

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

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

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

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

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

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

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

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

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PEACEKEEPING AND HUMAN RIGHTS: A CRUCIAL BUT UNEASY RELATIONSHIP

FRED TANNER

1. Introduction

With the end of the Cold War, the United Nations has found itself increasingly involved in conflict resolution of protracted civil wars. Accordingly, peace operations were mandated to deal with national reconciliation and democracy-building, but also with other non-military mission objectives, such as the protection of humanitarian relief. The monitoring of compliance with human rights has become an integrate part of this new type of peacekeeping. But, the complex relationship between peacekeeping and human rights has not been sufficiently addressed yet, neither by scholars nor by practitioners.

This study proposes to use the numerous peace operations in the greater Mediterranean area to look at the role of the human dimension in peacekeeping today. It will examine to what extent questions of human rights or humanitarian relief protection have entered primary or secondary mission objectives and how multi-component operations affect the overall performance of peace missions.

International attempts of conflict management in the greater Mediterranean area have led to the development of numerous peacekeeping operations in the region for the last 40 years. These operations differ in kind from each other as much as they do on a global level. They include unarmed observer missions (UNTSO in the Near East), classic UN interposition and observer missions (UNFICYP in Cyprus, UNIFIL in Lebanon), UN support mission for a comprehensive settlement (MINURSO in the Western Sahara), UN missions for humanitarian purposes (UNPROFOR in Former Yugoslavia), non-UN implementation missions operating under UN Chapter VII authority (NATO-led IFOR in Bosnia) and peacekeeping missions outside UN authority (Multinational Force and Observers in the Sinai).

Both in the Mediterranean region and globally, the question of

humanitarian relief and human rights took on an ever-increasing space in the mandates of peace operations. This was due to several reasons.

(1) First, the nature of peacekeeping has changed from primarily military to multifunctional missions with complex agendas and strong civilian, political and humanitarian components. This change was due to the direct involvement of the UN in the political settlements of civil wars. The multifunctional operations - often also referred to as "second-generation" peacekeeping - support the peace-building efforts of the parties. This support often consists of diverse tasks such as carrying out elections, registering and educating voters, supervising the demobilisation and disarming of armies in civil war, monitoring elections, the building of national institutions, the creation of a civilian police force and the investigation into human rights violation. Beginning with the peace process in Namibia, the UN or UN-mandated peace forces were asked to support the implementation of civil war settlements in Nicaragua, the Western Sahara, Angola, Cambodia, El Salvador, Mozambique and Bosnia.¹

(2) Second, the tragic situation in the Kurdish populated areas in northern Iraq after the Gulf War has led the UN Security Council to argue in its Resolution 688 (1991) that the internal repression of the civilian population can constitute a threat to "international peace and security in the region". This resolution established a clear precedent whereby the UN elevated the concern of human suffering - if combined with the danger of massive cross-border refugee flows - over the hereto sacrosanct principle of non-interference in domestic affairs of member states.² Peacekeeping operations, both under and outside UN Command have been developed for humanitarian (Somalia, Rwanda, Yugoslavia) and human rights purposes (Haiti). They were established under Chapter VII authority, providing them with the option to use force, if necessary, to achieve fundamental mission objectives.

(3) Third, the relationship between peacekeeping and human issues was brought to the forefront by the wars in the Balkan region. The

¹ For a good discussion of UN contributions to Civil War Settlements, see Stephen John Stedman, "UN Intervention in Civil Wars: Imperatives of Choice and Strategy," in Donald C. F. Daniel and Bradd C. Hayes, *Beyond Traditional Peacekeeping*, (eds.), St. Martin's Press, New York, 1995, pp. 40 - 63.

² For an examination of the case of Iraq, see Jane E. Stromseth, "Iraq's Repression of its Civilian Population: Collective Responses and Continuing Challenges," in Lori Fishler Damrosch, *Enforcing Restraint*, Council on Foreign Relations Press, New York, 1993, pp. 77-109. For a legal analysis about UN humanitarian intervention, see Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond," *Michigan Journal of International Law*, Vol. 15: 419, Winter 1994, pp. 519-589.

relationship between peacekeeping and humanitarianism is profoundly affected by the experience of the various peace support operations in former Yugoslavia. UNPROFOR was the first mission in the history of the UN where a peacekeeping force had to pursue a primarily humanitarian mandate in a hostile environment. At a later stage, the OSCE, NATO's implementation force (IFOR) and other agencies were involved in the implementation of the human rights component of the Dayton settlement. Finally, IFOR found itself caught up in the dilemma of judicial intervention in Bosnia that was actively pursued by the The Hague War Crime Tribunal on former Yugoslavia.

This study will examine the relationship between peacekeeping and human rights as well as humanitarianism by using the various types of peace missions in the Mediterranean as a reference. It will examine to what extent the classic peacekeeping missions, such as UNFICYP in Cyprus, are human-right sensitive. It will then use the case of the Western Sahara to assess the human rights role of peace missions in political settlements. The Balkan legacy, finally, provides ample lessons to the complexity of peace missions with humanitarian and human rights or even judicial mandates.

2. Classic peacekeeping operations: The humanitarian aspects of UNFICYP

Traditionally, peacekeeping operations did not explicitly deal with human rights issues. Mission objectives were geared towards maintaining the military status quo after conflict termination. For example, most classic peacekeeping operations were deployed in the aftermath of Arab-Israeli wars (UNEF I, UNEF II, and UNDOF) with the mandates to monitor the compliance with ceasefire arrangements, assist troop withdrawals, and provide buffers between the opposing forces.³

In some cases, however the classic peace missions addressed human rights and humanitarian questions through secondary mission objectives, such as law and order missions. In the Cyprus operation (UNFICYP), for instance, the "restoration of normal conditions and humanitarian functions" mandate comprised a number of humanitarian efforts to be carried out by UNFICYP. They included "facilitating visits south of the buffer zone for Greek Cypriots living in the northern part of the island; support for the refugee assistance efforts of the UN High Commissioner

³ For an extensive analysis of these missions, see, for instance, Alan James, *Peacekeeping in International Politics*, Macmillan, 1990.

for Refugees, including delivery of foodstuff, and cooperation with the UN Development Program, World Health Organisation and other agencies working on Cyprus" [Brigisson, 1993, p. 218].

Recently, the humanitarian component of the UNFICYP mission took on more importance with the conduct of the "Humanitarian Review" in both parts of the islands. The Review looked at the living conditions of Turkish Cypriots located in the South and of Greek Cypriots and Maronites living in the northern part of the island. The findings and recommendations were shared with the respective authorities.⁴ The main observations of any continued violations are the continued legal, bureaucratic and practical restrictions of freedom of movement of the minority groups, the capricious discrimination and the police harassment.

At present, the UN peacekeeping forces are not likely to assume a more prominent role in humanitarian questions, because of the restrictions that are imposed on their freedom of movement. UNFICYP's access to minority villages is either denied, restricted or at best, escorted by local forces.⁵

3. Peacekeeping and Human Rights Issues in Political Settlements: The Western Sahara

The UN mission to the Western Sahara reflects a "second-generation" peacekeeping operation, where the political settlement of the conflict was negotiated before the deployment of the UN contingent. The main mandate of the UN forces deployed to the Western Sahara (MINURSO) was, thus, not to freeze the military conflict between Morocco and POLISARIO, but to assist the two parties to implement their peace plan. As was the case with other peace support missions involved in comprehensive settlements, the peacekeeping force in the Western Sahara was given important tasks regarding human and political rights and the right of refugees to return home.

Peacemaking efforts on the armed conflict over the Western Sahara have led in 1988 to a "settlement proposal" that was accepted by the two opposing parties. This proposal was refined and operationalised in 1990 and 1991. The peace plan pursues a solution to the dispute *by means of a referendum*. MINURSO was to assure that the conditions were established for a free, fair and impartial referendum for the self-determination of

⁴ Report of the Secretary-General on the United Nations Operation in Cyprus, 10 December 1995, S/1995/1020, pp. 8-14.

⁵ Ibid. p. 14.

the people of Western Sahara. According to the settlement plan, the UN peacekeeping forces should make sure that the "people of Western Sahara will choose, freely and democratically, between independence and integration with Morocco".⁶ Corollary rights deriving from the peace plan were the right to vote, the right of self-determination and the rights of refugees to return home.⁷ Furthermore, the parties committed themselves to "release before the beginning of the referendum campaign, all Western Sahara political prisoners or detainees".⁸

The implementation of the peace plan has been stalled and MINURSO may have to be withdrawn, should there be no substantial progress in the coming months.⁹ It is true that the military part of the peace agreement has been implemented and a ceasefire is monitored by MINURSO since 1991. But, the implementation of the peace plan is held hostage to the continued disagreement about the question of who would be eligible to vote in the referendum.¹⁰

The question of voter eligibility might very well have a decisive impact on the outcome of the referendum. The harsh result of "winner takes all" - a characteristic of all referenda - has made this peace plan a very high stakes issue for the rivals. Should the POLISARIO prevail in the referendum, the residual Moroccan forces would have to withdraw from the Western Sahara. Should Morocco win, MINURSO would have to disarm the POLISARIO in the territory. But the disarmed and demilitarised ex-combatants would not receive any protection from the UN. The settlement does not foresee any post-referendum security guarantees for the loser, nor does it oblige the winner to engage in any type of democratic institution-building.

According to some officials, the day-to-day work of MINURSO has been made difficult by Moroccan delaying tactics, arbitrariness and deliberate non-cooperation (Ruddy, 1995). A major mistake of the UN has been to allow the parties to carry out their own registration process, instead of leaving this essential task with MINURSO. This has generated a complete

⁶ The Situation Concerning Western Sahara, Report of the Secretary-General, S/21360, 18 June 1990, p. 10. The draft peace plan of 1990 has been slightly modified in April 1991, particularly as to the military part of the agreement, see UN Document A/22464, 19 April 1991.

⁷ Ibid., see also William Durch, "Building on Sand, UN Peacekeeping in Western Sahara," *International Security*, Spring 1993, Vol. 17, No. 4, pp. 151-171.

⁸ The Situation Concerning Western Sahara (1990), *op. cit.* p. 21.

⁹ This threat has been clearly articulated by the Security Council Resolution 1033 (1995).

¹⁰ *Financial Times*, 6 November 1991, p. 4.

lack of transparency of the identification process and has led to the dispute over voter eligibility.

In its five years of operation, MINURSO has been unable to bring the parties into compliance with their commitment as far as prisoners of war and political prisoners are concerned. According to the Reports of the UN Secretary General, Saharan political prisoners were still retained in Morocco, whereas, according to the ICRC, the POLISARIO was still holding about 1900 Moroccan prisoners in the Tindouf region.¹¹

The enduring political stalemate finally obliged the UN to react in the spring of 1996: The UN Security Council decided in its Resolution 1056 of 29 May 1996, "that the identification process be suspended until such time as both parties provide concrete and convincing evidence that they are committed to resuming and completing it without further obstacles, in accordance with the settlement plan".

The suspension of the identification process and the reduction of the military component by 20 percent indicated that the UN is, at least for the time being, abandoning the work that has been associated with multifunctional peacekeeping and MINURSO is likely to be relegated to a classic ceasefire monitoring mission without any pertinence as to political and human rights within its area of operation.

4. Protection of humanitarian operations: The UNPROFOR mission

The mandate of UNPROFOR has evolved over time, first concentrating on conflict termination in Croatia on the basis of the Vance Plan, then branching out to humanitarian relief support in Bosnia. UN Resolution 770 (1992) recognised that "the situation in Bosnia Herzegovina constitutes a threat to international peace and security" and it argued that the provision of humanitarian assistance "is an integral element in the Council's efforts to restore peace and security in the area." Subsequently, the Council required UNPROFOR under Resolution 776 (1992) to support the efforts of the High Commissariat for Refugees (UNHCR) and to "provide protection, at UNHCR's request, where and when UNHCR considered such protection necessary."

Even though the resolutions for Bosnia have been adopted under Chapter VII authority, UNPROFOR was lacking the necessary military capabilities, the political endorsement of the troop-contributing states,

¹¹ The Situation Concerning Western Sahara, Report of the Secretary-General, 8 May 1996 (S/1996/343); ICRC News, 96/18, 8 May 1996.

and the operational authority (rules of engagement) to enforce its mandate. The enforcement actions in Bosnia were carried out by NATO airpower both in the air (no-fly zones) and on the ground (protection of safe areas).

The paralysis of UNPROFOR to take action has grown from their mission objective to protect humanitarian operations. Humanitarian operations *require the continuous consent of the parties*, a requirement that has been extensively exploited by the Bosnian Serbs, who always made their approval for transit of humanitarian convoys contingent upon accommodating conduct of the peacekeeping forces. The acceptance of such linkage policies by the peacekeeping forces can, according to an UNHCR Handbook, "cause paralysis in missions, where extraneous issues are allowed to cloud the primary principle of *humanity*" [UNHCR, 1995, p. 30].

Even though UNPROFOR did not have the authority to monitor or react to human rights violations in Bosnia, the question inevitably emerged how the peacekeepers could be "impartial between 'aggressors' and their victims, between 'ethnic cleansers' and terrorised civilians, between a recognised government and its reviled besiegers" [Tharoor, 1995, p. 126]. The tragedy of Srebrenica was probably the most telling episode of UNPROFOR's impotency, as a handful of blue helmets had to witness how the Bosnian Serb forces overran a UN-declared safe area that was crowded with tens of thousands of refugees.

The flagrant violations of human rights and humanitarian law has led to increased pressure to proceed with fact-finding missions. This pressure came primarily from the United States that called for the convening of a war crimes tribunal. Furthermore, Tadeusz Mazowiecki was appointed special rapporteur of the Geneva-based UN Commission on Human Rights where he was mandated to report his findings to the UN General Assembly and to the UN Security Council. His reports indicated an alarming rate of systematic violations of the most basic rights. The Security Council responded to these findings in its Resolution 771 and condemned "the violations of the Geneva Conventions of 1949 and other international humanitarian law."¹²

In multifunctional UN operations, the human rights or humanitarian functions are usually not carried out by peacekeeping forces, but by relief organisations and civilian human rights monitors. The increased presence of non-military actors in peacekeeping operations necessitates a great

¹² The resolution cites specifically "mass forcible expulsion and deportation of civilians, imprisonment and the abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property."

deal of coordination. In the case of former Yugoslavia the problems of providing humanitarian relief in a semi-permissive environment has been exacerbated by continuous difficulties of communication between UNPROFOR and UNHCR, the UN lead agency in former Yugoslavia until the Dayton Peace Settlement. According to Age Eknes, it was symptomatic for the poor UN operation that there was an "incompatibility of radio communication between humanitarian relief convoys and escorts-even though this problem was addressed at an early stage of the Bosnia operation. [Eknes, 1995, p. 122] As a result of the experiences of UNPROFOR, the "In-depth evaluation" report about peacekeeping of the Office of Internal Oversight Services of the UN recommends the Centre for Human Rights to be designated as a responsibility centre for human rights components of peacekeeping operations.¹³

Despite the poor record of UNPROFOR, it may not be fair to describe the mission as a failure: UNPROFOR has neither been mandated nor given the political backing and the military means to go beyond efforts to reduce the human suffering during the war. According to some analysts, the humanitarian intervention of the UN in the former Yugoslavia came as a second best solution.¹⁴ The inability of European states to stop the escalation of the armed conflict and its atrocities along with the lack of consensus among the member states of the Security Council on how to address the violent disintegration of the Yugoslav Federation has led to the deployment of a humanitarian mission into a belligerent environment. In this context, the peacekeeping missions in Croatia and Bosnia have been subjected to unfair expectations given UNPROFOR's limited military capability and the hostile environment of operation. According to Sergio Vieira de Mello, the humanitarian role of UNPROFOR was "a mere and frustrating palliative in the absence of a political settlement" (De Mello, p. 142.).

5. Non-UN missions: IFOR, OSCE and other organisations in Bosnia

The Dayton Peace Agreement is a comprehensive political settlement that englobes important provisos pertaining to human rights and

¹³ Office of Internal Oversight Services, In-depth evaluation of peacekeeping operations: start-up phase, 17 March 1995, E/AC.51/1995/1.

¹⁴ See, for instance, Mats Berdal, "United Nations Peacekeeping in Former Yugoslavia", in Donald C.F. Daniel and Bradd C. Hayes, *Beyond Traditional Peacekeeping*, *op. cit.*, pp. 228-247; Rosalyn Higgins, "The United Nations and the Former Yugoslavia," *International Affairs*, 69, no. 3, 1993.

democracy-building. They include the holding of free and fair elections, freedom of movement across the entire territory of Bosnia and Herzegovina, the right of refugees and displaced persons to return to their homes, and the guarantee of human and political rights to all citizens of Bosnia and Herzegovina.¹⁵

UN Security Council Resolution 1031 (1995) attempted to orchestrate the involvement of the various implementing agencies. NATO's IFOR is to implement the military component to the agreement, whereas the OSCE is the lead agency as to the implementation of the electoral process. The UN Commission on Human Rights, the OSCE, the UNHCR, and "other intergovernmental or regional human rights missions or organisations" are to monitor "closely the human rights situation in Bosnia and Herzegovina (...)".¹⁶ The UNHCR is the lead agency with respect to the return of refugees and displaced persons, while the UN International Police Task Force (IPTF) assists the parties in carrying out their law enforcement responsibilities as stipulated in Annex 11 to the Peace Agreement. The coordination is understandably complex, as it has to be done among the parties and among the various agencies.

With regards to human rights, the presence of a multitude of organisations has made the Bosnia peace mission a trying exercise of coordination.¹⁷ The High Representative, whose primary role is the coordination of the various internal and external actors involved in the peace process, has to assure coordination among more than 10 actors of inter-governmental nature.¹⁸

With the evolution of the mission, the OSCE has increasingly taken charge of human rights monitoring: According to the Chairman-in-Office of the OSCE, the successful carrying out of the elections depends on the

¹⁵ For a human rights-specific analysis of the Dayton Peace Agreement, see, Paul C. Szasz, "The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia," *The American Journal of International Law*, Vol. 90, 1996, pp. 301-316.

¹⁶ "Organisations concerned with Human Rights", Article XIII, Chapt. Three of Annex 6 (Agreement on Human Rights) of the Dayton Peace Agreement.

¹⁷ Competition exists between various agencies, such as the ECMM (European Community Monitoring Mission) and the OSCE. Such competition is fueled by US-European rivalry over the question of who should take the lead role in the reconstruction of Bosnia. See Arie Bloed, "The OSCE and the Bosnian peace arrangement," *Helsinki Monitor*, Nr. 1, 1996, pp. 74-75.

¹⁸ The International Tribunal for the Former Yugoslavia, the Centre for Human Rights, the UNHCR, the UN Mission in Bosnia and Herzegovina, UN High Commissioner for Human Rights, the OSCE, the Council of Europe, the European Community Monitoring Mission, the International Committee of the Red Cross and the Special Rapporteur of the UN Commission on Human Rights on the former Yugoslavia.

protection of fundamental and human rights. He supports an activist human rights monitoring approach to "promote the respect of these rights by monitoring, reporting, and especially even intervening with an appropriate response when incidents occur".¹⁹ The OSCE reasserted its role in human rights questions by appointing a Human Rights Ombudsperson, who is supported by the OSCE mission in Bosnia. The Ombudsperson, in turn, has established (together with the Human Rights Chamber) the Human Rights Commission of Bosnia.

The UN International Police Task Force (IPTF) was set up by the Security Council Resolution 1035 (1995) with the purpose of assuming tasks such as the monitoring and supporting of law enforcement activities and facilities, including associated judicial organisations, structure, and proceedings. One of the IPTF's secondary mission objectives is, however, to observe and inform about human rights violations.²⁰ The training of the IPTF personnel in Zagreb, therefore, also includes sessions on human rights and humanitarian law.

IFOR, the actual peacekeeping agent in Bosnia, has been authorised by UN Security Council Resolution 1031, that was adopted under Chapter VII authority. IFOR is operating under NATO command and control and under NATO rules of engagement which provide for the clear and robust use of force if necessary. IFOR successfully implemented the military aspects of the Dayton Peace Agreement. The mission objectives of IFOR do not include any human rights specific tasks. Its foremost contribution to the non-military part of the peace process is the consistent implementation of the freedom of movement for all involved agencies, including human rights monitors. Even though IFOR is - according to the words of US Secretary of Defense - "an impressive force that will intimidate anybody in the area", it is very careful not be lured into "mission creep" reminiscent of the UN forces in Somalia.²¹

The record of the first six months of the peace process has clearly shown that while it may be possible to pressure the parties into compliance in the military domain, it is infinitely more difficult to create the condition for free and fair elections. Such conditions include the freedom of movements, freedom of expression, free access to the media, and freedom of assembly. The record has also indicated that the fate of the political,

¹⁹ Quoted in OSCE Newsletter, Vol. 3, No. 3, March 1996, p. 2.

²⁰ Article VI of Annex 11 requires the IPTF personnel to provide information about human rights violations to the Human Rights Commission, the International Tribunal for the Former Yugoslavia, "or any other appropriate organisations."

²¹ Transcript of Address of Secretary Perry to the Officers and NCOs of the 1st Armored Division in Bad Keuznach, Germany, 24 November 1995.

military, humanitarian and even judicial elements of the peace process cannot be dissociated from each other. The success of IFOR is a necessary but not sufficient condition for the peace process in Bosnia. The same is true for the political and human rights parts of the agreement.

6. Peacekeeping and judicial intervention: The ambiguous role of IFOR

Most demands for IFOR actions outside the military dimension have been coming from the judicial side. The International Criminal Tribunal for the former Yugoslavia (ICTY), that is firmly embedded in the Dayton Peace Agreement, has asked IFOR to apprehend, detain and transfer to The Hague persons indicted for war crimes.

NATO decided at the beginning of 'Operation Joint Endeavour' that IFOR should support these requests, and apprehend war crime suspects "when coming into contact with them in carrying out its duties as defined by the military annex of the Peace Agreement". The relationship between IFOR and ICTY has been operationalised by a Memorandum of Understanding of 9 May 1996.

In practice, IFOR has been careful not to appear as an ICTY agent that is enforcing arrest warrants in Bosnia. IFOR refused, for instance, to fan out and to actively search for wanted war criminals. Lessons may have been learnt from the Aided manhunt in Somalia, that eventually derailed the UN peace mission.

The judicial issue came to the forefront with the ICTY's formal and mandatory arrest warrants of Radovan Karadzic and Gen. Ratko Mladic on 11 July 1996 on charges of war crimes, genocide and crimes against humanity (International Herald Tribune, 12 July 1996, p. 1). IFOR was not expected to arrest these two former Bosnian Serb leaders by force, because of Russian sensitivities (Russia is part of IFOR) and the threat of retaliation by Bosnian Serbs against unarmed UN police or other civilian agencies operating in Bosnia under the Dayton Peace Agreement.

At the same time, the IFOR Commander has the authority to determine, for instance, that Belgrade or the Bosnian Serbs "are failing significantly to meet their obligation" as to the War Crime Tribunal. In such a case, the Security Council would have to reimpose automatically economic sanctions against Serbia and Montenegro.

As in any peace mission that supports a peaceful national reconciliation process, IFOR needs the cooperation of all the parties to irreversibly implement the peace arrangements. This does not mean that IFOR ignored the judicial claims from The Hague. IFOR provided airlifts to The Hague of persons indicted for war crimes. Furthermore, IFOR contributed

indirectly to the judicial proceedings: IFOR has secured important evidence for investigators in a war-torn and potentially hostile environment, and it has assured the personal safety of the prosecutors, witnesses as well as of experts working on mass grave sites. IFOR as a non-UN agent may be tempted to keep the UN judicial intervention at arms-length. But, in final account, the dissociation of the various implementing actors from each other seems neither feasible nor desirable.

7. Conclusions

This study has shown that all types of peace missions in the Mediterranean are directly or indirectly involved in questions of human rights, democracy-building and humanitarian aid. Even classic peacekeeping operations such as UNFICYP, where the maintenance of the military stalemate represents the primary mission objective, the human dimension has become increasingly important over the last years. In most cases, the multi-task nature of today's peace operations has led to the deployment of multi-component contingents.

This development has led to new challenges for peacekeeping operations. First, the parties may be tempted to use the different mission components for bargaining or linkage policies; conditioning, for instance, the permission of humanitarian actions to progress of political or military questions. The effects of spiraling linkages has eroded the credibility of UNPROFOR's primary objective of humanitarian operations (UNHCR Handbook, p. 30, n.5). Second, the consent of the parties, an essential requirement for most peacekeeping operations, is likely to be selective or temporary when it comes to tasks such as human rights monitoring. Third, the impartiality of the peace forces and therefore the mission as a whole may be jeopardised when confronted with the request of supporting judicial intervention.

The case of Cyprus showed that in light of the military deadlock, the peacekeepers are trying to carefully address the conflict's underlying political causes: the inter-communal conflict based on different cultural and religious identities. But, UNFICYP's programme to build confidence among the two parts of the island and their acceptance of certain humanitarian standards has remained ineffective.

Similarly, the Western Sahara operation has come to a halt in its political and humanitarian aspects of the peace process. Disputes over voter eligibility and non-compliance with the obligations to release prisoners of wars and political prisoners as well as the manifest lack of cooperation with the peacekeepers in other non-military questions has jeopardised the UN mission as a whole.

The UN has reacted to both cases, Cyprus and the Western Sahara, with the reduction of UN personnel and the threat of complete withdrawal. The UN finds itself increasingly under pressure from member states, and in particular from the US, to scale down on non-essential activities. This has led the UN to face the vocation vs. cost dilemma. In the case of the Western Sahara, for instance, politically and financially, the UN cannot afford to be caught up for years in a dispute about voter eligibility while MINURSO costs about \$ 100,000 a day (Ruddy, 1995). On the other hand, a reduction or complete withdrawal of the UN from Cyprus or the Western Sahara is likely to increase human rights abuses and a return to open hostilities with the potential of international escalation.

The peace operations for the protection of humanitarian aid have proved to be the most difficult missions in the history of the UN. Somalia and Bosnia have been cases where peace support forces had to operate in semi-permissive environments. This has led to the militarisation of international relief, a paradox epitomised in the case of Somalia with aberrations into open warfighting. UNPROFOR, in turn, was a humanitarian protection mission without enforcement capabilities. It was caught up, nevertheless, in questions of impartiality due to the enforcement of safe areas by NATO airpower.

The Dayton settlement in Bosnia has generated the most complex peace mission ever, matched in size and scope only by the Cambodia operation. It has brought together a multitude of organisations covering different aspects of the peace process, including military security, democracy building, human rights and economic reconstruction. The implementation of the peace plan turned out to be a difficult exercise of coordination among the various organisations.

The implementation of free and fair elections or referenda have become part of the fundamental objectives of the peace missions in the Western Sahara and in Bosnia. The failure of achieving this objective equals the failure of the UN mission as a whole, even though the presence of the peacekeepers may have stabilised the military situation. The development in the Western Sahara or Bosnia clearly showed that the political, military and humanitarian components of peace missions are today not dissociable anymore. A failure in one area would inevitably lead to a failure of the entire mission.

The question of interdependence of the different aspects of peace missions also applies to judicial interventions in peace processes. The judicial interventions in Bosnia, for instance, that are orchestrated from a UN established body, may taint the UN's impartiality among the belligerents. As William Durch has observed so eloquently, the UN's "credibility as a global midwife of democratic transitions depends above

all on its image as an unbiased agent of popular choice" (Durch. 1993, p. 171).

The growing importance of non-military aspects of peacekeeping reflects the acceptance by the international community that human suffering and violations of human rights are among the most notorious obstacles to conflict resolution and durable peace. This acceptance had and still has to overcome opposition in the Security Council and in the conflict area of those UN members that prefer to uphold the principles of non-intervention in "matters which are essentially within the domestic jurisdiction of any state" (Article 2(7) of UN Charter). The performance of peace operations such as those of the Western Sahara or Bosnia will, in final account, be responsible for the role that humanitarianism and human rights will be able to play in future peace operations.

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References

- Berdal, Mats, "United Nations Peacekeeping in Former Yugoslavia", in Donald C.F. Daniel and Bradd C. Hayes, *Beyond Traditional Peacekeeping*, op.cit., pp. 228-247.
- Birgisson, Karl Th., "United Nations Peacekeeping Force in Cyprus," in William J. Durch, ed., *The Evolution of UN Peacekeeping*, New York: St. Martin's Press, 1993, p. 218.
- Bloed, Arie, "The OSCE and the Bosnian peace arrangement," *Helsinki Monitor*, Nr. 1, 1996, pp. 74-75.
- Eknes, Age, The UN in the Former Yugoslavia, in Thomas Weiss, (ed.), *The United Nations and Civil Wars*, Lynne Rienner, London, 1995, p. 122.
- Gordon, Ruth, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond," *Michigan Journal of International Law*, Vol. 15: 419, Winter 1994, pp. 519-589.
- Higgins, Rosalyn, "The United Nations and the Former Yugoslavia," *International Affairs*, 69, no. 3, 1993.
- International Committee of the Red Cross, *ICRC News*, 96/18, 8 May 1996.
- James, Alan, *Peacekeeping in International Politics*, Macmillan, 1990.
- OSCE, *OSCE Newsletter*, Vol. 3, No. 3, March 1996.
- Office of Internal Oversight Services, *In-depth Evaluation of Peacekeeping Operations: Start-up Phase*, 17 March 1995, E/AC. 51/1995/1.

- Perry, William, *Address to the Officers and NCOs of the 1st Armored Division in Bad Keuznach, Germany*, 24 November 1995 (transcript).
- Ruddy, Frank, Ambassador, "Statement", *Review of United Nations Operations and Peacekeeping*, Committee on Appropriations, House of Representatives, Congress of the United States, 25 January 1995.
- Stromseth, Jane E. "Iraq's Repression of its Civilian Population: Collective Responses and Continuing Challenges," in Lori Fishler Damrosch, *Enforcing Restraint*, Council on Foreign Relations Press, New York, 1993, pp. 77-109.
- Szasz, Paul C., "The protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia," *The American Journal of International Law*, Vol. 90, 1996, pp. 301-316.
- Tharoor, Shashi, "United Nations Peacekeeping in Europe," *Survival*, vol. 37, no. 2, Summer 1995, p. 126.
- Stedman, Stephan John, "UN Intervention in Civil Wars: Imperatives of Choice and Strategy," in Donald C.F. Daniel and Bradd C. Hayes, *Beyond Traditional Peacekeeping*, (eds.), St. Martin's Press, New York, 1995, pp. 40-63.
- UNHCR, *A UNHCR Handbook for the Military on Humanitarian Operations*, January 1995.
- United Nations, *The Situation Concerning Western Sahara*, Report of the Secretary-General, 18 June 1990, S/21360.
- United Nations, *Report of the Secretary-General on the United Nations Operation in Cyprus*, 10 December 1995, S/1995/1020, pp. 8-14.
- United Nations, *The Situation Concerning Western Sahara*, Report of the Secretary-General, 8 May 1996 (S/1996/343).

HUMAN RIGHTS AND MEDITERRANEAN SECURITY

SALVO ANDÒ

1. If we examine world events during the last years, we realise that it is not easy to draw a detailed and realistic picture of the factors which could determine the new world order and define, within this context, a precise structure of European security. The end of the bipolar world has led to a modification of the fundamental concepts of collective and regional security in Europe which were rooted in the old system. This transition is now rendering obsolete those concepts as well as cultural considerations which put the state at the centre of international law.

If the exclusive agents in international affairs were the states, since they have come into existence, and in recent decades international organisations, today new entities and factors are playing an extremely significant role in the dynamics of international relations. There are entities which do not identify themselves either with states or traditional international organisations. These entities, without using means considered in international law, wield significant *de facto* powers and condition the political decisions of the international community without using classic coercive methods.

These are non-governmental bodies and representative "cartels", formed because of interests that are transversally present in states such as associations of producers or consumers etc. They are forums which establish directives and parameters on which the legality of the behaviour of states or other international subjects is evaluated, without being expressions of either a single state or the international community. They are supranational or transnational agents which constitute a real framework involving nearly all states. In such a way a new customary law is produced at root level, i.e. not by states and international organisations, but by the dissolution of ideological creeds which enveloped the planet.

This is actually a law which, considering its formative process, can be considered a real "law of the people". Bearing this in mind, it would seem that issues such as national security, the balance of military power, national interests and non-interference are to become things of the past.

The world has become more complex and articulate. Security is no longer provided by some countries and utilised by others.

Unquestionably, the two superpowers constituted a considerable unifying force. The end of a security regime based on two opposing superpower poles has conferred more autonomy to medium and small sized powers. Once the protection provided by the two powers disappeared, these countries were no longer relegated to a second class role in international security matters. In the emerging multi-polar world, medium and small powers are partly recovering their sovereignty in matters of security as alliances between them become more equal. Even medium-sized powers which, until now, did not have access to heavy military arms can today play a more incisive role on the international stage. This is because military resources now have less decisive weight in relations between states than economic cooperation.

There is no longer the threat of direct, massive and imminent aggression on a large scale with little time for warning. This obviously modifies the nature of military alliances and the concept of neutrality and non-alignment. Conflicts can no longer be resolved in the context of equilibrium between the two superpowers; they require specific solutions, often in a regional or even a sub-regional framework. They also need to strengthen the role of the United Nations, by enforcing powers and prerogatives that exist mainly on paper. These powers were stopped from the outbreak of the Cold War and the non-peace, non-war situation which lasted for more than forty years.

Today the prospect of returning to the original intentions of the United Nations Charter seems more tangible. To start with, it would seem that the UN monopoly of power can finally be achieved. Although recognised by the Charter, this power was never put into practice because of contradictory and paralysing vetoes of superpowers which blocked the political organs of the organisation.

The creation of a new order is inevitable as the old "bipolar order" no longer exists. After the fall of Communism a new international order means that, perhaps for the first time in history, the world's problems will have to be tackled on a global rather than local or regional scale. To implement this, new principles and rules must be created and new international institutions established. Traditional institutions will have to experience radical transformation.

Above all the new order must be characterised by the principle of integration with its own hierarchy instead of the "anarchic" principle of disintegration. It must also be characterised by a wide dispersion of power instead of concentration of power in a few; by interdependence and cooperation instead of nationalism; by ideas and values instead of power;

by the creation of participatory regimes instead of authoritarian regimes that destroy liberty.

Taking these factors into account, it is impossible for military alliances to remain unchanged and this is why the characteristics of the new international order are still vague. However, in the future, military force will be considered less instrumental in attaining political objectives. The process of militarisation was linked to the idea of an unavoidable use of force, considered the privileged instrument of states' international policies, to dissuade and coerce.

The current situation leads to a policy which is becoming less and less militarised in nature. The reduction of conventional and nuclear strength, the affirmation of the concept of collective security, the emergence of a multipolar system characterised by the "phenomenon" of the dispersion of power all create the conditions for a heightened prevalence of political will over military will.

Cooperation is gradually replacing competition as a way to guarantee security. The fact that security can no longer be only expressed in military terms involves new responsibilities for all states. The threat used to be perceived as an external attacking enemy. Consider the recent history of Europe. The threats came only from the historical enemy - the Communist countries. In fact, NATO had the task of politically isolating and militarily containing this external threat. Today, many states in the world's "danger zones" have to deal with internal threats such as totalitarian ideology, intolerance towards minorities, political extremism, poverty and the role of religion. It is now a question of guaranteeing political stability within states and entire regions. This means the creation of global systems which know how to use security regional systems according to model indicated in the UN Charter.

In a nutshell, the concept of security is taking on a new and even more dynamic meaning. In this context military intervention can no longer be the same as when the two superpowers constituted a stabilising force. In other words, military means are to be used only as a final and exceptional solution, thus reducing the importance of dissuasion.

In this context, we can say that a historical period is now over. The last events in the military confrontation and competition between the two superpowers were the occupation of Afghanistan and the Euromissiles issue. But on a political level the antagonism ended one month after the fall of the Berlin Wall, on a Soviet ship anchored to the south of the island of Malta. In the course of a raging tempest, Bush and Gorbachev signed a real political alliance guaranteeing US backing to Soviet perestroika and Soviet support for the policy of *détente* sponsored by Bush. They also supported the reinforcement of the role of the UN. The old

system of antagonism and global obedience in favour of one of the two superpowers disappeared forever.

The signals which followed the historic agreement were unequivocal. The USSR would never have backed the military action under the system of collective security of the UN against Saddam Hussein during the Cold War. The dialogue between the PLO and Israel (the Madrid talks) took on a new intensity and led to the historic autonomy of the West Bank and the Gaza Strip. The Warsaw Pact was to be dissolved. The UN was to take part in more active peace-keeping missions – from the intervention in Somalia to that of Haiti – giving itself tasks that went beyond the simple enforcement of a cease-fire. Often the UN has to control states' use of their "domestic jurisdiction" and react to the most serious violations of human rights and democratic principles. This UN commitment has now obtained the consensus of all, or almost all, the world states.

As a result the normal means of maintaining security have today become political and economic. World opinion, particularly that of more evolved European societies, has accepted the new scenario. In fact, the end of the Cold War has been seen not only as the end of the nightmare of the nuclear holocaust, but as a worldwide "explosion" of peace. However, this is not the way things stand, as can be proved by the re-emergence of local conflicts, which seemed to have been long resolved, and by the outbreak of new conflicts in different parts of the world. It would seem that the end of the Cold War has brought about new disorders. The new world that emerged from that period seems incapable of ending the tragedies caused by the re-appearance of old ideological structures, old hates and old nationalistic resentments.

It would seem that although people are now more free to choose, they feel more insecure. The fall of Communism has created, at least in the eyes of public opinion in Western countries, a general desire for peace but has also created in certain states a hostile attitude towards any form of armed peace enforcement. In other words, some countries want to cash in the dividends of peace before the international situation has become really peaceful. This situation has brought about a general refusal by all countries to engage in heavy military expenditure or to finance the reconversion of existing military resources to conform to new political exigencies.

These positions are understandable, yet so is the warning which Willy Claes, the former Secretary-General of NATO, gave to the partners of the alliance when he urged them not to drastically cut their defence budgets. Claes stated that even if the Cold War was over, "peace has not been acquired, and therefore there has to be a limit to the reduction of military expenditure".

But when the "welfare state" declares it can no longer fulfill many of its traditional roles because of disastrous public expenditure and poverty increases, even in rich countries, it is inconceivable that military expenses can be maintained at present levels. In fact, it is impossible to cut expenses for pensions and health while at the same time maintain military expenditure at previous levels.

The period following the end of the Cold War is as uncertain as that following the two major wars of this century. In fact, as has been observed, this period is more similar to that following the first World War than that of the second. In other words, the situation resembles more that of the 1920s than that marking the appearance of the Soviet threat and the tension caused by antagonism between the West and the East. Every region seems inclined to turn in on itself now that the historic enemy no longer exists, ignoring the rest of the world.

Therefore, the end of Communism, and consequently, the end of ideological conflict that divided the world for fifty years, renders the contemporary world order more disorganised and dynamic than the one that preceded it. On the other hand it forces public opinion to seek new certainties and new models for cohabitation among and within states. World public opinion is much concerned with the crisis of the welfare state and its impact on the lifestyle of various peoples, and, at the same time, there is still considerable interest in problems which affect humanity on a large scale or international factors which condition state wealth. In fact, if the "rich" countries are condemned to live according to lower standards, this would as a consequence affect the poorer countries since the richer states would not be able to assist them. As a result the need arises to study new effective methods of cooperation in the "global village".

However, once there is no longer the threat of a nuclear holocaust, a certain feeling of freedom is permeating all major democratic countries. It is producing a popular revolt even against people in power and political elites. Everywhere in Europe, both in the East and in the West, there is a certain opposition towards traditional politics. The crisis of old ideologies is bringing about a crisis of politics in themselves. It is as if, at the end of Communism, values and ideas which dominated the European politics have come to an end. Such decline of politics favours the emergence of nationalist and often explicitly racist tendencies. It would seem, now that the Communist threat has receded, people in some Western countries want to flaunt their adherence to a new conservative belief which encourages them to ignore foreign affairs and concentrate on internal issues.

In order to face problems regarding the future of European security, basic considerations need to be kept in mind. Since many European nations

consider NATO their main instrument of defence, it is necessary to examine the future of the alliance as a political and military pact. Within this framework, it is not easy to define the recent strategy regarding the southern flank of the alliance. The alliance and major western organisations are focusing their energies on the East and also working intensely to institutionalise and reinforce CSCE (now the Organisation for Security and Cooperation in Europe). Apart from this concentration on the East, the Gulf crisis has showed that the North-South conflict is the first important challenge western security institutions had to face after the end of the Cold War. The problems of the South, that is, the regions of the world destined to underdevelopment, bears a great weight on the definition of the new identity and mission of institutions safeguarding western security.

The first element that must be pointed out is that the end of the Warsaw Pact has transformed western strategic thinking. The southern flank must not face one single monolithic threat, but a series of risks. This is, however, also true of the East, where the crisis of communist power has given way to a series of crises with the same pattern as those characterising the South: ethnic problems, ecological disasters, underdevelopment, extreme nationalism and territorial disputes. This situation created the expression "new arc of crisis" which formerly used to refer to crises between the Atlantic and Eurasia and which, at the end of the 1970s, also covered developing unrest in the Arab world, Iran and Afghanistan.

The southern flank and its specific problems today do not have the same importance as they did before, for the simple reason that the nature of the threat has changed. Security problems in this area have to be faced in the context of a security system in the Mediterranean. In other words, the global dimension, which until very recently was composed of the relationship between East and West, has been transformed, within the Northern hemisphere, into one between North and South, the latter referring to the Third World as well as the countries of the former Communist bloc.

If we examine the new geopolitical formation that the West faces today, which will model its aims and institutions guaranteeing security and multilateral solidarity, we can observe a new regional hierarchy emerging from the structure of the "new arc". This hierarchy is based on the fact that although the regions face similar crises, they are distinguished by their strategic and economic importance. These distinctions are clearly expressed by the degree of interest and concern shown by the West.

The Commonwealth of Independent States (CIS) and its difficult development are of prime importance in this scale of values. Russia still holds strategic nuclear weapons and, even though the CIS is today in

crisis, it still has great industrial and technological potential. It also claims a greater role in international matters although no longer on an equal footing with the US. Besides, if this crisis is not stemmed, it could destabilise the CIS, and this would have more important consequences for the West than any other crisis within the "new arc". In this context, the Middle East and Gulf regions continue to present serious risks to the security of the whole Mediterranean region. Likewise, the situation in the Balkans deserves a special mention. The efforts made by the international community did not prevent an escalation of violence and instability involving a much wider area.

It has already been stated that this evaluation of regional crises can be seen in the varying degree of interest by western countries. Although their motives may be different, the US and Germany are focusing their interest on the CIS crisis. The US are deeply involved in the Middle East and the Gulf crisis and in the way this has been managed. The European Union is directly involved in the crises of the Balkans and the Maghreb States. These diverse interests create a different degree of international solidarity *vis-à-vis* the various areas of the "new order", which highlight the distinctions between one area and another.

Returning to the southern flank, we can see a clear distinction between the Middle East and the Gulf areas and those of the Maghreb and the Horn of Africa. Within this new framework, an important connection can be established between the Maghreb and the Balkans. These distinctions and similarities are determined by the role played by different western countries in the regions concerned and the different degrees of solidarity that they inspire. In the four main critical areas in the southern flank, the European Union is heavily engaged in the Balkans and the Maghreb, where it tends to play a key role. It is only indirectly connected to the Middle East and the Gulf crises but it is only marginally involved in the crisis of the Horn of Africa. The commitment expressed by Europe in dealing with certain crises is not always reflected in the objective interest which Europe has in those areas. For example, so far, Europe has remained almost silent about the peace process in the Middle East. However, there is no doubt that it is one, but not the last, of the beneficiary of that very process.

Let us try to draw some practical conclusions from the considerations we have been elaborating upon. In concrete terms, what does the present southern flank mean for European Union countries? If we take into account European involvement in finding a solution to the problems of the countries in these areas, we can distinguish three concentric circles. In the outer circle, encompassing the Horn of Africa and Africa south of the Sahara generally, the European Union is engaged in upholding action

by the UN, in particular through humanitarian and economic aid, by means of its important systematic contributions through its multilateral and bilateral arrangements. Some countries within the European Union are trying to find a bilateral solution to certain local crises, such as Italy's role as a mediator between rival parties in Mozambique.

In the middle circle, the countries of the European Union are involved in the socio-economic dimension of Arab-Israeli negotiations, by supporting the political mediation being brokered by the US.

In the inner circle, the member states of the European Union and the Union itself are at the forefront of the Balkan crisis. At the same time they are concerned that certain conflictual situations, ethnic or religious, could develop into serious political crisis perhaps also in some African state, particularly of the Maghreb due to increasing fundamentalist movements.

2. Taking into account all that has been discussed, with particular reference to the new problems of European security, we can state that:

(1) The Soviet threat has disappeared, but Russia still has the potential to mobilise massive armed forces. It possesses a vast quantity of weapons which require a parallel Western capacity to confront eventual Russian mobilisation. As we shall see this means, firstly, that the potential of NATO defence must be restored.

(2) In the Mediterranean, there is still the threat of missile, nuclear and chemical proliferation. We must bear in mind that chemical agents are less effective than passive defences but have enormous psychological consequences.

(3) What cannot be underestimated are threats to the Gulf region, as they could compromise Western access to oil resources, and destabilising action in pro-Western countries of the Mediterranean by external forces, potentially obliging the West to intervene, or run the risk of losing all capacity of limiting conflict.

(4) The end of Communism gave rise to forms of nationalism which, from what has preceded, can really be defined as an extreme phase of Communism. This type of nationalism creates an explosive concoction out of old party bureaucrats' efforts at self-preservation and extreme forms of nationalistic feeling. Ethnic realities and national identities, which had disappeared from European history for many decades, are now reaffirmed. The process started by the October Revolution levelled out these identities, which are now re-emerging as ghosts from the past.

(5) The situation in Bosnia does not concern only the Balkans; the threat has also involved and continues to involve a wider area. Countries such as Italy are concerned by the threat at their door, the connected

possibilities of terrorist escalation and by the risk of having to sustain the shock and pressure of fleeing masses of refugees. It is therefore in their interest that the conflict is resolved as quickly as possible.

We have thus outlined the new "arc of crisis" that spreads from the Atlantic to Eurasia. It includes countries enjoying political stability, which could be easily upset, such as Egypt.

If we observe what is happening in the Mediterranean in particular, it appears obvious that the end of the Cold War and the reduction of Russian pressure have not produced an immediate state of peace despite positive developments in middle-eastern parts of this area. We are here referring to the beginning of the peace process between the PLO and Israel. Although its outcome still appears hazy, the direction it is taking should be encouraged by all means. There is no other alternative than direct dialogue between the two parties.

Altogether, many factors indicate that the end of East-West bipolarism could transform the southern Mediterranean into a new theatre of conflict, this time between North and South. If this point of view is accepted, it clearly indicates that although the Berlin Wall has fallen, this area is still of vital strategic importance. There is no single way of defining this strategic importance by examining the threats to peace in the area. Old and recent social problems give rise to various critical zones which, in a sense, are fuelled by factions and rivalries within the Arab world. Consequently, the possibility of guaranteeing an efficient system of collective security in the area appears alarmingly questionable.

Faced by such a complex and risky situation, Western propensity towards involvement in this area varies greatly. The only certainty is provided by a massive US deployment throughout the Mediterranean, except perhaps in the Maghreb where the traditional political and cultural influence of southern European countries prevails.

Thus if we examine briefly the new "arc of crisis" we have described as spreading from East to West, we can see that the Gulf war was followed by a general break-up within the Arab world. This may not be conducive to widespread political consensus. While the Iraqi threat has been reduced, a new state of unbalance has occurred, with the scales tipping in favour of Iran.

It is certain that the situation in the Middle East is showing encouraging new developments, while at the same time no one can confirm that it is definitely heading towards a stability situation in that area. After the Gulf War there emerged a desire for revenge against Iraq and for area leadership. These factors can create instability.

Since the end of the Cold War, Turkey appears to be progressively changing its role. The country no longer seems indispensable to US

interests in Europe. This new condition could force the country into a dangerous marginal position with regard to the European process of integration. It could dangerously underline the contrasts between its cultural and social models and those of the European Union. And only the Turkish fundamentalist groups would benefit from such a situation. We cannot afford to underestimate certain real dangers of instability in the area where Turkey still occupies a key position. After the fall of Communism, no one can foresee the political situation that may develop in the Transcaucasian area.

It is therefore important to ensure that Turkey does not experience frustration now that the bipolar situation has finally ended. The same may apply to Egypt. The country, traditionally pro-Western, could suddenly be destabilised by an increase in the political weight of pro-Islamic minorities. Even the relatively homogeneous and generally pro-European area of the Maghreb, traditionally the calmest in the region, is exposed to these fundamentalist stimuli.

What has occurred in Algeria need not necessarily be considered an isolated case, even though all the pessimistic predictions regarding its future have turned out to be unfounded. Algeria does not seem keen to start an ideological war against the West or to export its revolution to neighbouring countries.

The situation in the Balkans seemed to have reached a point of no return. In this region the international community suffered many defeats and humiliations. For years all diplomatic efforts by international bodies failed. The same applied to peace plans drawn up to reflect conflicting interests of different European countries. The threat that the conflict may spread to areas such as Macedonia and Kosovo, which, until now, have kept out of the fighting, was very real. Furthermore, in the US Congress there seemed to prevail a position in favour of Bosnian rearmament and the removal of the UN multi-national contingent from Bosnian territory.

In addition to the seriousness of this crisis, there was also the risk of reviving old tensions which seemed a thing of the past (for example Greek-Turkish antagonism), or of "latching on" new dualisms producing harrowing and lasting consequences (such as Turkish-Iranian antagonism). Fortunately, the situation in Bosnia has stabilised even if the problems to be solved are still numerous. The "Bosnian lesson" however, gives us much to coterminate. Europe, above all, proved powerless in the Bosnian situation which created further complications. Looking into the future, Europe's helplessness could have a devastating impact on areas of the Arab world which view Europe as the main point of reference for political initiatives aimed at settling long-standing disputes.

Europe's political stability and democratic traditions should allow it to show intransigence every time it has to deal with violations of human rights or democratic regulations. It is impossible for Europe to remain indifferent to the expectations and appeals of so many countries in this region.

It would seem, however, that no strategic plan of the southern Mediterranean area has yet been drawn up. This indecision is matched by a dangerous syndrome of neglect which could have an impact on the region's people, who may interpret the new international situation as relegating them to an even more marginal position.

This syndrome could develop further through increasing aid to East European countries (which are culturally closer to Western Europe than south Mediterranean countries) and the fact that each country in this area has lost its former importance since it is no longer "contended for" by the US or the USSR.

Paradoxically, this feeling of neglect may be supplemented by a feeling of excessive control, vigilance or attention. The Gulf War has shown how a medium-sized country left to its own devices can threaten Western interests, especially since global empires created by the Cold War have been dissolved. The particular social realities and needs expressed by some countries make them a potential threat to peace and so they must be kept under "special surveillance". In the new equilibrium of forces, these countries have replaced Russia as a threat to world peace. This awareness gives rise to resentment and provides the ideal terrain to cultivate anti-Western propaganda amongst Islamic fundamentalists.

Therefore, taking this into consideration, the situation in the Mediterranean is charged with tension because it is exposed to worrying developments. Yet what happens in this area will obviously have enormous repercussions on Western stability. Therefore the events of 1989 have increased the central strategic and political importance of the Mediterranean.

The West's economic interest in maintaining stability in this area is revealed by statistics. Until the Gulf War 50% of the volume of oil transported throughout the world, as well as 50% of world maritime transport, half of which is made up of oil products, involved the Mediterranean, while 30% of imports and exports of Eastern-bloc countries came through Black Sea ports.

All this goes to show how the political situation in the Mediterranean region could suddenly become more tense and turbulent with direct and serious repercussions on world security.

The present state of affairs forces us to consider not only present areas of crisis, but other possible areas. Not only do we have to see how the

traditional threat has been modified, but how it involves the internal affairs of the main strategic entities concerned. It includes, therefore, the behaviour of strategically placed countries which have to be contended with to establish a stabilising policy in the area.

When we speak of the development of strategic entities, with reference to the Mediterranean or to the area of Southern Europe, we automatically include the US, USSR, Western Europe, and, especially, Germany and Turkey. In other words, we have to examine what decisions for collective action can be taken in view of the possible evolution of hostile situations and ethnic conflicts within particular countries.

This latter point forces us to consider the foreseeable evolution of the role of the main existing institutions of collective defence security and the possible structures of the emerging European multi-institutional security systems. Taking all this into account, we do not have or at least not completely, the conditions to create any new structure of European security based on general formalised agreements. We must therefore adopt a more flexible structure, which would allow for on the spot agreements and ad hoc coalitions, particularly regarding the interests of individual states.

The problems of regional security in southern Europe and the Mediterranean must contend with a generalised situation which, in coming years, may be subject to various developments. This situation creates new problems regarding the configuration of a complex security system. However, it is difficult, especially for the principal strategical actors, to determine the right course of action. Consequently, this makes any hypothesis regarding the position they may assume technically valid but difficult to evaluate politically.

In past years, Europe did not provide its own security but made a limited contribution. The main political and strategic reason for the aid given by the US to Europe is no longer valid today. Before, European defence was central to the system of universal security, both politically and strategically. This situation determined that Europe obtained what it asked for, within the context of a system of atlantic security to which not everyone contributed in the same measure. Europe must now contribute more to its own defence, bearing in mind that the US can only provide limited "aid". This requires a common effort towards improved cooperation between national defence systems. It also requires a re-orientation of European security since it is no longer the eastern front which is most vulnerable but the southern side.

Certainly with the fall of the Communist empire, Europe no longer has to face threats from the Mediterranean area. There is no longer an aggressive Soviet fleet requiring constant surveillance. In fact the Soviet fleet has disintegrated and its bulk is now controlled by Ukraine. European

security, particularly in the Mediterranean, is no longer threatened by the East. The challenge is posed by unresolved social situations in the most depressed areas of the southern part of the Mediterranean where ecological disasters could destabilise the area. The threat of terrorism has also moved away from its traditional forms. Terrorist attacks might no longer resemble former spectacular episodes, such as kidnapping and killings in Western cities. Some Islamic fundamentalists prefer to hit emblematic Western objects within their territories. New dangers are no longer expressed in terms of military threat, but of "cultural offensive".

3. To what extent can Europe still count on US aid? American policy and public opinion are divided. US isolationist tendencies in the recent political debate will prevail. At the same time the US, like the rest of the West, cannot avoid the need to limit its public expenditure.

US public opinion views the disappearance of its historical enemy and the end of the world fight against Communism as a long awaited opportunity to re-direct US foreign policy towards reducing military intervention. The main reasons behind its position as the guardian of the world have disappeared.

The reduction of US troops in Europe and the US delay in fulfilling its financial commitments towards NATO are all signs of a foreign policy which does not want disengagement in Europe, but is directed towards more "reasonable" engagement.

Not only political reasons, such as former ties between Western countries, point towards this direction, but also economic considerations which necessitate that the US does not abandon Europe. Even after the fall of Communism the game with Russia is not over. The process of Russian disarmament has to be monitored. Huge arsenals have to be dismantled and it is important to see which direction these armaments take. In fact, because of its catastrophic economic situation, Russia would like to sell everything to anyone. Obviously, the US also wants to participate in the process of the economic reconstruction of Russia. However, Russia must be introduced into an economy market system without creating serious social conflicts. Russia therefore needs full international solidarity.

The US must also monitor the western region of the Mediterranean to ensure no conflict arises which could have possible consequences in the Gulf, where there is still unrest. The US must also follow Middle Eastern developments and encourage the success of the peace process between the PLO and Israel. The US must also guarantee that maritime traffic flows freely in the Mediterranean to support the economic interests of

powerful US groups. It is unthinkable that the US will abandon this key nerve centre or that it will ignore European and Mediterranean affairs.

The presence of the US in this area will perhaps be less involved on a military level than in the past and also less exclusive on a political level. It will establish partnership relations with Europe requiring equal collaboration. The US will no longer have a monopoly on security in this area, but will help maintain it on a par with the Europeans.

It will be difficult for any US President faced with an increasing national debt to convince the Americans that the burden of US military engagement in Europe cannot be questioned, particularly when large sectors of public opinion do not believe "the enemy" still exists.

4. Radical changes on the international scene, the reduction of military expenditure and progress in the process of European integration provide the conditions for the creation of a project of Euro-American partnership first proposed by John F. Kennedy in the 60's. During Kennedy's time as President of the US, this was a means to moderate De Gaulle's anti-American intransigence, by offering Europeans an alliance with the US on equal terms. Today, from a more pragmatic perspective, it is a means to share the costs of European defence equally between the US and the Europeans to avoid burdening the former with political and military responsibilities.

In any case, equal partnership relations between Europe and the US can only enhance the consolidation of a true European awareness, regarding issues linked to the security of the European continent and the role of Europe outside its territory for the prevention and resolution of regional crises. This type of equal partnership also paves the way for a process of European political unity preventing Europeans from squabbling over greater or lesser "Atlantic" loyalties. It should also end the mistrust with which the US political establishment and public opinion viewed "United Europe".

Equal distribution of responsibility between Europeans and Americans should, moreover, constitute a general principle of European security and not only that of southern Europe. In order to attain this balance, it is important that Europeans have a clear idea of their true, and hopefully, lasting political vocation. Once the threat from the East has subsided, the concept of "sufficient security", to which both Europe and the US should refer, can appear highly ambiguous.

A new security policy presupposes a definition of the aims of European policy itself. But this depends on the results of the European integration process. This integration is being realised in fits and starts because it is

trapped between two important options: the German desire to extend Europe and the general wish of EU member countries (despite the well-known UK position) for a more deeply united Europe.

A problem exists concerning the form of the relationship which Europe should establish with former European Communist countries. This relationship involves more than security issues, even though these countries are looking towards NATO. Armaments in these countries now affect the security of all. The new relationship also involves tackling huge social problems which must be solved to ensure the tranquillity of Europe's richer areas.

The obligations of the West in general and of Europe in particular towards former Communist countries of the Eastern bloc are not easy to fulfil. It was one thing to show political solidarity with perestroika; it is another far more expensive undertaking to sustain the creation of a true democratic system in these countries, involving the development of a market economy and helping governments resist nostalgic social reactions.

The building of democracy in the East is proving to be slower and less direct than it was expected to be just after the fall of Communism. Only a few years have passed since 1989, but some former Communist countries are already registering disturbing signs of dissatisfaction with democratic institutions. One reason is that the social costs of transition tend to dissipate the consensus that emerged in favour of the change of regime.

Since 1989, one thing appears certain. Western democracy with its market organisation, its social rights and its systems of redistribution of wealth cannot be reproduced quickly in this type of scenario. On the contrary, what is happening is that the creation of a market economy in tandem with new manifestations of injustice and oppression, beyond even the excesses of former occurrences, are being identified as symbolic of Western egoistic hedonism. These fundamental concerns obviously distract European attention away from Mediterranean problems, particularly the southern shores.

Once the danger from the East has abated, it is only natural that Europe, urged on by Germany, will try to recompose its cultural unity. This is acceptable, on condition, however, that it does not occur at the expense of the process of European integration and Mediterranean political stability. Destabilisation is a danger to Europe. It is sufficient to imagine the threat to European soil by overwhelming numbers of immigrants who are not easy to regulate, let alone any possible terrorist relapse.

After Maastricht, Europe has to provide itself with a common means of defence to uphold a common security policy. Unfortunately, the problem of former Yugoslavia revealed a serious lack of European political initiative and ability. When confronted with an emergency that concerned the whole

of Europe, major European countries as well as the EU itself, opted to "wait and see".

It is not easy to define the perimeters of the area in the Mediterranean where Europe is to play a leading political role. Opinions in European countries differ greatly. There are those who feel that after the end of Communism, the cultural and political frontiers of former Europe have been automatically extended eastward. There are others who believe that, apart from real initiatives that must be taken, attention to southern Mediterranean shore countries and the Arab world would confer international prestige and authority to Europe and enhance its political role.

5. Europe has an enormous responsibility to define and implement a world order where peace prevails, particularly since security policies are no longer a matter of military resources. Furthermore, with the disappearance of the Communist threat it is clear that the new global conflict of the next century will develop between North and South. This responsibility weighs heavily on Europe, because of the pressure of hundreds of millions living in terrible conditions on the Mediterranean's southern shores with no visible future, contrary to the populations of Eastern Europe.

If it is true that an effective security system cannot exist without social justice, i.e. sound development and acceptable lifestyles, it is also true that without political stability there is no development. It is not a question of guaranteeing order for order's sake, but of creating the political conditions needed for sustainable development. If this is the task, it is therefore necessary to achieve an historical reconciliation in the Mediterranean between the North and South, with a commitment on the part of all, especially Europe.

Europe cannot disregard the North-South conflict because it is developing in a region and "sea" of which it forms part and where many of its interests converge. The fact that this area is one of the most unstable in the world means that Europe faces a cluster of serious risks rather than a single massive threat from one particular isolated area of crisis. We have already seen that traditionally, great "historic" conflicts converge politically in the Mediterranean.

Space in the Mediterranean is limited and the forces of conflict and tension are strong and violent, especially in the south. The Mediterranean is only a small pool in a global context, however the contradictions which destabilise it are emblematic, because the Mediterranean is a synthesis of the history of the world. It is an area inhabited by some of the most well-educated people in the world with three monotheistic religions facing

each other – Judaism, Christianity and Islam – and with three cultures – Western, Islamic and Orthodox.

The southern region is also one of the most underdeveloped areas of the world. Yet in this area, particularly to the east, there are some of the world's largest oil fields with a huge source of wealth. Until now instead of facilitating development and creating a proper welfare state, this wealth has generated a steady increase in military expenditure.

It is necessary to take into account the fact that the economic recession that hit rich countries in the mid-1980s caused even greater ruin in the economies of southern countries. These economies have been, until now, supported by international solidarity. But, in the absence of the adequate development policies and in the presence of a decreasing international economic aid, for the people of these countries there is no other alternative than emigration.

Misery, demographic explosions, religious and ethnic rivalry and recent environmental upheavals have sparked off an explosion of uncontrollable and contagious violence, with racism and religious intolerance assuming central roles. Poverty, the sense of unequal justice, the sense of humiliation, with roots in the times of colonisation, are the prime causes of the development of religious fundamentalism.

Western-type democratic regimes and political regimes conditioned by religious fundamentalisms also coexist in the Mediterranean. There are ferocious dictatorships and autocratic monarchies as well as parliamentary regimes and republics in permanently precarious states. Moreover, the Mediterranean region is the principal theatre of the conflict between North and South, given that it is more than anything else one between the West and Islam.

Unless its special characteristics are heeded, the conflict will become more irreversible as it is a conflict between values. It is primarily cultural and cannot be resolved or mediated by simply re-organising the distribution of wealth among people. On the contrary, the West must recognise diversity as legitimate and tolerable. Islamic values must be appreciated as having the same equal status as Western values. Western culture must show greater tolerance. After all, its traditions should encourage it to do precisely this, to question itself and make its position more relative. The West is clearly heir to the most enabling cultural tradition in this context.

This political and social framework illustrates the complex problems facing this area, and the numerous conflicts between neighbouring states. The origins of some of these conflicts are longstanding and seem insoluble. Often their roots lie in the very same peace treaties by which certain territories were divided between different states after the colonial wars and World Wars. For example, consider the conflict between the

Arab states and Israel or between Greeks and Turks, or Kurds and Turks.

These territories were divided at the negotiating table to satisfy the interests of victorious powers, without taking into account the identity and the aspirations of the people concerned. The loyalties imposed by the two superpowers after World War II forced the suspension of some of these historical conflicts, but they exploded again with the fall of the Berlin Wall and the end of Communism.

In the last fifteen years Western society has gone through a crisis of prestige and identity. This stems from cultural backgrounds as well as from the difficulty of ensuring attained standards of living are maintained. At the same time Islamic fundamentalism has spread. Its most strident expressions, as far as the West was concerned, were the Iranian revolution and the Gulf War. At the root of these two events, there is the ideological conflict between the Arab world and the West with the former's often violent rejection of the processes of social and political modernisation. This rejection does not involve the whole of the Arab world, as there are also moderate elements, however the feeling is growing.

The results of this are easy to identify at the level of interstate rivalry, particularly the increase in violations of human rights and the denial of the basic rules which are conditions of survival not only of a fully democratic regime, but even of a regime moving timidly towards democracy. The nature of these emerging tensions means they cannot be dealt with on a case-by-case basis. Before defining a strategy, Europe must attain a shared understanding of the problems of this area and perhaps we should go so far as to speak of its "mission". This is the only way in which Europe can achieve the appropriate profile to lead at this historical point.

Do the necessary conditions for the emergence of a single unified European position on these issues exist? Perhaps a common awareness will slowly appear, but it requires facing security problems on a global scale. It will be more difficult to achieve common attitudes and the willingness to make joint sacrifices. Democratic Europe has in fact been slowly extending its scope. Compare the geopolitical map of Western Europe today with that immediately after the war. The rules of democracy are now the common heritage of Western Europe. Since Spain and Portugal moved from a totalitarian to a democratic regime, Europe in effect presents a united political front. The fact that in the last twenty years the frontiers of democratic Europe have been extended has influenced the very process of integration.

Democratic culture rejects, as we shall see later, the use of force in relations between states. Democracy creates a climate of reciprocal trust.

Democratisation favours the production of the right conditions to tackle the problems of peace and security as "Europeans". This means facing old and new threats in a unified way, especially as far as European interests are directly concerned. This is also the case with critical situations in the Mediterranean. The different centres of crisis are all interrelated and for this reason they tend to spread over an ever wider area. If these emergencies are faced together, without necessarily resorting to military solutions, it would mean fostering cooperation at another level.

It would also mean not taking for granted the difficulties and misunderstandings that arise when Islamic reality is viewed from a great distance. Why should anything from the Islamic world be judged as implicitly anti-Western or as going against the interests of old Europe? Why should we distinguish *a priori* before examining evolving political realities that may or may not be pro-Western and then formulate different cooperation policies according to the various beneficiary countries?

Pessimistic forecasts regarding the future of Algeria are a case in point. Besides Islamic fundamentalism, there is also Islamic moderation and it is in the interest of Europe and the Western world to see that moderation prevails rather than extremism, by first avoiding sweeping judgements. The development of the relationship between the PLO and Israel, notwithstanding many difficulties, should persuade us that, while being wary of extremists in both rival camps, this is the best course to follow.

There are enough signs to indicate that many Arab countries are moving towards moderation. The events in September 1993 leading to the agreement on the autonomy of the Jericho and Gaza territories and the subsequent difficulty of putting it into practice again showed the contradictory division within the Arab world. There are those who are willing to negotiate and those who have taken an intransigent attitude to the historical problem of coexistence with Israel.

The peace process between Israel and Palestine is not an easy one. Arafat correctly defined this peace as the "peace of the courageous". Each step forward encounters new obstacles, as the murder of Rabin showed. However, peace in this area of the world does not depend just on the outcome of negotiations between the PLO and Israel. There are too many crises in the region, and too many intransigent protagonists. There will only be real peace when the method of dialogue is accepted by everyone, particularly Lebanon and Syria.

It is therefore in the interests of Europe to support by all means, even economic, the process of tranquillity and stabilise the position of Arafat, who assumes an emblematic role in the context of the forces of Arab moderatism. Any political downsizing of Arafat would reverse the progress made in the relations between Israel and Palestine. Arafat is at present

being attacked by extremists from both sides. On the right-wing of the PLO there are those who want to continue the Holy War against Israel and there are supporters of a western-leaning left wing, persons like Abdel Shafi, who accuse Arafat's leadership of being marred by nepotism. This faction does not want to wed the movement's traditional lack of organisational democracy with the democratic set-up which needs to be constructed in the autonomous territories where the Palestinian State is to be born. Unfortunately, even the noblest of initiatives (such as that aimed at guaranteeing authentic democracy within the PLO) at present may destabilise the situation and obstruct the peace process which has already faced innumerable difficulties.

The historic decision to concede autonomy to the Gaza and Jericho territories has in a way cancelled out the most traumatic rifts caused by the Six Day War of 1967. The decision to grant administrative autonomy to these territories not only provides the beginning of a solution to the Palestinian problem, but it will perhaps end the quarrel over the restitution of the territories occupied by Israel after the war with Egypt. There thus emerges a possible solution to traditional conflicts which have created instability in the Mediterranean. New political conditions are emerging which makes dialogue possible even between historical antagonists.

The most significant event in this context was the treaty signed in Cairo in February 1995 by Israeli Prime Minister Rabin, Palestinian leader Arafat, King Hussein of Jordan and Egyptian President Mubarak. The purpose of this agreement is to fight extremism through the systematic collaboration of the police of the four countries. This is the first time that the prospect of peace in the region does not depend on bilateral agreements but on a "working forum" formed by the principal local protagonists. This created two major blocs: a moderate bloc of these four entities and an opposing bloc led by Syria.

All things considered, only Europe can produce in this area an effective global security policy of lofty political inspiration and tackle problems that would otherwise lead to instability and disorder. Europe, unlike the US, also has the cultural instruments with which to understand this part of the world. Europe has always been in contact with the Arab world. Relations in this context cannot be established solely on grounds of military dissuasion. Certain contradictions within the Arab world cannot be ignored, but should be interpreted politically. The lack of a European political presence in this area would only allow the situation to escalate.

Every medium or small power will try to have a larger say than its neighbour-competitor and arm itself more heavily. Military expenses will cause starvation among people who are already hungry. A proliferation

of arms in a situation already heavily charged with political and social tension can only result in conflicts with inevitable repercussions in Europe.

The Cold War has come to an end. Yet the Mediterranean region is saturated with weapons. The reason may be the end of the Cold War itself. The protection of the two superpowers is over and everyone has set up shop alone. Since the political system which obliged aligned countries to show unwavering obedience to one of the two leading powers has gone, local conflicts are increasing. Furthermore, since the weapons of the great Soviet arsenal are now for sale, any country can buy what it likes without serious control.

Even though the peril of a Third World War has ceased to exist, stupefying sums of money are still being spent on armaments; around 1.9 million dollars per minute. This constitutes the greatest post Cold War scandal in the world as more and more people continue to die of hunger. The situation in the Mediterranean is particularly worrying from this point of view. In 1960, 8.3% of the world's expenditure on armaments occurred in this area. Twenty years later, the Mediterranean share of the global sale of arms had increased to 18.1%. In 1990, despite worldwide military expenditure cuts, the countries of the southern part of the Mediterranean still accounted for 13.9% of world expenditure. This tendency has remained unchanged if it is true that in 1992 Syria purchased 1.2 million dollars worth of arms from the Soviet Union.

The arms race has continued despite the fall of the Wall. Just compare the military expenditure of the countries on the northern shore of the Mediterranean with those on the south. Northern countries have cut down from 92 billion dollars to 87 billion in military expenditure between 1985 and 1990, while in the south expenditure increased from 66 billion to 71 billion dollars during the same period. This occurred despite the end of the Gulf War, the dissolving of the Communist empire and the solid establishment of the peace process with Egypt.

It is true that apart from Israel there are no nuclear powers in the area. But the escalation in conventional arms, the presence of missiles with nuclear warheads and the possession of chemical weapons by some countries make this area highly risky. Negotiations on disarmament in this area cannot reach a happy ending in terms of bilateral agreements, but through a single comprehensive security system including countries such as Egypt, Jordan, Syria, Iraq, Saudi Arabia, Algeria and Iran.

Israel, the only nuclear power in the region, has so far shown an unwillingness to adhere to the Treaty of Non-Proliferation. Israel believes that deterrents are essential to ensure peace, its enemies however argue that it is useless to discuss reducing conventional arms while Israel

remains a nuclear power. The conditions Israel demands from the others – recognition of the State of Israel, restraint and control of conventional arms; controls to be carried out, not only by supranational organisations but also by Israel itself and significant developments in the peace process – are just as difficult as those demanded of Israel. The truth is that Israel does not have as many men or (conventional) arms as the other countries put together. It can only count on the quality of its defence. Therefore, only a positive development in relations between the PLO and Israel can create the necessary political conditions for negotiations on the disarmament of the entire region. On this matter, however, it is difficult to break the deadlock produced by numerous cross-vetoes.

6. Military risks and the paradox created by the escalation of military expenditure, in sharp contrast to stagnant social expenditure, are set starkly against the living conditions of the overwhelming majority of the population in this area which offend the democratic conscience of developed countries.

Public opinion in these countries seems to have matured and is more demanding of its governments. Television brings into the homes of people in affluent countries scenes of collective despair and genocides caused by hunger and illness. These scenes deeply offend the conscience of those who have been raised to respect the values of human solidarity and the rule of law.

Today large masses of people migrate from poor countries to rich ones. They invade those neighbouring countries which can provide shelter to refugees as well as countries further afield. This creates great imbalances in very large areas of the world, because no protective barrier can really separate the affluent world from that of need and desperation. No rich country can absorb thousands upon thousands of foreign citizens who ask for help and work. The social problems that such a situation creates in receiving countries are reflected in their internal political balance. One witnesses xenophobic episodes based on purely emotional reasoning which is manipulated for political ends.

As well as these irrational manifestations, very real problems have to be faced in a responsible way because in some countries the huge number of foreign workers which have to be integrated can upset the very basis of peaceful cohabitation. This situation seems to be particularly serious in those countries which, having agreed to and enforced the Schengen Agreement and having abolished the controls on their internal frontiers, cannot stop third country nationals from moving from one place to another. The flow of migrants must be organised rationally as no country alone

can withstand the impact of repercussions which may damage its social and economic fabric as well as public law and order.

A global strategy is therefore necessary to control the flow of migrants and to direct it on the basis of an equal sharing of burdens among all countries concerned. A quota system must be established so reception of migrants is organised as well as possible. However, firstly, the social question at the root of mass emigration must be tackled to create in the countries of origin conditions for the survival of so many millions.

If we do not work towards this, the heavy burden on the shoulders of countries taking in immigrants will no longer be sustainable. Many migrants head for countries with a solid economy such as Germany and France. Other migrants head for countries with a less stable economy such as Italy. Taking this into consideration, what is happening is that the local population feels that its social tranquillity is threatened by the new arrivals. This is a real problem. In this context it is predictable that xenophobic and intolerant feelings will emerge.

It is important to again underline the nature of the task facing us. The tendency towards distorted economic development between the North and South must be reversed. This tendency penalises the rich world, besides giving the ever-poorer southern countries the role of producers of work-force for export. If the development of this area is not organised and sustained by the more developed countries, then the demographic growth of the countries in the South will disrupt the economies and social systems of the North.

The data available seem to justify the darkest predictions. If we limit ourselves to the Mediterranean, we can observe that the ratio between the number of inhabitants on the Southern and Northern shores was one to three in 1950. This relationship will be completely reversed in the year 2025. One third of the total population will live in the North and two thirds in the South. In 1990, the population of the North African shore (excluding Egypt) was 63 million. In 2025, it be 142 million.

From this information, an irrefutable truth emerges – demographic imbalance creates an imbalance of migration. Such a situation inevitably generates conflict between the rich countries, which host the immigrants, and poor countries which “produce” the immigrants. This conflict will be the most important question of the future, considering that demographic imbalance will continue to grow. The exodus of entire populations towards rich countries is the direct consequence of the unequal distribution of wealth between peoples. In contrast to former immigration, this new immigration is not a brief phenomenon. Immigration in the first fifty years of this century was the result of the unequal distribution of wealth between social classes within European countries. This situation

prompted many people to seek their fortune in the New World, outside Europe.

The new immigration, however, pushed masses of people to move from the underdeveloped world towards Europe. This is not easily reversible. Many still believe that modern capitalism will resolve the contradictions of a lopsided development involving the whole planet. But is it possible to invert the negative political and economic tendencies of capitalism and bring about a new economic world order? Only one provisional solution is immediately possible: to organise the efficient inflow of immigrants, on the basis of planned distribution between the rich nations. The tempting alternative to this solution is to seek to create an insurmountable barrier to keep out the immigrants. This alternative will not work. The definitive solution lies in the tenacious reduction of the demographic explosion, that is birth control. But who is to determine such control, the developed countries? This would not be a politically acceptable solution.

Policies aimed at controlling migrant flow are necessary for host countries. Yet to the people of the south these policies appear to be another source of harassment to exclude millions and millions who risk dying of hunger from survival. On one hand, this helps Islamic fundamentalism to gain a firmer grip even on populations who have always been friendly towards the Northern shore of the Mediterranean. On the other hand, it could make any politically fanatical act, any irresponsible initiative against the West appear to be an act of holy revenge against an intolerable situation. During the Gulf War, the popularity of Saddam Hussein among these populations was extremely high, because the Iraqi dictator appeared to be taking revenge against the rich on behalf of all the poor people of the South.

It is therefore necessary to control the flow of migrants, preferably through flexible measures without host countries imposing forced assimilation. To understand what should not be done, a great deal can be learnt from the case of the "Islamic veil" in France.

Many claimed that in a secular school the pupils could not use clothes which could manifestly show their belonging to a particular religion. The problem of the Islamic veil also posed the problem of the manner in which immigrants are to be integrated into the social texture of the country that welcomes them. By prohibiting Islamic girls from wearing the veil, a minority was being denied this right to preserve its collective identity. The veil is a symbol of Islam, an Islam which the Western man can, on occasion, appear as fundamentalist and politically violent. Their refusal of the veil was in reality the refusal of a minority religion.

This runs contrary to the principle of tolerance. Social harmony may not be imposed from above, it must respect the pluralist tendencies in

society. Tolerance demands the recognition of the identities which would otherwise be excluded; identities which have to be woven into the social context. One cannot be tolerant towards "different" individuals without tolerating as well the usage and the customs of the community of which those individuals form part. Any individual should not be made to renounce to his sense of belonging to the collective identity, in order for him to be able to enjoy his fundamental rights or to obtain the citizenship of the country which receive him. Tolerance is not a matter of allowing "compatible difference". There are differences which are harder to accept because they conflict with our different religious and political convictions, but such differences must be allowed. The distinction between liberalism and jacobinism is as follows: liberalism consents every individual to adopt his favourite lifestyle while the jacobite society suggests to his members to follow a certain model which is represented as the best for the protection of the common interest.

On this basis, every immigrant should be free to choose between his own social model and that of the host country. Assimilation cannot be imposed by law, but encouraged through the advantages of sharing a single social culture. Assimilation is more efficient, that is, when it is supported by factors and objectives which make the social model of the host nation desirable. The choice towards integration becomes irreversible in schools and in workplace. It must be added that military service in the host country becomes a real shortcut normally used to obtain full citizenship. Any other instrument of assimilation - especially of co-active assimilation - may give rise to reaction and to the creation of difficult situations and real tension which inevitably falls under the umbrella of the policy of public order, thus creating citizens who are dangerously marginalised. For example, it has been observed in this context that there is a double advantage gained by inserting non-naturalised foreigners in the police forces within those immigrant communities which tend to retain their own cultural identity (such is the case in France notably, but also in Great Britain, Belgium and Germany). Not only is assimilation encouraged (the immigrant sees his possible inclusion in the police force as a privileged position), but in this manner further bitter and permanent tension is avoided between a group of citizens which puts the law into action even when force, where necessary, and the great mass of immigrants who seem to have no choice but to experience more or less on the margins of society. From the experience gained in the US, the presence of members of the same religion and citizens of the same country within the police force creates a feeling of trust and avoids the conviction amongst immigrants that they are being treated differently because of their race. This also generates more discipline within the police force.

A single policy for cooperation is, however, necessary in the most underdeveloped areas, where the greatest flow of immigrants originate. Such a policy should start off the development process, especially in the creation of job possibilities by targeting investment to serve the interests of the receiving country, not those of the donor.

This problem is particularly felt in Europe given that integration between East and West has an enormous social cost because unemployment is today the common social problem in both parts of the continent. In a period when Western economies seem to be inclined towards expansion, wealth channelled towards underdeveloped countries is a guarantee for social peace in the developed countries themselves.

To this end it would be useful to establish a Bank for Mediterranean Development running along similar lines as the European Bank for the Development and Reconstruction of Eastern bloc countries. It is necessary however to find a solution to the problem of the debts of poor countries. The majority of these debts cannot be paid off and can only generate further resentment and ultimately a feeling of conflict ending in violence.

One thing is certain. All aid should be given within the context of specific development projects. The money for international cooperation should not be used to fill arsenals. Specific restrictions about money use should be made, such as the loss of advantages in the case of any increase in military expenditure.

From this it clearly results that a collective commitment is required of the international community and of Europe in particular, for the development and stability of the Mediterranean. If the concept of security is socio-political and no longer only humanitarian, we cannot talk of security in the Mediterranean as we once did, in terms of trying to "dissuade" the adversary through threats or the use of force.

In Europe, after World War II, there were two conflicting alliances. Today, with the end of the Cold War, the Mediterranean region is characterised by a multiplicity of crisis situations. On the other hand, the American Sixth Fleet is not in a position to maintain order in the region. A guarantee of stability and development cannot only be offered by the "private sector". Public commitment is also needed, commitment on the part of states, and especially European states. It is a matter of establishing relationships of trust in the area, which military measures alone cannot create. It is a matter of putting into practice effective cooperation programmes which require compatibility and complementary national behaviours. It is a matter of establishing between Europe and the countries on the southern shores of the Mediterranean a dialogue which is not vertical, from Europe to the rest of the Mediterranean, but horizontal. On these lines underlie the structure of the proposal which

emerged at the Barcellona Conference of 1995. No single state was made the sole bearer of the responsibility for the "sustainable development" of the Southern shores of the Mediterranean. Rather, projects of co-development inclusive of such fields as education, multi-media, etc., were envisaged. Thus, the most interesting aspect of the Barcellona proposal is that the flourishing of a prosperous society on Southern shores cannot result from a mere transfer of either technology packages or cultural models from North to South, but requires a strongly participative and co-productive response. The transaction cannot be merely receptive on the one side, and proactive on the other. Only with these conditions can cooperation guarantee security, because it will be inevitably translated into new lifestyles. Europe has shown this capacity to understand and the will to act in relation to the East. The same should also happen with the south.

North-west Europe was in conflict with north-east Europe during the Cold War, both politically and culturally. Liberal-democratic and free market Europe is now supporting the north east. The south needs the same solidarity. There are the conditions to create a "global village" in the Mediterranean. It is not a problem of economic growth, but of fostering a unified culture respectful of differences. Cultural cooperation is the basis for all forms of cooperation. The Mediterranean would be crossed more often, from north to south and vice-versa, as happens with the Atlantic.

The idea that security must not be entrusted just to military means must be inculcated whenever people believe that only weapons guarantee safe frontiers. Facts show that the situation is different. Arsenal do not guarantee security in the world, but force people to live in poverty. The persuasive capacity of great European democracies must be convincing in this respect. Political stability depends on the way in which the international community guarantees the development and the peaceful solution of conflicts between states. States must demonstrate through their behaviour that conflicts cannot be resolved with the definitive and irreversible victory of one side over another. The concept of total victory, through the use of force, must be banned from international relations. Faced with conflict, compromise, not victory, should be sought. Territorial dispossession, changing frontiers and the humiliation of an ethnic minority will not resolve conflicts. In this turbulent region of the world, there is the need to assert the principle that a military victory is politically ineffective. True victory is the acquisition of new opportunities for the future, in terms of economic development and political stability.

Everyone agrees that the situation in the southern Mediterranean is

more critical than before; that Europe must deal with threats, against which simply shifting troops from the Eastern to the Southern flank, is of little use. It is understood that a multi-dimensional reply is required, in which military aspects are not the surest means of guaranteeing security, because if the world is in danger of becoming an explosive dustbin, the danger cannot be prevented by more weapons. It is not by arms that the destructive potential mustered by marginal states with ill-intent can be neutralised, now that various powers can produce the atom bomb. It is obvious that security also depends on the careful use of military resources, which should be deployed when critical situations arise.

However, if we take into account the kind of threat previously described and the social and human factors behind it, we can see that security can be achieved through political and diplomatic "preventive" action. Conflicts need to be forestalled by the type of preventive action envisaged by Boutros Ghali in his "agenda for peace", despite the failure of preventive diplomacy in former Yugoslavia. They can be solved by tackling, once and for all, the important social questions from which they arise.

It is also necessary for military intervention to be tactful when handling situations of local crisis so these do not degenerate into true wars. There is need for international policing action every time the international legal order is seriously violated. A proper security framework for humanitarian operations and the protection of ethnic minorities threatened by extermination should also be guaranteed. The new tasks being set for military intervention require a body which is less intent on the passive defence of territory but more flexible and better organised to intervene in countries which are distant from its native land. The military establishment should, moreover, resist the temptation to impose a particular political regime against the will of local populations, even if it were democratic.

Peace guarantee in the post Cold War era requires all members of the international community to respect a minimum standard of the rule of law even if recourse to force is necessary. No single country can be expected to fulfil these duties alone. A collective response is necessary. Yet it is not enough to redeploy traditional systems of defence. A multi-dimensional security system must be set up to deal with all the factors determining political stability, prevention and conflict solution today.

It must start from one consideration: states of the northern and southern shores of the Mediterranean. The Mediterranean must also have a common policy for security because it is of fundamental importance to European security. Every European initiative in this area must take account of the need to building international relations based on systems where legal rules are valid for all and controlled by a single governing body for peace.

A European security system can only be valid if it refers to this new international order and if it uses all means possible to maintain it.

We can say that once Communism has come to an end, the West is now its own sole enemy. The end of Communism does not mean the end of problems which gave rise to it. Communism did not descend on us like an alien force from space; it was born within Western culture. The Communist utopia derived its force from the contradictions of Western development and democracy. The end of Communism presents capitalism with the challenge of building solidarity among and within states. Even the richer ones in which democracy succumbs to the logic of the "two-thirds society", according to the term coined by Peter Glotz, must cease condemning a third of their citizens to poverty.

The conflict between North and South cannot be solved by arms or by the instruments of ideological "penetration". Now that Communism is dead, the West has no alibi. Formerly the challenge of the danger of nuclear holocaust coming from the East was invoked by the West as an excuse for its incoherence and its failures to fulfil its obligations towards those parts of the world which were sinking in degradation produced by misery. Today these contradictions stand out without any obfuscating screens. This means that the West will be crushed by the weight of these contradictions. In this respect, it is unacceptable that certain declarations of principle have remained a dead letter. It is right to state: "The West of Enlightenment and civil rights is still to be attained. Democracy still needs to be taken seriously. This 'ideal West' appears more than ever as the concrete utopia that can only be achieved approximately."

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References

- R. Aliboni (ed), *L'Europa tra Est e Sud, Cooperazione e Sicurezza*, Milan, F. Angeli, 1992
- R. Aliboni, *European Security across the Mediterranean*, Chaillot Paper, no. 2, Paris, Institute for Security Studies (WEU), 1991
- R. Aliboni, "Previsioni epolitiche della Comunita' europea e dell'Europa occidentale", in *I Paesi della Sponda Sud del Mediterraneo e la politica europea*, Cemiss, Roma, 1994

- B. Angelet, *L'Islamisme en Algérie*, Louvain La Neuve, Carnac
- M. Livi Bacci, F. Martuzzi Veronese (eds.), "Le risorse umane nel Mediterraneo", *Popolazione e società al crocevia tra Nord e Sud*, Bologna, Il Mulino, 1990
- S. Birks and C. Sinclair, *Migration, the Time Bomb*, London, New York, Croomhelm, 1980
- B. Boutros Ghali, *An Agenda for Peace: Preventive Diplomacy, Peace Making and Peace Keeping*, New York, United Nations, 1992
- J. Calleja, H. Wiberg, S. Busuttil (editors) *The Search for Peace in the Mediterranean Region*, Mireva, Malta, 1994
- M. Cesa, *Defining Security: The Case of Southern Europe and the Superpowers in the Mediterranean*, ETS Editrice, Pisa, 1989
- J. C. Chesnais, *Les migrations de l'Europe de l'Est vers l'Europe de l'Ouest: de l'histoire (1946-1989) la perspective (1990-2000)*
- H. Dekmejian, *Islam in Revolution, Fundamentalism in the Arab World*, New York, Syracuse University Press; Y. Choueri, *Islamic Fundamentalism*, London, 1990
- W.J. Durch and B.M. Blechman, *Keeping in the Peace: the United Nations, in The Emerging World Order*, Washington, DC, The Henry L. Stimson Center, 1992
- W.J. Durch, *The Evolution of United Nations Peace Keeping*, New York, St. Martin's Press, 1992
- L. Ferhani, "Islamisme, laïcité et droits de l'homme", *L'Harmattan*, Paris, 1991
- P. Flores d'Arcais, *Etica senza fede*, Einaudi, Torino 1992
- E. B. Haas, "Some operational concepts of collective security", *American Political Science Review*, vol. 49, 1955
- F. Heisbourg, "Population's movements in post-Cold War Europe", in *Survival*, vol. XXXIII, I, January-February 1991
- P. Ingrao, "La democrazia nel tempo dell'atomica" in *Missili e potere popolare*, F. Angeli, Milan, 1986
- A. Kaletsky, *The Cost of Default*, New York, Twentieth Century Fund, 1985
- Disarmament Archives, 1983-1989, SIPRI Report, Dedalo, Bari
- G. R. Y. Kepel, *Intellectuels et militants de l'Islam contemporain*, Paris
- V. Kessler, *L'avenir économique méditerranéen: éléments pour une réflexion*, CEPPI, 1990
- Rapporto Brandt, *Nord-Sud: un programma per la sopravvivenza*, Milan, 1980, and South Commission 1990, *The Challenge to the South*, Oxford, Oxford University Press
- R. Laveau, "L'Algérie en état de siege", *Monde Arabe Maghreb-Machrek* 133, July to September 1991
- A. Levi, "La guerra fredda e il nuovo ordine mondiale", *Foreign Affairs*. October 1992
- R. Leyeau, "Islamic Veil and National Flag" in *The European Journal of International Affairs*, n. 10, 4 1990
- L. Martin, "National Security in a World Order", *The World Today*, February 1992
- M. Morakvasic, "La mobilità geografica ricerca per l'apertura delle frontiere"

- et la démocratisation dans les pays de l'Europe de l'Est", text presented to the colloquium 'Nation, Etat et Territoire en Europe de l'Est et en URSS', University of Toulouse-Le Mirail, 1990
- C. Pelanda, *I problemi della sicurezza nell'Est europeo e nell'ex Unione Sovietica*, Cemiss, Rome, 1994
- G. Pennisi-G.Scanni, *Debito, crisi e sviluppo*, Venice, Marsilio, 1991
- G. Pennisi, "Il Sud del Mondo nella sua interrelazione con l'Europa", in L. Guazzone (ed.), *L'Europa degli anni novanta. La geopolitica del cambiamento*, Milan, F. Angeli, 1991
- E. Remacle, "Les dispositions du Traité de Maastricht: politique étrangère et sécurité commune de l'Union Européenne", *Etudes Internationales*, 23, 2 June 1992
- G. Sacco, *Rapporto di ricerca su movimenti migratori e sicurezza nazionale*, CEMISS, Rome, 1993
- G. Salam, "Islam and Politics in Saudi Arabia", *Arab Study Quarterly*, 9, 3, summer 1987
- SIOI, *Prospects for Reform of the United Nations System*, CEDAM, Padua, 1992
- F.Sogliani, "Il risveglio dell'ONU", in *Politica Internazionale*, November 1988
- W.R. Thompson, "Collective Security re-examined", *American Political Science Review*, vol. 47, 1953
- R.Williamson, *Religious Fundamentalism as a Threat to Peace: Two Studies*, Life and Peace Institute, Uppsala, 1992 and O.Roy, *L'echec de l'Islam politique*, Paris, Seuil, 1992
- The Military Balance, 1991 to 1992*, Brassey's for the IISS, London 1991

CITTADINANZA E TUTELA DELLA PERSONA

PROFILI DI DIRITTO COSTITUZIONALE E DI DIRITTO CIVILE

GUIDO ALPA

1. I diritti dei cittadini

Accogliendo il significato sociologico di cittadinanza, intesa come il complesso delle situazioni che coinvolgono l'individuo in quanto parte di un aggregato sociale e volta a considerare in modo unitario la persona, (non quindi nella sua dimensione di consumatore, utente, risparmiatore, etc.) si è proposta una nuova elencazione dei diritti, che spazia dai diritti fondamentali, ai diritti sociali, agli interessi.

Di qui la classificazione di: diritti fondamentali, diritti dei consumatori, diritti degli utenti di servizi pubblici, diritti dei "soggetti economici", diritti dei contribuenti, diritti degli automobilisti, diritti dei turisti, e così via (Sciarretta, *I diritti dei cittadini*, Milano, 1992; AA. VV. *La nuova cittadinanza*, Roma, 1993). Così intesa, la cittadinanza non assume più solo il significato di appartenenza dell'individuo ad uno Stato, ma coinvolge la sua posizione con riguardo alla sfera delle libertà e alla sua collocazione sociale.

Si tratta di una *reductio ad unitatem* che può apprezzarsi sul piano politico, in quanto tende ad evitare la frammentazione delle posizioni di tutela; ma non vi riesce fino in fondo: da un lato, perché attualmente non vi è una normattiva generale che unifichi le diverse posizioni; dall'altro, perché ciascuna qualificazione presuppone una valenza giuridica dell'interesse tutelato, e tale valenza è data da regole specifiche dirette a proteggere il singolo nella specifica dimensione considerata.

2. La persona nei testi costituzionali

Nelle diverse esperienze la problematica dei diritti della persona si sfrangia in alcune direttrici di base. Là dove si è radicata una tutela costituzionale "forte", i diritti della persona trovano il loro fondamento - quale referente normativo - nei testi costituzionali, nella loro elaborazione

giurisprudenziale ad opera delle corti costituzionali, e nelle elaborazioni dottrinali: è il caso dell'esperienza tedesca (v. ad es. Haeberle, *Le libertà fondamentali nello Stato costituzionale*, trad. it. parziale, Roma, 1993; Alexy, *Theorie der Grundrechte*, Francoforte, 1986).

Là dove la rilevanza costituzionale della dimensione della persona è meno forte, perché i riferenti normativi sono più apprezzati nella loro valenza politica che non nella loro valenza giuridico-formale, la problematica è collocata nell'ambito delle libertà pubbliche, come è il caso dell'esperienza francese (Frangi, *Constitution et droit privé*, Aix Marseille, Parigi, 1992).

L'esperienza italiana si colloca in una posizione intermedia: da un lato, le fa difetto la costruzione teorico-dogmatica dei diritti fondamentali; dall'altro l'apporto dei cultori del diritto privato ha fatto sì che la tematica delle libertà individuali potesse essere ricondotta nell'alveo del principio generale di tutela della persona ex art. 2 Cost., sicché in esso hanno trovato spazio e tutela anche i diritti della personalità.

A questi indirizzi si salda l'indirizzo sovranazionale che promuove la tutela dei diritti umani.

La tematica della normazione delle diverse dimensioni della persona è stata esaminata nell'esperienza statunitense anche dal punto di osservazione dell'analisi economica del diritto.

3. L'analisi economica del diritto

Non è ancora stata tentata dalla nostra cultura giuridica un'analisi economica dei diritti della persona: nelle introduzioni e nelle discussioni su questa tecnica interpretativa si è dato rilievo ad altri settori che, avendo solido contenuto patrimoniale, si prestano maggiormente all'applicazione delle categorie economiche; per i diritti della persona l'ostacolo è al tempo stesso concettuale e ideologico: concettuale, perché pur avendo i diritti della persona anche un contenuto economico - si pensi all'utilizzazione del nome o dell'immagine - ripugna pensare alla dignità umana, alla libertà, ai diritti della personalità, che sono segni inequivoci del tasso di civiltà e democrazia di una società, quasi come se si potessero valutare in termini pecuniari, e come se il loro riconoscimento e la loro garanzia (che pure hanno un "costo") potessero essere oggetto di negoziazione o di limitazione per ragioni di carattere economico; ideologico, perché, usciti i diritti della persona dalle maglie strette del condizionamento politico e sociale proprio delle società ottocentesche, il loro apprezzamento economico riprodurrebbe, con termini nuovi, quel condizionamento antico.

Le perplessità all'analisi economica dei diritti della persona si possono tuttavia attenuare se si muove da alcuni assunti di base che possono

orientare l'interprete: (i) l'assunto secondo il quale i diritti della persona, per la loro natura e il loro rango, debbono in ogni caso prevalere sugli interessi di tipo strettamente patrimoniale; (ii) l'assunto secondo il quale, accertato il loro "costo", non sia possibile organizzare una scala delle priorità, in cui tali diritti siano collocati in ragione del costo; (iii) l'assunto secondo il quale l'analisi economica non può assumere un ruolo primario, e tantomeno esclusivo, nell'analisi degli aspetti giuridici di tali diritti; (iv) l'assunto secondo il quale la brutalità delle conclusioni non deve distogliere dall'attenzione per il nuovo metodo: la brutalità delle conclusioni non implica affatto che esse si debbano accogliere e tantomeno che si debbano mettere in pratica.

Così sgombrato il campo dal rischio di essere indotti a compiere operazioni contrastanti con la lettera e con lo spirito delle fonti costituzionali e comunitarie, val la pena di introdursi in questa nuova prospettiva, e soffermarsi sui risultati acquisiti dalla dottrina - in questo caso, di matrice statunitense - per apprezzarne, pur sommariamente, il significato. I punti di riferimento restano ancora le opere di Richard Posner e quelle di Guido Calabresi.

3.1. La tesi di Richard Posner

Posner tratta delle materie che secondo la nostra cultura giuridica si ascrivono ai diritti della persona in più passi del suo manuel (*Economic Analysis of Law*, II ed., Boston e Toronto, 1977). La privacy è menzionata a proposito dei "property rights", intesi in senso lato, cioè in una dimensione più ampia dei diritti sui beni immobili e mobili (op. cit., p. 55). E il discorso è espresso in termini di costi e valori: l'uso di un'immagine sarà fatto se il suo costo è inferiore al valore di sfruttamento. La celebrità che si oppone all'uso della sua immagine in un messaggio pubblicitario non si preoccupa tanto di dare pubblicità al proprio volto, quanto del fatto che il suo impiego abusivo le ha impedito di ottenere un corrispettivo, oppure di farne un più vantaggioso impiego. Riconoscendo il diritto alla privacy si colloca l'immagine al punto in cui il suo uso è il più vantaggioso. Ma la comparazione dei costi conduce a diversi risultati là dove i costi di negoziazione per l'impiego di dati personali diventi troppo oneroso. Così, nel caso di alienazione di una lista di indirizzi di abbonati da parte della società editrice di un giornale a larga diffusione ad imprese interessate ad utilizzarla per recapitare i loro messaggi pubblicitari, il costo di negoziazione per acquisire da ciascun abbonato il consenso alla trasmissione della lista sarebbe troppo alto; Posner ritiene pertanto che il diritto alla privacy, in questo caso, non si deve riconoscere all'individuo (cioè all'abbonato), bensì alla società editrice.

L'uomo non può essere oggetto di diritti, e quindi ripugna alla coscienza umana, prima ancora che alle regole giuridiche, ammettere che i genitori possano sottrarsi ai costi di mantenimento e di educazione dei figli attraverso la loro alienazione onerosa a terzi. Provvede a questo desiderio dei genitori di liberarsi dei figli, o all'incuria dei genitori per i figli, l'istituto della adozione. Un istituto gestito o dallo Stato, o, là dove sia consentito, da agenzie private; fiorente è inoltre il mercato nero, di dimensioni internazionali. Posner si chiede le ragioni della opposizione all'ammissibilità del "commercio" dei minori e cerca di superarle con la sua logica economica; in più, si preoccupa di eliminare il mercato nero, ma raggiunge la conclusione che l'allocazione della risorsa umana (minori abbandonati) mediante criteri economici non perverrebbe a soluzioni accettabili, in quanto in ogni caso sarebbero privilegiati gli acquirenti dotati di maggiori disponibilità economiche e sarebbero trascurati i minori con handicap o comunque poco attraenti (op. cit., p. 111).

Anche le regole che contrastano la discriminazione dei poveri e di coloro che appartengono ad etnie diverse da quella maggioritaria sono passibili di interpretazione economica. Quanto ai poveri, la giurisprudenza della Suprema Corte statunitense ha fondato la teoria del "giusti bisogni minimali" (Griffin v. Illinois, 351 U. S. 12, 1956) secondo la quale è necessario assicurare un minimo di servizi sociali anche a coloro che non sono in grado di pagarli. In questo senso, si ottiene una redistribuzione delle risorse che deve essere esaminata alla luce del costo dell'assicurazione privata da parte dei singoli. E per quanto riguarda i diritti dei consumatori, in tanto è possibile riconoscerli, in quanto sia possibile assicurare piena libertà economica all'impresa (op. cit., p. 507). Quanto agli appartenenti ad etnie minoritarie, il risultato della legislazione antirazziale non deve portare ad una discriminazione alla rovescia, perché economicamente si favorirebbero le classi agiate medie delle etnie minoritarie a svantaggio delle classi di etnia maggioritaria (op. cit., p. 538).

Il contributo di Guido Calabresi è ben più solido, perché tiene conto non solo della logica economica in senso stretto, ma dei valori sui quali si fondano gli ordinamenti. L'analisi diviene drammatica quando si debbono affrontare i problemi di priorità nella assegnazione degli organi da trapiantare.

La tematica della persona trova tuttavia il suo *humus* naturale nei testi normativi e, primieramente, nelle Costituzioni.

4. Le Costituzioni

Nei testi costituzionali la capacità giuridica si affianca, spesso si sovrappone o si confonde con i diritti civili e politici, e con i diritti della

personalità. Al di là delle cautele che si debbono assumere nel confronto testuale, poiché non sempre le medesime espressioni alludono al medesimo significato, e al di là delle addizioni dell'interprete nell'elaborazione dottrinale e giurisprudenziale, e ancora al di là del problema della effettività, si possono riscontrare molte analogie e qualche rilevante differenza.

Occorre comunque operare due precisazioni preliminari: (i) per ragioni storiche e culturali, non è possibile raffrontare la "Dichiarazione dei diritti" francese, che risale al 1789, e che è richiamata dalle costituzioni francesi successive, con le Carte dei diritti oggi vigenti negli altri paesi europei; e così pure l'elenco dei rights riconosciuti ai cittadini inglesi dalla Costituzione che è di fronte consuetudinaria, non scritta. Su questi importanti testi e problemi si prende posizione altrove; (ii) non si possono comprare senza collocarle nell'epoca storica in cui sono state approvate costituzioni ottocentesche e costituzioni del nostro secolo. Le prime sembrano affondare le loro radici nella netta distinzione tra rapporti cittadino / Stato e rapporti tra cittadini (affidati ai codici civili); le seconde risentono degli sconvolgimenti istituzionali e sociali provocati dai conflitti mondiali, e si ispirano alle dichiarazioni universali dei diritti dell'uomo.

4.2. Nella Costituzione belga, che risale al 1831, al tit. II (i Belgi e i loro diritti) si fa riferimento alla cittadinanza (art. 4) e alla naturalizzazione (art. 5); si dispone che nello stato non vi sia "alcuna distinzione di ordini" (art. 6), si tutelano le libertà individuali (art. 7 ss.) si è aggiunto l'art. 6 bis secondo il quale "il godimento delle libertà e dei diritti riconosciuti ai Belgi deve essere assicurato senza discriminazioni. A tal fine, le leggi e i decreti garantiscono in particolare i diritti e le libertà delle minoranze ideologiche e filosofiche"; la capacità giuridica non è menzionata, ma per induzione si ricava dal disposto dell'art. 13 che abolisce la morte civile; si stabilisce altresì che il segreto epistolare è inviolabile (art. 22).

Nella Costituzione del Lussemburgo (del 1868) non compaiono le libertà civili.

I "diritti personali" sono contemplati nella Costituzione irlandese del 1937 tra i diritti fondamentali (art. 40). L'eguaglianza è garantita, non sono conferiti titoli nobiliari dallo Stato; lo Stato garantisce, in quanto possibile, la difesa e l'azionabilità dei diritti personali del cittadino, e protegge nel modo migliore possibile contro le minacce ingiuste la vita, la persona, l'onore e i diritti di proprietà di ogni cittadino. In coerenza con la intonazione confessionale della Costituzione (che si apre con l'invocazione della Ss. Trinità, di Gesù Cristo, della Prudenza, della Giustizia e della Carità) lo Stato "riconosce il diritto alla vita del nascituro

e, con il debito riguardo al pari diritto alla vita della madre, garantisce con le sue leggi il rispetto, e, per quanto possibile, la tutela e l'azionabilità di tale diritto". Si riconosce anche l'esistenza di diverse "classi" tra le quali la proprietà e il controllo delle risorse materiali della comunità debbono essere distribuiti nel modo migliore per contribuire al bene comune (art. 45).

Il testo costituzionale (artt. 2, 22) italiano è stato assunto quale modello di costituzione lunga e pregevole dalla gran parte delle costituzioni europee di recente introduzione.

La Legge fondamentale di Bonn (del 1949) proclama la intangibilità della dignità dell'uomo, riconosce gli inviolabili e inalienabili diritti dell'uomo, e rende i diritti fondamentali immediatamente applicabili (art. 1); tra i diritti di libertà, dispone che ognuno abbia diritto al libero sviluppo della propria personalità, in quanto non violi i diritti degli altri e non trasgredisca l'ordinamento costituzionale o la legge morale; riconosce il diritto alla vita e all'incolumità fisica, nonché la libertà personale (art. 2); oltre alle altre libertà civili, prevede l'invulnerabilità del segreto epistolare, del segreto postale e delle telecomunicazioni (art. 10); estende i diritti fondamentali alle persone giuridiche nazionali, in quanto ad esse applicabili (art. 19), riconosce il diritto di resistenza (art. 20). Si richiamano altresì (all'art. 140) alcune disposizioni della Costituzione di Weimar (del 1919), in cui si adombra la nozione di capacità giuridica e di capacità d'agire: l'indipendenza del godimento dei diritti civili e politici e dell'accesso agli uffici pubblici dalla confessione religiosa.

Anche nella Costituzione danese (del 1953) non compare la capacità giuridica; tuttavia l'art. 70 dispone che nessuno possa essere privato del godimento dei diritti civili e politici, né essere dispensato dagli obblighi civili, a causa della sua professione di fede o della sua origine; ed uguale disposizione si rinviene a proposito delle limitazioni alla libertà personale (art. 71); si prevende altresì la soppressione con legge di ogni restrizione della libertà e dell'uguaglianza nell'accesso alle professioni, quando non sia giustificata dal bene comune; si prevede altresì il diritto di ogni persona (kommuner) di amministrare liberamente i propri interessi sotto il controllo dello Stato (art. 82), si abolisce ogni privilegio collegato alla nobiltà, al titolo o al rango (art. 83), e l'abolizione di feudi, maggioraschi e fedecomessi immobiliari o familiari (art. 84).

Nella Costituzione greca (del 1975/1986), tra i diritti individuali e sociali si esclude che ai cittadini greci si possano conferire o riconoscere titoli di nobiltà o di distinzione (art. 4 c. 7), si riconosce il diritto di ciascuno di sviluppare la propria personalità liberamente, e si garantisce l'assoluta protezione della vita, dell'onore e della libertà, senza distinzione di nazionalità, razza, lingua, convinzioni religiose o politiche (art. 5 cc. 1 e

2); il domicilio è qualificato come un "santuario" e si dispone che la vita privata e familiare dell'individuo sia inviolabile (art. 9); i diritti dell'uomo in quanto individuo ed in quanto membro della società sono posti sotto la garanzia dello Stato, i cui organi sono tutti obbligati ad assicurarne il libero esercizio (art. 25).

Nelle costituzioni più recenti i diritti della personalità assurgono direttamente al rango costituzionale, senza necessità di ricorrere alle disposizioni di apertura, vere e proprie clausole generali, quali l'art. 2 della Cost. it. e l'art. 2 della Legge fondamentale di Bonn.

La Costituzione portoghese (1976) prevede il principio di universalità (art. 12) secondo il quale i cittadini godono dei diritti e sono soggetti ai doveri stabiliti dalla Costituzione, e così le formazioni sociali (che, in questo contesto, divengono esse stesse titolari di diritti e doveri); il principio di eguaglianza, senza discriminazioni di origine, sesso, razza, lingua, territorio, provenienza, religione, convinzioni politiche o ideologiche, istruzione, situazione economica, condizione sociale (art. 13); tali precetti sono immediatamente applicabili (art. 18) e si riconosce il diritto di resistenza (art. 21). Tra i diritti, libertà e garanzie personali, si dispone che la vita umana è inviolabile (art. 24) e così pure l'integrità fisica e morale. Si tutelano costituzionalmente anche i diritti della personalità tipici della disciplina civilistica, quali: l'identità personale, la capacità civile, la cittadinanza, il buon nome e la reputazione, l'immagine, la parola, l'intimità della vita privata e familiare (art. 26); tra i diritti e doveri economici, oltre ai diritti dei lavoratori si contempera la tutela dei consumatori (art. 60) in ordine al diritto alla qualità di beni e servizi usati, alla formazione e alla informazione, alla protezione della salute, alla sicurezza e i loro interessi economici e alla riparazione dei danni; si proibisce la pubblicità occulta, indiretta e ingannevole, e si garantisce il diritto all'audizione delle associazioni dei consumatori.

La Costituzione spagnola del 1978 dispone che la dignità della persona, i diritti inviolabili che le appartengono, il libero sviluppo della personalità, il rispetto della legge e dei diritti altrui costituiscono il fondamento dell'ordine pubblico e della pace sociale, e richiama i diritti riconosciuti dalla Dichiarazione universale, alla cui luce si debbono interpretare le disposizioni costituzionali (art. 10). Si prevede che la maggiore età si compia al diciottesimo anno (art. 12); si sancisce il principio di eguaglianza (art. 14) senza discriminazioni degli Spagnoli per ragioni di nascita, razza, sesso, religione, opinione o qualsiasi altra condizione o circostanza personale o sociale. Si garantisce per tutti il diritto alla vita e all'integrità fisica o morale (art. 15), nonché il diritto all'onore, all'intimità personale e familiare e alla propria immagine, e si precisa che la legge limita l'uso dell'informatica per garantire l'onore, l'intimità personale, e familiare

dei cittadini ed il pieno esercizio dei loro diritti (art. 18). Tra i diritti dei cittadini si contempla il diritto alla salute (art. 43) e il diritto di godere di un ambiente adeguato per lo sviluppo della persona (art. 45). I pubblici poteri tutelano i minorati fisici e psichici (art. 49), e garantiscono i diritti dei consumatori e degli utenti (art. 51). A questo proposito si specifica che tali diritti riguardano la sicurezza, la salute e gli interessi economici e che i pubblici poteri promuovono l'informazione e l'educazione dei consumatori (secondo l'elencazione della Risoluzione comunitaria del 1975). I diritti fondamentali possono essere fatti valere direttamente dinanzi al giudice ordinario (art. 53).

Anche la Costituzione olandese è recente (1983), risalendo la legge fondamentale precedente al 1814. Vi si rinvencono il principio di eguaglianza e il divieto di discriminazioni fondate sulla religione, su convinzioni personali, opinioni politiche, sulla razza, il sesso e la clausola di chiusura "ogni altro motivo" (art. 1). Si riconosce il rispetto di ciascuno alla sua vita privata, e la tutela della privacy si estende alla registrazione e alla diffusione di dati personali; si riconosce il diritto di prendere conoscenza dei dati registrati e della loro utilizzazione nonché la possibilità di correggerne l'esattezza (art. 10).

Nel testo costituzionale italiano la qualificazione terminologica della persona, la cui menzione colloca il riferimento nell'ambito di singole fattispecie è variegata e ricchissima. Già l'analisi lessicale rivela quante siano le situazioni giuridicamente rilevanti prefigurate dai Costituenti, e come la persona sia al centro dello stesso impianto normativo fondamentale. Di volta in volta considerata come membro di una entità (come il popolo), e come membro dell'organizzazione politica (elettore, eletto), come parte dell'organizzazione amministrativa (funzionario, impiegato, dipendente), e soprattutto nei ruoli familiari (coniuge, genitore, figlio, minore), sociali (cittadino, straniero), professionali (lavoratore, professore, avvocato, magistrato, militare, agente di polizia) ivi compresa la considerazione delle condizioni economiche (non abbiente, indigente) e le condizioni di marginalità (minore, inabile, minorato).

5. La persona fisica

"Persona fisica" è l'espressione impiegata dai redattori del codice civile per indicare la grande partizione dei soggetti di diritto, che sono appunto "uomini" (o "uomini e donne" come suggerirebbe di precisare la diatriba terminologica, fine a se stessa, in corso da decenni nella cultura giuridica statunitense) ed enti, quali finzioni giuridiche di imputazione di rapporti, diritti, doveri ad aggregazioni di persone e di beni. Dal punto di vista formale, l'impiego terminologico di persona fisica già lascia intendere

che l'individuo come tale è "persona fisica" e pertanto ogni individuo è destinatario - di per sé - di precetti, di diritti e dei doveri, in generale di situazioni giuridiche attive e passive; e quindi nel mondo del diritto già l'individuo è considerato "persona", in cui l'aggettivo qualificativo "fisica" serve solo a distinguerlo da altre persone che non sono individui, ma creazioni fittizie. Quindi, già a livello terminologico si potrebbe superare la concezione della persona fisica come semplice fattispecie; in ogni caso, la dottrina recente esprime un orientamento nettamente prevalente tendente a superare la concezione formalistica, e a considerare la "persona umana" come un valore, anzi, il valore fondamentale sul quale poggia l'intero ordinamento giuridico: se si sia in presenza di un valore "pre" - giuridico, ovvero di un valore riconosciuto e garantito dall'ordinamento giuridico è discussione non ancora sopita, di difficile, forse impossibile soluzione, attesa la irriducibilità ad un unico metro delle due concezioni opposte, giusnaturalistica l'una, giuspositivistica, l'altra.

In ambito naturalistico, e quindi in ambito giuridico, si distinguono poi: la persona dalla vita, dalla salute, dalla integrità fisica, dall'embrione, dal corpo, dalle singole parti del corpo, dagli stati mentali, dai sentimenti, dalle sofferenze, dai diritti della personalità, e così via: tutti questi sono aspetti dell'individuo o della persona, intesa in modo statico e in modo dinamico, che nel mondo del diritto ricevono qualificazioni e trattamento giuridico differenziati. L'entità unitaria della persona non è mutilata dal suo sfrangiamento in questi aspetti: sono le esigenze pratiche offerte dal modo di porsi della persona che hanno suggerito o hanno imposto l'identificazione e la frantumazione di questi aspetti.

Si pone perciò l'esigenza di identificare biologicamente e giuridicamente il momento di inizio della vita e il momento della sua cessazione: concepimento, vita embrionale e fetale, nascita e morte sono le fasi temporali in cui si articola l'essere umano.

6. Distinzioni concettuali

La dottrina attuale insiste nella distinzione tra capacità giuridica e capacità d'agire, tra capacità e soggettività, tra capacità e personalità, tra capacità e legittimazione. Queste distinzioni sono al tempo stesso didascaliche e normative, perché sono il frutto, come più volte si è messo in luce, di itinerari culturali e ideologici differenti, che in parte sorreggono il dato normativo, in parte vi si sovrappongono, in parte da esso si distaccano o tendono a correggerlo ed integrarlo. Le stesse definizioni di questi termini sono espressione della cultura e dei valori di cui si fa espressioni l'interprete, sicché nell'impossibilità di offrire una definizione univoca di tali concetti, appare preferibile di volta in volta segnalare le

scelte dell'interprete: si è già sottolineato, in ogni caso, che si è in presenza di un termine storicamente e geograficamente determinato, e perciò di un concetto relativo (come già ha messo in luce Fabricius, *Relativitat der Rechtsfahigkeit*, Monaco-Berlino, 1963, p. 49 ss.), non assoluto. Ma se la dottrina continua a operare queste distinzioni concettuali, si deve prendere atto, senza indulgere ad un behaviorismo meccanico, che esse non sono suggerite solo da regioni sistematiche, ma conservano un ruolo operativo insopprimibile. Insomma, la tesi di Puchta (*Pandekten*, Lipsia, 1872, p. 36), pur apprezzabile, secondo la quale persona, capacità giuridica, personalità sono espressioni fungibili, non risponde, allo stato, agli indirizzi oggi ancora prevalenti. E tuttavia si fa espressione, oggi, di una esigenza essenziale, rivolta a incentrare sulla persona, e quindi sul suo modo di essere nel mondo del diritto, unitaria e infrazionabile.

E' ancora attuale infatti la definizione di capacità giuridica intesa come attitudine o idoneità alla titolarità di diritti e di doveri, o ad essere soggetto di diritto; ma divergono le concezioni che distinguono una capacità di agire, da quelle che più semplicemente distinguono una capacità giuridica da una capacità di agire, quest'ultima intesa come idoneità a concludere validi negozi giuridici, da quelle che unificano capacità giuridica e capacità di agire. L'idea di capacità intesa in modo unitario è la più rispondente ad istanze sistematiche e filologiche, oltre che alle istanze di valorizzazione della persona (Perlingieri, *La personalità umana nell'ordinamento giuridico*, Camerino - Napoli, 1972) atteso che anche i testi normativi, come ha dimostrato Falzea (*Capacità (teor.gen.) in Enc.dir.cit.*, p. 12 ss.), sono imprecisi e spesso tra loro contraddittori.

Nella revisione critica delle diverse interpretazioni e dei concetti sopra enumerati si insiste sull'essere la capacità giuridica un "principio generale" (Stanzione, *Persona fisica*, I, *Dir. civ.*, 1). Sia si assuma come tale, secondo la concezione positivista, una regola di carattere generale indotta da regole positivamente espresse, sia che si accolga la concezione giusrealistica, di prassi creative di regole (Alpa, *I principi generali*, Milano, 1993) la capacità in sé non può essere considerata un principio: il principio sarà piuttosto espresso in formule normattive, e cioè come regola generale di riconoscimento e tutela dei valori della persona.

Ancora. La nozione di capacità giuridica generale, distinta dalla capacità giuridica speciale può essere criticata, ma non fino al punto di negarne la consistenza e l'utilità: semmai, si potrà far cadere la capacità giuridica speciale e ricondurla alla nozione originaria e unitaria.

La distinzione tra capacità d'agire deve essere riformulata: al tempo stesso, la distinzione concettuale non si deve trasformare in distinzione tra le persone, assegnando ad una o più categorie così ritagliate una dimensione subalterna; e neppure in una qualità generale del soggetto.

Di qui la tesi che la capacità di agire sia data dall'attitudine materiale alla cura dei propri interessi (Stanzione, op. cit., p. 11).

Muovendo da questa soluzione, si tratteranno di seguito le c.d. limitazioni alla capacità (giuridica) derivanti dall'età, dal sesso, dall'infermità, e dalle altre distinzioni prese in considerazione dalla legge, non come formule discriminatorie, ma piuttosto come formule descrittive che denunciano l'esistenza di discriminazioni e l'esigenza di superarle, sempre in applicazione del principio generale di tutela della persona. Analoghe distinzioni riguardano la capacità d'agire: anche a questo proposito, si darà conto degli orientamenti giurisprudenziali, espressivi del diritto vivente, ancorché in contrasto con quanto qui sostenuto, e con le scelte concettuali proposte.

La distinzione tra capacità giuridica e soggettività è sostenuta dalla c.d. teoria organica, per cui il soggetto giuridico è una fattispecie, composta da substrato materiale (l'individuo) e da riconoscimento formale (Falzea, op. ult. cit., p. 10); e propugnata in modo logico dalla teoria positivista kelseniana, che vede nella persona il complesso dei doveri giuridici e dei diritti soggettivi, per cui persona e personalità sono o sinonimi o superfetazioni della capacità giuridica (Kelsen, *La dottrina pura del diritto*, Torino, 1966, p. 197). Storicamente, l'identità è sicura, ma deve essere mediata dalla ripartizione delle persone negli status di appartenenza.

Nella nuova prospettiva che assume l'individuo-persona a base dell'ordinamento, la distinzione tra capacità giuridica e personalità, quanto alle persone fisiche, non ha concreta rilevanza, e quindi deve essere abbandonata.

Tra capacità e legittimazione passa poi un'ulteriore differenza: la legittimazione implica capacità a disporre, e quindi si differenzia dalla capacità (giuridica), in quanto questa non implica di per sé l'attitudine a disporre; e dalla capacità (di agire) per la medesima ragione (Rescigno, *Legittimazione*, dir. sost., Nss D. It., IX, Torino, 1963, p. 717).

7.1. Il modello normativo del codice civile italiano

Il codice civile si apre con dieci disposizioni dedicate alle "persone fisiche": alcune di esse riguardano aspetti del soggetto: capacità giuridica (art. 1), capacità d'agire (art. 2), età (art. 2), morte (sotto il profilo della commorienza, art. 4); altre riguardano alcuni aspetti della personalità: atti di disposizione del corpo (art. 5), nome e pseudonimo (artt. 6-9), immagine (art. 10). Il testo attuale ha subito due modificazioni: all'art. 1 è caduto il secondo comma ("Le limitazioni alla capacità giuridica derivanti dall'appartenenza a determinate razze sono stabilite da leggi speciali"), abrogato dall' art. 1 del r.d.1.20.1.1994, n.25 e dall'art.3

d.lgs.lt.14.9.1944,n.287; dell'art.2, che fissava la maggiore età al ventunesimo anno, è rimasta la disposizione secondo la quale "con la maggiore età si acquista la capacità di compiere tutti gli atti per i quali non sia stabilita una età diversa"; è stata sostituita la prima parte, che fissa la maggiore età al diciottesimo anno ed è stato aggiunto un secondo comma ("Sono salve le leggi speciali che stabiliscono un'età inferiore in materia di capacità a prestare il proprio lavoro. In tal caso il minore è abilitato all'esercizio dei diritti e delle azioni che dipendono dal contratto di lavoro") dall'art.1 della l.8.3.1975, n.39, entrata in vigore il 10.3.1975; la medesima legge reca norme transitorie (artt. 24, 25).

L'origine del nuovo testo è illustrata nella Relazione della Commissione reale (p. 31) sulla base della necessità di colmare una lacuna presente nel codice civile del 1865; lacuna ovviata tenendo conto dei codici civili più recenti, rispetto all'epoca della codificazione, e degli orientamenti giurisprudenziali maturati sotto il codice previgente. Già Roberto de Ruggiero aveva osservato che il codice civile del 1865 non presentava in questo settore una organica sistemazione, in quanto i requisiti della nascita, la commorienza, la premorienza, erano disciplinati nel libro III in tema di diritto ereditario, sub artt. 724, 924; inoltre, faceva difetto un titolo generale contenente l'elunciazione dei principi sulla capacità e sugli attributi della personalità (Istituzioni di diritto civile, vol. I, VII ed., Messina-Milano, 1934, p. 325, n. 1).

La stessa Commissione chiarisce le tecniche di redazione di queste disposizioni: si voleva evitare di enunciare formule di carattere didascalico e di incorrere in non opportune anticipazioni della disciplina dei particolari istituti.

Pur espone in modo chiaro, le regole in esame non sono state concepite (come accadde per il codice civile svizzero) come se dovessero essere intese compiutamente da chi non fosse provisto di cultura giuridica: vi si impiegano, infatti, termini tecnici privi di definizione (quali "capacità giuridica", "capacità di agire", "ordine pubblico", "buon costume", "risarcimento dei danni"), e termini che, pur correnti nel linguaggio comune, assumono un significato giuridico tecnico (quali "nascita", "nome", "pseudonimo", "immagine"); non si indica la definizione di morte, e si lascia al procedimento induttivo la definizione di "commorienza" (morte contemporanea di più persone). Lo stesso termine di "persona", impiegato nel titolo del libro I, e nella dizione del titolo I, nonché negli artt. 4, 6, 7, 9, 10 non è definito. Il che conferma sia la tesi secondo la quale la disposizione per poter essere applicata richiede di essere trasformata in "norma", sia che le addizioni dell'interprete integrano il contenuto della disposizione. La stessa disposizione, a seconda del soggetto che la usa, e a seconda dell'epoca e del contesto in cui si usa, varia quindi di significato.

In ogni caso, è necessario un bagaglio concettuale - di concetti giuridici, ovviamente - a cui lo stesso legislatore fa rinvio.

7.2. *I modelli vigenti coevi al codice civile*

Nessuna utilità poteva presentare, all'epoca della codificazione, il Code Napoléon, sul quale si erano modellate le prime disposizioni del cod. civ. it. abrogato, in quanto non definiva, né teneva in conto la persona in quanto tale, ma ne considerava solo la capacità di esercizio dei "diritti civili" e operava la distinzione tra il cittadino e lo straniero.

Più interessante, anche se non fu seguito, il modello spagnolo (del 1889), in parte ricalcato sul Code Napoléon, e in parte innovativo: vi si legge che la nascita determina la "personalità" (art. 29); che si reputa nato il feto che ha sembiante umano ed è capace di sopravvivere ventiquattrore da quando è separato dal seno materno (art. 30); che la primogenitura, in caso di parto plurimo, spetta al primo nato (art. 31); che la personalità civile si estingue con la morte delle persone (art. 32); che, in difetto di prova, si presume che più persone siano morti nel medesimo momento (art. 33).

Più articolato il modello del codice civile tedesco (1896-1900), in cui: si menziona la "capacità" giuridica, che comincia con la nascita (par. 1), ma si aggiungono disposizioni riguardanti la tutela, l'emancipazione, il domicilio, il nome (par. 12), la scomparsa, la dichiarazione di morte, la commorienza (par. 20). Salvo qualche coincidenza, talvolta anche lessicale (come per l'art. 1 cod. civ. it. e il par. 1 BGB, o per l'art. 4 e il par. 20), gli altri istituti disciplinati sono stati correttamente separati e distinti nel codice civile italiano.

Il cod. civ. svizzero (del 1907) tratta della personalità e degli atti civili nello stesso titolo dedicato alle persone fisiche; nel capo primo fa riferimento al "diritto della personalità", ma all'art. 11 menziona la "eguale capacità di avere diritti ed obbligazioni", concede l'esercizio dei diritti civili a chi è maggiorenne ed è capace di discernimento (art. 13), definisce tale capacità "qualunque persona che non si apriva della facoltà di agire ragionevolmente per effetto della sua età infantile o di infermità o di debolezza mentale, di ebbrezza o di uno stato consimile" (art. 16), vieta la rinuncia alla "capacità civile", l'alienazione della libertà o l'assoggettamento a limitazioni incompatibili con il diritto o la morale (art. 27, in cui riecheggiano lo spirito e la lettera dell'art. 5 cod. civ. it.), prevede una analitica disciplina della tutela della personalità (art. 28 ss.), dispone che "la personalità comincia con la vita fuori dall'alveo materno e finisce con la morte", e subordina i diritti del concepito alla sua nascita (art. 31), si sofferma sulla prova della morte, desumibile dagli atti dello stato civile o in mancanza da presunzioni.

7.3. *Le nozioni di base nella dottrina coeva al codice civile*

Per comprendere il clima in cui sono state redatte le disposizioni sulla persona fisica è sufficiente considerare le trattazioni manualistiche anteriori al 1942, e, tra esse, quelle più diffuse: il bagaglio di nozioni elementari necessarie per capire e applicare il nuovo testo non doveva essere appesantito dalle elaborazioni, tanto pregevoli, quanto sofisticate, che alcuni Autori avevano già provveduto a compiere.

Nel manuale istituzionale di Emanuele Gianturco, il tascabile più usato dalla fine del secolo ai primi decenni di questo, già si avverte l'influsso della cultura giuridica tedesca: dapprima si definisce il diritto subbiiettivo (*facultas agendi*) e di poi si definisce la persona, cioè ogni uomo "subbietto capace di diritto" (*Istituzioni di diritto civile italiano*, III ed., Firenze, 1889, p. 27). Dell'esistenza della persona fisica si indicano i presupposti di fatto: nascita, vita, vitalità. Si esclude che occorran presupposti di diritto (un tempo richiesti) in quanto i tre status (*libertatis*, *civitatis*, *familiae*) non sono più presupposti e condizioni della capacità giuridica, bensì "qualità della persona"; il concetto di persona è esteso alle persone giuridiche. Quanto alla capacità di agire, se ne indicano le limitazioni dettate dall'età, dalla salute, dalle condanne penali; la differenza di ceto e di confessione religiosa non ha più importanza civile; si richiama l'art. 24 dello Statuto albertino, osservando che la nobiltà, la borghesia e la plebe godono i medesimi diritti e soggiacciono agli stessi doveri; le persone religiose, grazie all'2 della l. 7. 7. 1866 hanno riacquisito la piena capacità civile e politica, nonostante i voti di castità e povertà; principi di umanità e di giustizia hanno consentito di abolire istituti quali la fuorgiudica, la morte civile, l'infamia (art. 24 del r.d. 17.2.1861 per le province napoletane e siciliane). Come si vede, tali limitazioni sono ricondotte all'esercizio dei diritti (capacità di agire) anche se oggi, più propriamente, si ascriverebbero alla capacità giuridica.

Nel più ampio testo di Venzi (*Manuale di diritto civile italiano*, VII ed., Torino, 1933) si segue questa impostazione: la persona è definita come il soggetto di diritto, *subiectum iuris*, cioè l'essere cui, secondo il diritto obbiiettivo, è attribuito il diritto soggettivo; soggetti di diritto possono essere solo gli uomini e non gli animali e le cose; l'uomo non può essere oggetto di diritto; gli speciali diritti sulla persona propria sono il suicidio, l'automutilazione, il nome, il titolo nobiliare e lo stemma, si pone in dubbio che possano esserlo il diritto d'autore e il diritto d'inventore (pp. 55 ss.).

Più dettagliati i testi di Roberto de Ruggiero e di Nicola Stolfi. Il primo A. riprende le osservazioni di Gianturco, e definisce la capacità giuridica come "l'idoneità ad essere subbietto di diritti", che appartiene ad ogni uomo; le sue limitazioni, dovute a sesso, età, condanna penale,

non possono giungere ad annientarla; la capacità d'agire è definita come "l'idoneità del subbietto a compiere atti giuridici ed a esercitare i suoi diritti". Per poter essere titolare di diritti il soggetto deve esistere: di qui la descrizione delle nozioni di nascita, di vita e di vitalità. Quest'ultimo requisito è stato soppresso nel codice civile del 1942, non senza contrasti e ripensamenti (v. Rel. Re, n. 18). Ma già de Ruggiero aveva osservato come requisito non fosse richiesto dal codice civ. tedesco (par. 1) e dal codice civ. svizzero (art. 31). La personalità viene definita non come un diritto, ma come il presupposto per essere titolari di diritti: tra i dirittiche che sono fondamentali, dai quali derivano tutti gli altri, de Ruggiero colloca "gli attributi fondamentali della personalità", che sono il diritto di libertà, il diritto di istituire rapporti patrimoniali con altri, il diritto di testare, il diritto di creare rapporti familiari, il diritto al nome, all'immagine, all'integrità personale (op. cit., p. 329 ss.).

Il secondo tratta delle persone nell'ambito della descrizione dei requisiti del negozio giuridico, ed opera una analitica ricostruzione storica della capacità (Diritto civile, vol. I, p. II, Torino, 1931, p. 15 ss.); l'exkursus riguarda i tre status, fino all'introduzione dell'art. 24 dello Statuto albertino, con cui si eliminano le limitazioni dettate dall'intolleranza religiosa, e all'art. 3 del codice civ. del 1865 con cui sopraggiunge la eliminazione di ogni differenza, comprese quelle riguardanti gli stranieri; essendo la capacità giuridica riconosciuta a tutti, non vi è più ragione di occuparsi degli status (op. cit., p. 17).

7.4. L'attuale portata dell'art. 1. La dottrina

La dottrina recente ha ripensato in modo critico il significato e il ruolo dell'art. 1 cod. civ. Nei paragrafi precedenti si è consumato il tentativo di illustrare come questa disposizione, che ancora nel 1942 aveva un ruolo di portata generale, e di livello sostanzialmente costituzionale, atteso l'atteggiamento riduttivo dello Statuto albertino, debba oggi essere collocata in una più ampia e complessa prospettiva, attinente al sistema delle fonti, interne, comunitarie e internazionali, e ai profili di lettura, riguardanti l'interpretazione politico-sociale e l'interpretazione economica. Più che non alla elaborazione di Adriano De Cupis, di natura esegetica e descrittiva, si deve alle operazioni di Angelo Falzea la ricostruzione concettuale e formalista della nozione di capacità giuridica e di capacità giuridica e di capacità d'agire; e ai contributi più recenti (di Pietro Rescigno, Davide Messinetti, Mario Bessone e Gilda Ferrando) il tentativo di superare questa concezione e di affrontare l'intera problematica in termini attuali.

7.5. *Problemi attuali*

L'intera materia è ora illustrata in una prospettiva di intersezione tra il diritto pubblico e il diritto privato nel commentario curato da Alessandro Pizzorusso, Roberto Romboli, Umberto Breccia, Anna De Vita.

La civilistica è tornato sui temi della capacità, legati ai temi della persona e dei diritti della personalità in altre, numerose occasioni di dibattito.

Si è così osservato che l'evoluzione dell'idea di soggettività giuridica, dal 1942 ad oggi, si può riassumere nella formula "dal soggetto come fattispecie al soggetto come sintesi degli effetti" (Lipari, *Spunti problematici in tema di soggettività giuridica, ne La civilistica italiana dagli anni Cinquanta ad oggi tra crisi dogmatica e riforme legislative*, Padova, 1991, p. 55). In altri termini, come non sia più possibile ricondurre la soggettività all'individuo (come aveva tentato Falzea, *Il soggetto nel sistema dei fenomeni giuridici*, Milano, 1939, e v. ora in senso critico Alcaro, *Riflessioni critiche intorno alla soggettività giuridica. Significato di una evoluzione*, Milano, 1976) e neppure alla "proiezione oggettiva del sistema normativo". Ciò è chiaramente percepibile sia nella frammentazione degli interessi tutelati, non solo individuali, ma collettivi e diffusi, sia nella complessità delle fonti, sia nella ricomparsa degli status, intesi come status "di protezione" e non più come status di privilegio. Si è così rotto il sistema originario, di creazione pandettistica che metteva al centro dell'universo giuridico il rapporto, e l'individuo come soggetto del rapporto, e si è pervenuti alla nozione di soggettività come sintesi degli effetti, cioè come "mera registrazione dell'accaduto" (Lipari, *op. cit.*, p. 58). Il riemergere del diritto a formazione negoziale ha fatto sì che l'individuazione degli interessi effettivamente tutelati si possa fare solo *ex post*.

Si è poi sottolineata la rivalutazione dell'elemento personale, di contro alla preponderante patrimonializzazione dei rapporti privati, così come la necessaria collocazione del settore nella duplice prospettiva del diritto civile e del diritto pubblico, e del rapporto dell'individuo con gli enti collettivi (Rescigno, *Individuo e formazioni sociali*, *ivi*, p. 36). In questo senso, la depatrimonializzazione non genera l'ingresso di interessi extrapatrimoniali, ma piuttosto la valutazione economica di tali interessi. E la capacità giuridica non può più essere concepita come una "concessione" fatta dallo Stato (ordinamento) all'individuo: la capacità giuridica assume una valenza morale, come indicato dalla stessa Carta costituzionale: si tratta ormai di una nozione a cui si deve riconoscere relatività storica ed elasticità di contenuti, e così pure alla nozione di capacità di agire.

8. La capacità di agire

Percorso testuale dell'art. 2 cod. civ. e trama concettuale.

A differenza di quanto è avvenuto per l'art. 1 cod. civ. il percorso testuale dell'art. 2 è stato assai semplice, ed ha subito nel tempo le variazioni collegate con le modificazioni normative della maggiore età in generale e nel rapporto di lavoro.

Ciò perché - a differenza della nozione di capacità giuridica, soggettività, personalità, che implicava scelte di carattere politico, oltre che scelte di natura teorica, sulla capacità di agire vi era maggior consenso tra i giuristi, anzi, si può dire che vi fosse già allora una sostanziale concordia nella definizione di "idoneità a compiere atti"; chi era influenzato dalla Pandettistica, qualificava tale idoneità in termini di legittimazione al compimento di validi negozi giuridici; chi preferiva una definizione più vicina alla cultura di matrice francese, e più generale, faceva riferimento a validi atti giuridicamente rilevanti. Il riflesso di questo uniforme modo di sentire si coglie nel testo normattivo ove l'espressione "capacità di agire" compare nella rubrica dell'art. 2, e nel contesto della disposizione si ha la definizione, pur parziale, di capacità di agire come "capacità di compiere tutti gli atti per i quali non sia stabilita una età diversa".

Oggi la dottrina definisce la capacità di agire come "idoneità a svolgere l'attività giuridica che riguarda la sfera di interessi della propria persona" (Rescigno, voce Capacità di agire, Noviss. Dig. It., p. 861).

La revisione critica della teoria tradizionale, già avviata da Falzea (voce Capacità, cit., p. 30), si è sviluppata lungo tre direttrici:

(i) la critica alla concezione espressa dalla dottrina francese, che intravede nella capacità giuridica il godimento di diritti, nella capacità di agire l'esercizio dei diritti; si è correttamente posto in luce che godimento ed esercizio sono termini equivalenti in senso giuridico (Rescigno, op. u. t. cit., p. 862);

(ii) la critica alla frammentazione della capacità agire - distinta dalla capacità giuridica - nonché alla frammentazione della capacità generale e capacità speciali (a disporre, a testare, al lavoro, processuale, etc.): la nozione unitaria di capacità, incentrata sul valore della persona e sulla tutela della persona si oppone a questa articolazione sistematica (Stanzione, op. cit.);

(iii) la critica alla scelta (implicante anche una opzione politica) del legislatore italiano di distinguere, quanto all'età, due sole fasce, quella anteriore al compimento della maggiore età, ora fissata al compimento del diciottesimo anno, e quella superiore alla maggiore età; si additano ad esempi da imitare tre diversi modelli (Stanzione, Capacità. V. Diritto comparato e straniero, in Enc. giur., p. 2 ss.):

- il modello austriaco, che distingue quattro periodi: il periodo che giunge fino al settimo anno (Kindheit); il periodo che giunge fino al quattordicesimo anno (Unmuendigkeit); il periodo fino al diciannovesimo anno (Minderjaehrigkeit von Muendigen); il periodo successivo (Volljaehrigkeit, ex 1. 14. 2.1973, n. 108);
- il modello tedesco, che distingue, quanto alla capacità negoziale, tre periodi (parr. 104 e 105 B. G. B.): il periodo fino al settimo anno (Geschaeftunfaehigkeit); il periodo fino al diciottesimo anno (Beschraenkte Geschaeftfaehigkeit); il periodo successivo (Geschaeftfaehigkeit);
- il modello inglese in cui si considerano validi i contratti conclusi dai minori concernenti le operazioni economiche dirette alla acquisizione di beni e servizi di prima necessità (necessaries); ciò perché la deminutio che affligge il minore non solo appare lesiva della sua dignità e personalità, ma confligge con quanto avviene nella prassi, in cui il minore dotato di capacità di intendere e di volere compiere regolarmente negozi giuridici di modesto importo economico.

Di qui le proposte di modificazione normativa concernenti la conclusione di negozi da parte dei minori.

Anche per le limitazioni alla capacità di agire, e le diverse forme di incapacità si è rilevato come l'impianto di codice, oltre ad essere poco sistematico, si risolve in una serie di regole di difficile amministrazione. Pur condividendo le critiche nascenti dalla comparazione e dalla prassi, si è optato, in questo lavoro, per la rappresentazione della nozione e della sua applicazione in uniformità agli orientamenti della dottrina dominante e della giurisprudenza.

9. Aspetti comparatistici

Per affinità culturali, per l'influenza che ha esercitato sulla costruzione del diritto generale della personalità nel nostro ambiente, per il percorso parallelo che si registra da un catalogo di diritti della persona frammentati ad un diritto unitario, per l'incidenza della normativa costituzionale, il modello più rilevante è dato da quello offerto dall'esperienza tedesca.

Anche qui la dottrina ha preso le mosse dalle disposizioni di codice (par. 12 sul diritto al nome; par. 823, sul diritto alla vita, sul corpo, alla salute, alla libertà; par. 824 sul diritto alla reputazione economica; par. 825 sulla libertà sessuale; e così via) per costruire una figura generale, in contrapposizione agli orientamenti della giurisprudenza, volti ad accreditare la teoria pluralista.

La teoria monista si è risolta ad operare un collegamento stretto tra gli

artt. 1 e 2 della Legge fondamentale e il par. 823 del B.G.B., superando le critiche alla applicazione diretta della normativa costituzionale ai rapporti tra privati. In questa vicenda è stata determinante la giurisprudenza della Corte Suprema, già a partire dagli anni Sessanta (v. ora Somma, I diritti della personalità e il diritto generale della personalità nel diritto privato tedesco: una scheda, in *Sistemi giuridici comparati*, a cura di Guido Alpa, Torino, 1996). Ne è sorta una definizione di diritto generale della personalità (Grundrecht des allgemeinen Persoenlichkeitsrechts) quale "diritto del singolo ad ottenere riguardo per la propria dignità e a formare autonomamente la propria individualità"; tale indirizzo è stato avvalorato dalla Corte costituzionale.

Dottrina e giurisprudenza civilistiche sono perciò univoche nell'affermazione di un diritto generale: si tratta di un diritto assoluto, cui fanno capo posizioni giuridiche diverse, di cui quel diritto è considerato la fonte (Quellenrecht); si isolano così il diritto alla vita, il diritto alla integrità fisica, il diritto alla salute, il diritto al nome, il diritto all'immagine, il diritto all'onore, il diritto alla reputazione economica, il diritto all'identità personale, il diritto alla identità sessuale, il diritto alla identità culturale, il diritto all'autodeterminazione sessuale della donna, il diritto alla riservatezza, ivi compresa la c.d. riservatezza informatica (1. 27. 1.1977; 1. 20. 12. 1990); in quanto compatibili, tali diritti sono riconosciuti anche agli enti.

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THE RIGHT TO FREE INTERPRETATION UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The Council of Europe Colloquy held in Madeira in 1983 on Human Rights of Aliens in Europe brought to the fore various problems, some of them far from small, facing aliens and especially migrant workers in Europe. The present paper seeks to focus on one particular area where the European Convention on Human Rights has afforded them effective protection. This concerns the right to free interpretation in criminal proceedings when the person charged is not, or not sufficiently, conversant with the language used in court.

Article 6 paragraph 3(e) of the Convention provides that everyone charged with a criminal offence has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Obviously, this right is not confined exclusively to aliens since there may be aliens who are sufficiently conversant with the language of the proceedings, and on the other hand, even a national forming part of a linguistic minority may conceivably find himself in need of protection in this regard, though in view of the modern principle of compulsory education, it is not easy to envisage a member of a linguistic minority within a member State not being sufficiently conversant with the national language.

Of course, in principle, a member of a linguistic minority within a State may not complain that he is not entitled to use his own language before courts in which the language used is that of the majority, the national language. But the determining factor remains always whether the person concerned can understand or speak the language used in court. Thus, as was held by the European Commission on Human Rights, a Turkish national who persisted in using in the proceedings his native Kurdish language could claim no protection, since it was not a case of a person who could not understand or speak the language used in court,

but of a person who simply insisted on conducting his defence in a different language.¹

The right protected by Article 6 paragraph 3(e) will be examined under the following heads:

1. Nature and scope of the right;
2. Quality and extent of the interpretation;
3. Interpretation costs.

1. Nature and scope of the right

This right forms part of a cluster of "minimum" rights secured to anyone charged with a criminal offence (Article 6 paragraph 3). These rights are specific aspects of the general right to a fair trial set forth in paragraph 1 of the same Article and must also be interpreted in the light of that general notion. Indeed, the importance of the right to a fair trial in a democratic society subscribing to the rule of law needs no stressing. It is also the right which is more commonly invoked before both the European Commission and the European Court of Human Rights and which has therefore given rise to a particularly abundant and interesting jurisprudence. On the particular aspect of it presently under consideration, however, the existing jurisprudence, though certainly not lacking in interest, is not so abundant, obviously because the incidence of cases concerning the subject of interpretation is not as high as that of cases concerning, for instance, that other aspect of the same general right which is an independent and impartial tribunal.

The protection afforded by Article 6 paragraph 3(e) does not extend to any person involved in court litigation, but applies only to a person "charged with a criminal offence." On the other hand, it is not confined to oral statements made at the trial hearing, but applies also to documentary material in the proceedings, the understanding of which is necessary to secure for the person charged a fair trial. Nor is it confined to the trial proper, but applies also to pre-trial proceedings, where interpreters' assistance is also necessary to provide the person charged with an opportunity to prepare his defence and ensure that the trial will be fair.²

¹ D. 18954/91, 21st October 1993, DR 75, 192.

² *Luedicke, Belkacem and Koc*, judgment of the 28th November 1978, Series A, no. 29, p. 20, para. 48; *Kamasinski*, judgment of the 19th December 1989, Series A, no. 168, p. 35, para. 74.

It has been held, however, by the European Commission on Human Rights in the case of an Italian citizen extradited from France to Austria, who could not speak German, that this provision (see the words "language used in court") "cannot be given such a wide interpretation as to cover the relations between the accused and his counsel. [It] in fact only applies to the relations between the accused and the judge."³ In this case the applicant complained that he had not been given the free assistance of an interpreter for contacts with his defence counsel (*not* a free legal aid one) who did not speak his language. It is submitted, however, that the position would be different, under other aspects of the notion of a fair trial, had the counsel been a free legal aid one.

Whether an accused person can understand or speak the language used in court or not is of course a question of fact to be decided in each particular case. The question has come up before the Commission on more than one occasion. The accused person's inability to understand or speak the language, as a condition for the free assistance of an interpreter, need not be absolute. It is enough if his knowledge or comprehension of the language is sufficiently limited to prevent him from adequately following the proceedings and having a fair trial.⁴

In the first case on this particular provision to come up before the European Court of Human Rights, *Luedicke, Belkacem and Koc*, the scope of this provision was defined as follows: "Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3(e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial."⁵ This case is particularly important, as we shall see, for the construction of the word "free" qualifying the words "assistance of an interpreter" in the text of this provision.

2. Quality and extent of the interpretation

The question of the adequacy of the interpretation came up before the European Court of Human Rights in a case against Austria, *Kamasinski*.⁶

³ D. 6185/73, 29th May 1975, DR 2, 68 (70).

⁴ See, *inter alia*, D. 8124/77, 7th December 1978 (unpublished).

⁵ Page 20, para. 48.

⁶ Judgment of the 19th December 1989, Series A, no. 168.

The applicant, a United States citizen who underwent trial in Austria on charges of aggravated fraud and misappropriation, did not understand German, but was assisted by interpreters. He complained in the first place that the Austrian law providing for court-registered interpreters (the Court Experts and Interpreters Act, 1975, which, *inter alia*, required “special knowledge”) was excessively vague and did not prescribe a reasonable standard of proficiency ensuring the effective assistance of an interpreter. The Court premised in this connection that it was not called upon to adjudicate on the Austrian system of registered interpreters as such, but solely on the issue whether the interpretation assistance provided in this case satisfied the requirement of Article 6.

On this issue, the applicant alleged inadequate interpretation of oral statements and complained of the lack of written translation of official documents at the different stages of the procedure. After quoting the general principle set out in the *Luedicke, Belkacem and Koc* judgment, already referred to, the Court went on to state as follows: “However, paragraph 3(e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.”⁷

Applying by analogy a principle affirmed by it in the *Artico* case⁸ with regard to Article 6 paragraph 3(c), the Court also said: “In view of the need for the right guaranteed by paragraph 3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.”⁹ The principle had already been accepted also in the Commission’s report.

It will be noted that the Court took a global approach based on a cumulative assessment of the various factors involved. For instance, with regard to the fact that questions put to the witnesses (as distinct from the answers) were not interpreted at the trial hearing, the Court remarked that this in itself did not suffice to establish a violation of paragraphs

⁷ Ibid., page 35, para. 74.

⁸ Judgment of the 13th May 1980, Series A, no. 37, pp. 16 and 18, paras 33 and 36.

⁹ Page 35, para. 74.

3(d) or 3(e) of Article 6, but was one factor along with others to be considered. In the end it did not find it substantiated on the evidence, taken as a whole, that the applicant was unable, because of deficient interpretation, either to understand the evidence produced against him or to have witnesses examined or cross-examined on his behalf.¹⁰

3. Interpretation costs

The question of the true meaning of the word “free” qualifying the words “assistance of an interpreter” in the provision under examination came up before the European Court of Human Rights for the first time in the case, already referred to, of *Luedicke, Belkacem and Koc*. The case originated in three separate applications brought against the Federal Republic of Germany by a United Kingdom citizen, an Algerian and a Turk who had been criminally charged before different German courts. Under German law they were duly provided with the assistance of an interpreter, but after being convicted and sentenced, they were ordered to pay interpreters’ fees as part of the costs of the proceedings. The essential question involved was in fact whether paragraph 3(e) requires definitive relief from liability to pay interpreters’ costs or merely provisional relief, i.e. until final conviction. In other words, does freedom from liability to pay interpretation costs depend on the outcome of the criminal prosecution or is it a once for all dispensation?

The Court, agreeing with the Commission’s conclusion, found in the first place that the words “free” / “gratuitement” in this provision have in themselves an ordinary meaning that is clear and determinate. Moreover, that ordinary meaning is not contradicted by the context of the sub-paragraph and is in fact confirmed by the object and purpose of Article 6. Sub-paragraph (e) of Article 6.3, the Court said, entails for anyone who cannot speak or understand the language used in court the right to receive the free assistance of an interpreter without subsequently having the relative costs claimed back from him.¹¹ After the judgment, the Federal Republic of Germany, the State concerned, amended its legislation to bring it into line with it.

The same question then came up again before the European Court of Human Rights in *Ozturk*, but with a new and interesting twist. The offence

¹⁰ Page 38, para. 83.

¹¹ Page 19, para. 46.

involved was not an “ordinary” criminal offence, but a “regulatory” one. Again, the State concerned was the Federal Republic of Germany, and it was represented on behalf of the government that paragraph 3(e) was not applicable in the circumstances since the applicant was not “charged with a criminal offence.” Under the German Regulatory Offences Act of 1968/1975, which decriminalised petty offences, notably traffic offences, the misconduct committed by the applicant was not treated as a criminal offence (*Straftat*), but as a “regulatory offence” (*Ordnungswidrigkeit*), which was distinguishable not only by reason of the procedure laid down for its prosecution and punishment, but also by reason of its juridical characteristics and consequences.

In the first place the Court said: “By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual ... as well as the needs of the proper administration of justice The Convention is not opposed to the moves towards ‘decriminalisation’ which are taking place - in extremely varied form in the member States of the Council of Europe Nevertheless, if the Contracting States were able at their discretion, by ‘classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.”¹²

Now already in 1976 in the *Engel* case the Court had considered as criminal offences for the purposes of Article 6 certain offences for which some Dutch conscript servicemen had been subjected to sanctions, but which were classified by domestic law as disciplinary offences. In fact the paragraph just quoted from *Ozturk* practically reproduces another in *Engel*.¹³

Reaffirming the “autonomy” of the notion of “criminal” for the purposes of Article 6 and applying the criteria developed in the *Engel* judgment (briefly, the qualification given under domestic law, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring), here too the Court, like the Commission, identified in effect a criminal offence for the purposes of Article 6. The consequence was that paragraph 3(e) applied, and as the domestic court

¹² Page 18, para. 32.

¹³ *Engel and Others*, judgment of the 8th June 1976, Series A, no. 22, page 33, para. 80. See also pages 34 - 35, paras 81 - 82.

had made the applicant bear the costs incurred in connection with the services of an interpreter at the hearing, a violation of this provision was in fact found. Initially the Federal Republic of Germany took the view that the *Ozturk* judgment “had not modified domestic law,”¹⁴ but eventually amended the relevant legislation to bring it into line with this judgment as well.

In the matter of interpretation costs, the fact that any such costs, which a person charged has been ordered by the court to pay, are covered by his insurance does not alter the essential principle, saving of course any repercussions on the application of Article 50 (just satisfaction). Thus in the *Ozturk (Article 50)* judgment, since the interpreter’s fees had in fact been borne by the applicant’s insurance company, the Court held that there was therefore no prejudice capable of being the subject of a claim for restitution.¹⁵

Is an intimation by the domestic authorities that the applicant would eventually have to pay interpreters’ fees sufficient to bring about a violation of this provision? Reverting in this connection to *Kamasinski*, the applicant in that case objected that for several months he had been led by the Austrian authorities to believe that he would have to pay interpretation charges in the event of his being convicted (even though eventually he was not made to pay them), and in his submission this very fact was in violation of paragraph 3(e). The Court does not seem to have in principle ruled out the possibility that, in appropriate cases, the matter may come within the purview of this provision. It observed that, whilst the attitude of the accused towards the appointment of an interpreter might “in some borderline cases” be influenced by the fear of financial consequences,¹⁶ the temporary concern occasioned in this particular case to the applicant because of the initial error of the Austrian authorities was not such as to have had any repercussions on the exercise of his right to a fair trial as safeguarded by Article 6.¹⁷

Although this paper has concentrated on paragraph 3(e) of Article 6, it is important to keep in mind the special relationship of this provision with others in the Convention. This particular provision seeks to prevent any inequality between an accused person who is not conversant with the language used in court and one who is. Hence, it is to be regarded as a special rule in relation to the general rule contained in Article 6

¹⁴ Comm. D. 11394/85, 5th March 1986, DR 46, 214.

¹⁵ Judgment of the 23rd October 1984, Series A no. 85, para. 8.

¹⁶ See the abovementioned Luedicke, Belkacem and Koc judgment, page 18, para. 42.

¹⁷ Page 39, para. 86.

paragraph 1 and Article 14 taken together.¹⁸ In particular, paragraph 3(e) is to be read in the context of the whole Article 6, which guarantees the all-important general right to a fair trial and reflects the fundamental principle of the rule of law.¹⁹

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¹⁸ Luedicke, Belkacem and Koc, *supra*, para. 53.

¹⁹ Sunday Times, judgment of the 26th April 1979, Series A no. 30, page 34, para. 55.

I DIRITTI NATURALI IN DIRITTO COSTITUZIONALE

LUIGI COMPAGNA

A differenza della rivoluzione americana, nella quale un'architettura costituzionale stabile fu l'effettivo risultato dell'affermazione rivoluzionaria, la rivoluzione francese vide aprirsi un fossato sempre crescente tra Rivoluzione e Costituzione. In quel fossato andarono di volta in volta a frantumarsi, nel decennio che va dal giuramento della Pallacorda al testo del 1799 con il quale Napoleone reputava di terminare la rivoluzione, molti e multiformi sforzi di creare una espressione costituzionale, se non definitiva, duratura almeno per una generazione di francesi. Da quel fossato in quel decennio Sieyès fu costituente e costituzionalista che non si lasciò inghiottire, ma che in molteplici e multiformi circostanze fu in grado talora di ripetersi senza riproporsi e talora di riproporsi senza ripetersi. Fino a quell'estremo sommerso "*la Constitution c'est moi*", quando su di lui incombeva un altro fossato di tutt'altra natura.

Non conta, quindi, stabilire se dell'incerto tormentato rapporto fra Rivoluzione e Costituzione egli sia stato la chiave per accedervi o quella per uscirvi, o più verosimilmente tanto per accedervi quanto per uscirvi. Giova, piuttosto, notare come da quel fossato in quel decennio si siano preservati tanto il suo dottrinarismo, quanto il suo pragmatismo. Fin da quella originaria maniera, dottrinarica eppur pragmatica, appunto, di guardare al rapporto fra Dichiarazione e Costituzione.

In termini dottrinari, per Sieyès la Costituzione in Francia era da creare e non da restaurare. La sua confutazione radicale dell'uso tradizionale della parola "costituzione" lo aveva portato a teorizzare l'esistenza della nazione quale realtà politica ultima, anteriore ad ogni forma costituzionale. "Una nazione - si era letto in *Che cosa è il Terzo Stato?* - è indipendente da qualsiasi forma; ed è sufficiente che la sua volontà appaia, perché ogni diritto positivo cessi davanti a essa come davanti alla sorgente e al signore supremo di ogni diritto positivo".

Era la sua dottrina rivoluzionaria del potere costituente, la quale non gli avrebbe impedito nessun pragmatismo di politica costituzionale. Ed era, appunto, necessità pragmatica anteporre alla Costituzione una Dichiarazione dei diritti, che non consentisse, come sarebbe piaciuto ai

Mounier e ai Lally-Tollendal, di rifarsi al “diritto positivo proprio di un grande popolo, unito da quindici secoli”.

Sicché quando, in quello stesso 4 agosto che avrebbe dato il colpo di grazia all'organizzazione feudale, l'Assemblea decise per appello nominale che la Costituzione sarebbe stata preceduta dalla Dichiarazione dei diritti dell'uomo e del cittadino, parve evidente quanto la Francia si fosse allontanata dall'idea di una costituzione da restaurare ed avesse optato per l'idea di una costituzione da creare. Così come era avvenuto in sede di verifica poteri, la dottrina rivoluzionaria del potere costituente segnava un altro punto decisivo al proprio attivo. La Dichiarazione, come premeva a Sieyès, veniva posta davanti alla Costituzione per garantire il definitivo annullamento dei vecchi poteri e dei vecchi diritti, nonché di ogni possibilità di rivolgersi ad essi.

“La prima rivoluzione fondata sulla teoria dei diritti dell'umanità”, secondo il motto testamentario di Robespierre dell'8 termidoro, si sarebbe caratterizzata per la Dichiarazione del 26 agosto 1789 assai più che per la Costituzione del 3 settembre 1791. Per quale motivo? Non tanto per il vuoto costituzionale apertosi in quel biennio, come pare a Nicola Matteucci, ma come non condivide Roberto Martucci¹; quanto perché proprio il ruolo fondamentale assunto della Dichiarazione del 1789 rivestiva un carattere eversivo rispetto ad ogni forma costituzionale, sia dell'antico regime sia della rivoluzione, come alla stessa “talpa” non sarebbe sfuggito e come avrebbero cercato di tener presente le sue proposte di una “*jurie constitutionnaire*” nella Costituzione del 1795 e di un “*Sénat conservateur*” nella Costituzione del 1799.

La Dichiarazione adottata il 26 agosto 1789 verrà sostituita da una nuova nella Costituzione del 1793. Questa verrà soppiantata a sua volta due anni dopo da una “Dichiarazione dei diritti e *dei doveri* dell'uomo e del cittadino. “Ma non c'è dubbio che quella buona e quella vera in storia delle Dichiarazioni sia rimasta la prima. Il che certo non può dirsi in storia delle Costituzioni per quella del 3 settembre 1791.

Nella rivoluzione americana i diritti costituzionali si erano *naturaliter*

¹ “Alla Dichiarazione dei diritti dell'uomo e del cittadino del 1789 solo il 3 settembre 1791 seguì la Costituzione, con un pauroso vuoto costituzionale”. (N. Matteucci, *Lo Stato moderno. Lessico e Percorsi*, Bologna, il Mulino, 1993, p. 146). “La normativa del Novantuno non viene fuori con forte ritardo ma completa e levigata come Minerva dal cranio di Giove” (R. Martucci, *Tra Costituente e Convenzione. Per una rilettura storico-costituzionale di alcuni “nodi” istituzionali della Rivoluzione francese*, in AA. VV., *Studi in memoria di Giovanni Cassandro*, Ufficio Centrale per i beni archivistici, Roma, 1991, p. 614).

eretti in diritti costituzionali ed il peso delle dichiarazioni era diventato sempre minore rispetto a quello della Costituzione.

Nella rivoluzione francese nessun dettato costituzionale riuscì mai altrettanto *naturaliter* ad arrotondare le punte e gli spigoli di diritti naturali tenacemente anteriori alle istituzioni e sempre renitenti a lasciarsi integralmente incorporare come diritti positivi; e quando i diritti naturali si affezionano troppo al rango di principi ideali, è facile che il gius-naturalismo stenti a farsi costituzionalismo. Lo stesso "carattere sacro" della Dichiarazione del 1789, considerata dall'Assemblea "catechismo nazionale", ne rendeva problematica una costituzionalizzazione all'americana e avrebbe finito per tutto l'arco della rivoluzione col ribadire il dottrinarismo ed il pragmatismo, entrambi assai poco americanofili, con cui Sieyès aveva concepito il rapporto fra Dichiarazione e Costituzione.

Questo, ovviamente, non implica affatto che la *Déclaration* fosse un semplice preambolo privo di valore giuridico, prologo in cielo di un assetto costituzionale introvabile, vacua esercitazione di astrattezza metafisica. Anzi. I lavori preparatori di luglio e l'andamento della storica discussione in Assemblea degli articoli, che ebbe luogo dal 20 al 26 agosto, documentano ampiamente² come anche le formulazioni necessariamente improntate e generalità ed astrattezza non contenessero genericità e vaghezza. La convinzione di redigere un testo giuridicamente vincolante, e magari addirittura qualcosa di più, aveva permeato i costituenti ed aveva imposto l'uso di secche prescrizioni imperative, che poco spazio lasciavano ai giri di parole e alle vuote descrizioni.³

Più del gusto delle citazioni classicheggianti, come sarebbe poi divenuto ricorrente in quell'Assemblea e ancor più nelle successive, veniva in quei giorni battuto e ribattuto in Francia il sentiero attraverso il quale, nei tredici anni che avevano preceduto la riunione degli Stati Generali, oltre Atlantico i diritti naturali erano assurti a diritti costituzionali. Vi si riferiva

² Cfr. soprattutto M. Gauchet; *La Révolution des droits de l'homme*, Bibliothèque des Histoires, Gallimard, 1989; S. Rials, *La déclaration des droits de l'homme et du citoyen*, Paris, 1988.

³ Mai come nella discussione degli articoli, si ebbe la sensazione di una partecipazione più collettiva che personale ai lavori dell'Assemblea. Ben poco restò del testo originario e, come nota G. Del Vecchio, *La Dichiarazione dei diritti dell'uomo e del cittadino nella rivoluzione francese*, Genova, 1903, p. 36; "solo dal vivo della pubblica discussione nell'adunanza plenaria scaturirono quelle formule le brevi ed adamantine, che s'erano invano lungamente cercate dai singoli deputati e dai loro aggruppamenti parziali. La Dichiarazione dei diritti non è opera di alcun individuo, e può veramente considerarsi come il prodotto di uno stato psicologico collettivo".

esplicitamente, evocando l'idea di *Déclaration* e la sua portata, la relazione di Champion de Cicé del 27 luglio.⁴

Del resto, il primo a presentare un progetto di Dichiarazione davanti all'Assemblea, quasi per predestinazione, era stato La Fayette, il quale si diceva avesse elaborato il suo testo con i consigli di Jefferson, che in quel periodo era ambasciatore degli Stati Uniti a Parigi. A Jefferson il comitato della Costituzione avrebbe richiesto perfino una consultazione ufficiale, incompatibile con le sue funzioni diplomatiche. Più informalmente, l'ultimo giorno del dibattito sulla Dichiarazione, il 26 agosto, molti deputati si ritroveranno a casa sua per sottoporgli i loro diversi punti di vista sul ruolo che l'autorità del re dovrà avere nella futura organizzazione dei poteri.

Altri combattenti della guerra d'indipendenza americana, come il conte Mathieu de Montmorency, si schiereranno al fianco di La Fayette. Il traduttore delle *Costituzioni dei tredici Stati dell'America*, il duca de la Rochefoucauld d'Enville, interverrà in Assemblea per ricordare il senso della lezione americana in tema di libertà di stampa ed alla sua raccolta, in possesso di molti costituenti, veniva apertamente attribuita la missione di farsi *vademecum* di giusnaturalismo e costituzionalismo trionfanti. Senza dimenticare come l'Assemblea annoverasse pure altri ottimi conoscitori dell'esperienza giuridica americana, come Dèmeunier e come Dupont de Nemours, e come esercitassero sempre maggior ascendente gli scritti di Condorcet, autore di un progetto destinato ad alimentare dall'esterno la discussione (oltre che del *cahier* della nobiltà di Manthes) e analista rigoroso *De l'influence de la révolution de l'Amérique sur l'opinion et la législation de l'Europe* e delle *Idées sur le despotisme*.

Con le Dichiarazioni in America si era dato vita a documenti giuridici - e giustiziabili - di sicuro rilievo costituzionale. Slegatesi dalla Gran Bretagna, trovatesi nella necessità di pensare nuove strutture di governo⁵,

⁴ "... Cette noble idée, conçue dans un autre hémisphère, devait de préférence se transplanter d'abord parmi nous. Nous avons concouru aux événements qui ont rendu à l'Amérique septentrionale sa liberté: elle nous montre sur quels principes nous devons affuyer la conservation de la nôtre; et c'est le nouveau Monde, où nous n'avons autrefois apporté que des fers, qui nous apprend aujourd'hui à nous garantir du malheur d'en porter nous-mêmes ..." (Rapport fait par M. l'Archevêque de Bordeaux, au nom du comité choisi par l'Assemblée Nationale, pour rédiger un Projet de Constitution, dans la séance du Lundi 27 Juillet 1789, Paris, 1789, p. 6).

⁵ "... Che ogni qual volta una qualsiasi forma di Governo tende a negare tali fini, è Diritto del Popolo modificarlo o distruggerlo, e creare un nuovo Governo, che si fondi su quei principi e che abbia i propri poteri ordinati in quella guisa che gli sembri più idonea al raggiungimento della sua sicurezza e felicità ..." (*Dichiarazione d'Indipendenza* del 4 luglio 1776, in A. Aquarone, G. Negri, C. Scelba, a cura di, *La formazione degli Stati Uniti d'America. Documenti*, Pisa, 1961, p. 416).

le antiche colonie si eran proclamante soggetti di diritto internazionale, e per ciò stesso “sovrane”, grazie alla nitida notificazione *erga omnes* con cui si chiudeva la Dichiarazione d’Indipendenza:

“ ... Noi, pertanto, rappresentanti degli stati d’America, riuniti in Congresso generale, (...) solennemente proclamiamo e dichiariamo, in nome e per autorità dei buoni Popoli di queste Colonie, che queste Colonie Unite sono e devono di diritto esser Stati liberi e indipendenti; che sono disciolte di ogni dovere di fedeltà verso la Corona britannica e che ogni vincolo politico fra di esse e lo stato di Gran Bretagna è e dev’essere del tutto reciso; e che quali Stati liberi e indipendenti, esse avranno pieno potere di muovere guerra, di concludere la pace, di stipulare alleanze, di regolare il commercio e di compiere tutti quegli altri atti che gli Stati indipendenti possono di diritto compiere”.

In questi termini, estremamente concreti, sobri, misurati, poteva porsi, risolversi, esaurirsi, nella rivoluzione americana, il problema della sovranità. Non altrettanto, nella rivoluzione francese, che siffatte agilità di lessico e linearità d’intenti mai avrebbe potuto consentirsi. “Il y a simplement - nota Gauchetque les Américains n’avaient pas à gérer le sort de la redoutable entité mystique nommée souveraineté une, indivisible, inaliénable et imprescriptible, force mal dissociable et maîtrisable, au piège de laquelle le processus révolutionnaire se pend dès qu’il s’en saisit comme de son levier légitime. Il y puisera sa prodigieuse énergie rationnelle; il perdra au mirage de ses ressources et de ses nécessités les repères de la praticabilité démocratique”.⁶

Districarsi dai tentacoli della “sovranità” significava districare anche i nodi della “costituibilità” degli organismi abilitati ad esercitare i poteri statali. Nell’esperienza americana era toccato al popolo, rappresentato da deputati eletti, delineare lo schema di funzionamento delle istituzioni pubbliche: quasi ovunque furono elette apposite convenzioni costituzionali, incaricate di stendere l’Atto fondamentale; ove ciò non si verificò, le assemblee in carica ebbero dagli elettori un mandato supplementare al fine di poter mettere mano all’opera costituente. Assolto il proprio compito, le convenzioni costituzionali erano scomparse, rimettendo la funzione legislativa al corpo rappresentativo “costituito”.

Lungo tale sentiero, la Costituzione era stata voluta e praticata soprattutto come “limite” da fissare al governo rappresentativo.⁷ Per dirla

⁶ M. Gauchet, cit., p. 47.

⁷ Nella ricostruzione di N. Matteucci, cit., p. 146, “si può evincere che agli Americani interessava di più la costituzione, per limitare i poteri del governo rappresentativo; ai Francesi, invece, la dichiarazione dei diritti, che finiva per essere quasi uno strumento eversivo dei poteri costituenti, in mano al popolo deliberante”.

col Palmer, "il popolo", dopo aver esercitato la sovranità, si assoggettava al governo; dopo aver fatto la legge, si sottometteva ad essa; di propria volontà accettava certe limitazioni, ma nello stesso tempo ne imponeva al governo".⁸

Del costituzionalismo moderno venivano in luce due elementi che americani sarebbero rimasti a lungo, anche nel secolo successivo. In primo luogo, l'organo legislativo fondatore della nuova legittimità statale non era assimilabile o pari-ordinato al legislatore ordinario, ma gli era sovra-ordinato per espressa investitura del corpo elettorale o, per adoperare il lessico dovuto a Jefferson, "per autorità dei buoni Popoli di queste Colonie". In secondo luogo, principi tanto in alto fissati potevano venir modificati solo da nuovi organismi legislativi *ad hoc* abilitati e non nel corso di una qualunque legislatura. Insomma, come Mazzei avrebbe obiettato a Mably, quanto era "costituito" in via di costituzione, non poteva informalmente trasformarsi in "costituente", per auto-accrescimento di competenze, modificando struttura e articolazione dei poteri pubblici al di fuori del mandato elettorale.⁹

Dalla sovra-ordinazione del legislatore costituzionale dipendeva la supremazia della norma così adottata nella gerarchia delle fonti. Di tale supremazia erano partecipi le Dichiarazioni, testi a legalità rafforzata, volti a sottolineare con solennità e con precisione i principi fondamentali dell'ordinamento americano.¹⁰

Divenuti diritti costituzionali, sono i diritti eminentissimi, che l'uomo ha in quanto tale e che in quanto cittadino conserva, a battezzare il diritto pubblico moderno, di modo che la loro omissione o violazione avrebbe ridimensionato la legittimità e la rappresentatività di un ordinamento. Questo era la convinzione, sincera e sentita anche più di quanto si avvertisse nel rapporto dell'arcivescovo di Bordeaux il 27 luglio, che animava un largo settore della Costituente, il quale interpretava all'americana lo spirito della *Déclaration*, attribuendole il massimo di giuridicità, al fine di preconstituire con essa i pilastri di garanzia e di rappresentatività di un ordinamento dei poteri pubblici da conquistare nella sua scia.

⁸ R. R. Palmer, *The Age of the Democratic Revolution*, Princeton, 1959, trad. it. di A. Castelnovo Tedesco, *L'era delle rivoluzioni democratiche*, Milano, 1971, p. 239.

⁹ Cfr. R. Martucci, *cit.*, pp. 620-622.

¹⁰ A giudizio di M. Galizia, *La teoria della sovranità dal Medio Evo alla Rivoluzione francese*, Milano, 1951, p. 428 "le dichiarazioni non si limitano ad affermare genericamente ed astrattamente la libertà individuata, ma la fissano in termini ben precisi specificandone i vari contenuti: libertà personali, di parola, di stampa, di culto, di riunione".

Si sarebbe detto che così "l'Amérique contribuait, d'une façon bien plus immédiate et bien plus efficace, par un exemple vivant, à republicaniser les sentiments des Français".¹¹ E si sarebbe detto pure che a pensare e ad agire fosse un unico complessivo movimento rivoluzionario, che al modo di una pallina di ping-pong dalla Francia era andata a rimbalzare in America e dall'America ora rimbalzava in Francia.

"Attraverso la diffusione dei *bills of rights* - secondo Felice Battaglia - ritornava in patria, aureolato di gloria e reso più efficace dalla nuova forma precettistica, un complesso di principi che appunto da Montesquieu, da Rousseau, da Voltaire ai fisiocratici, era stato il patrimonio dell'illuminismo. Che l'uomo abbia dei diritti fondati sulla natura (diritti innati o naturali); che tali diritti interpretati dalla etica ragione si possano opporre ai diritti positivi; che i diritti positivi, legittimi o giusti nell'accordo con i diritti naturali, decadano a illegittimi o ingiusti ove ne divergano, tutto ciò era qualcosa che la scuola del diritto naturale da Grozio a Locke, da Pufendorf a Thomasius aveva già acquisito, e che Rousseau aveva espresso in una forma calda ed immaginosa. Raccolte nei testi americani, ristituite da una rivoluzione vittoriosa al paese che le aveva più largamente diffuse, seppur non le aveva per primo promosse, idee siffatte non potevano in un clima rovente e certo preparato ad intenderle non sollecitare una nuova rielaborazione in vista di nuovi fini, e divenivano il presupposto per un nuovo processo rivoluzionario".¹²

Analogo il punto di vista di Mario Galizia. "Se - egli scrive - la Rivoluzione Americana, le sue dichiarazioni dei diritti, le sue costituzioni erano state profondamente influenzate dal pensiero politico francese, esse non mancarono a loro volta, di rimando, di produrre una vasta eco nella società francese. Le idee di Montesquieu e di Rousseau erano uscite dall'astratto terreno della filosofia, erano diventate una luminosa realtà. Eco ingrandita dal fatto che la situazione economico-politica ormai premeva, che il movimento rivoluzionario era ormai in atto anche in Francia".¹³

Considerazioni, tutte queste, non infondate. Ma di cui sarebbe azzardato esagerare ambito e profondità, prescindendo cioè dall'invito di Alberto Aquarone ad attribuire al pensiero politico inglese del sei e settecento assai maggiore incidenza sulle istituzioni politiche americane di quello

¹¹ A. Aulard, *Histoire politique de la Révolution Française. Origines et développement de la Démocratie et de la République (1789-1804)*, Paris, 1905³, p. 19.

¹² F. Battaglia, *Libertà ed Uguaglianza nelle Dichiarazioni francesi dei diritti dal 1789 al 1795*, Bologna, N. Zanichelli, 1946, p. 4.

¹³ M. Galizia, *cit.*, p. 435.

francese dell'illuminismo.¹⁴ Né riferirli tutti e due all'illuminismo basta a fare di Montesquieu e Rousseau una *consociatio simbiotica* (di altusiano memoria) delle due rivoluzioni. Non li si possono federare neanche rubricandoli come oggetti di identico *import-export*, fra Francia e America prima e fra America e Francia poi, in una sorta di comunicazione a circuito chiuso, senza altri collegamenti e senza altre connessioni.

"The spirit of 1787 - secondo Bryce - was an English spirit, and therefore a conservative, tinged, no doubt, by the hatred of tyranny developed in the revolutionary struggle, tinged also by the nascent dislike of inequality, but in the main an English spirit, which desired to work in the old paths of precedent".¹⁵ Di qui quelle istanze di stabilità istituzionale tanto avvertite dai Madison e dagli Hamilton, o quelle di autentica rigidità conservatrice di un Adams.

Il Montesquieu noto ed ammirato in America era lo storicista assai più dell'illuminista, ed anche sul principio della separazione dei poteri più che a Montesquieu la cultura politica americana si rifaceva a Blackstone. "Montesquieu, comunque, era - a dire di Aquarone - l'unico pensatore non inglese del quale i membri della Convenzione di Filadelfia risentissero l'influsso; Rousseau non fu nominato neppure una volta nel coro dei dibattiti che si svolsero in seno ad essa e non è improbabile che egli fosse quasi completamente ignorato da quegli uomini di pur non mediocre cultura. E la teoria dello stato di natura e del contratto sociale, che era allora generalmente riconosciuta in America ed alla quale non mancarono numerosi riferimenti sia alla Convenzione di Filadelfia, sia ed ancor di più nel corso dei dibattiti sulla ratifica della Costituzione che si tennero in seno alle assemblee appositamente convocate nei vari stati, era derivata non certo dal ginevrino quanto da Locke".¹⁶

Se allora in America mai si ricavò dalla teoria della volontà generale un concetto di sovranità del tipo di quello elaborato da Rousseau nel *Contratto Sociale*, in Francia, invece, la volontà generale alla Rousseau nel 1789 servì a mantenere nella prima fase della Rivoluzione la posizione del re, pur scegliendo la versione ne più radicale della formazione di una legittimità collettiva a partire dagli individui. Ecco le radici del cosiddetto legicentrismo francese. La pienezza e la preminenza del potere legislativo consentivano alla Assemblea di fissare l'autorità della rappresentanza

¹⁴ Cfr. A. Aquarone, *Due Costituenti Settecentesche. Note sulla Convenzione di Filadelfia e sull'Assemblea Nazionale francese*, Pisa, Nistri-Lischi, 1959, pp. 80-96.

¹⁵ J. Bryce, *The American Commonwealth*, New York, 1941, (I^a ed. 1888), vol. I, p. 300.

¹⁶ A. Aquarone, *cit.*, p. 84.

collettiva, ma anche di risparmiare alla Dichiarazione ed al suo raccordo con la Costituzione ogni confronto diretto, anche meramente teorico, con la possibilità di un esecutivo monarchico.

“Gli americani - sintetizza Gauchet - non si sono trovati di fronte contemporaneamente alla necessità di demolire una società gerarchica, di ricevere l'eredità di un potere pubblico costituitosi nel corso di parecchi secoli e di fondare un potere preminente senza destabilizzare il forte potere esistente. Ora, tutti questi dati fortemente vincolanti confluiscono per imporre alla categoria dei rousseauiani un ruolo centrale e risolutivo. Questo rousseauismo non è tanto un rousseauismo d'influenza, che si esplicherebbe con il peso complessivo degli esemplari del *Contratto Sociale* in circolazione rapportato al volume globale dei cervelli francesi, quanto piuttosto rousseauismo d'opportunità funzionale, sostenuto dai bisogni specifici di un contesto e di un'impresa ... I membri della Costituente sono al tempo stesso orientati dall'esempio americano e dominati dal linguaggio del *Contratto sociale*. Ma sono anche altrettanto lontani sia dagli Stati Uniti sia dai cattivi discepoli di Rousseau”.¹⁷

La Dichiarazione doveva servire all'Assemblea costituente per stabilire un nuovo potere “all'interno” di quello antico; per conciliare l'instaurazione della legittimità nazionale con il rispetto della legittimità regale; perché la “vera” rappresentanza non cozzasse, o meglio non cozzasse ancora, contro la rappresentatività del trono. Era necessaria una sua giuridicità all'americana, ma che significasse pure l'imporsi di una volontà generale la più rousseauiana possibile. Ai legami organici di antico regime ed all'autorità delle persone fisiche la *Déclaration*, anticipazione e prefigurazione dell'intero sistema costituzionale, avrebbe sostituito il regno della legge, ossia quel sistema di relazioni degli individui in cui l'astrattezza e generalità del “comando” rispetta la loro primordiale “mancanza di collegamento”.

Eran le circostanze prima e più dei principi a far valere esigenze di equivocanza e al tempo stesso di equidistanza fra modello americano e sollecitazione rousseauiana. Così era certo per Sieyès, uomo assai radicato nei principi, ma non per questo incapace di guardar sempre con grande disponibilità alle circostanze. Non lo preoccupava affatto che il modello americano fosse un po' nella mente di tutti e che esplicitamente o implicitamente in rapporto ad esso i deputati della Costituente francese

¹⁷ M. Gauchet, Diritti dell'uomo, in F. Furet - M. Ozouf, cit., vol. II, p. 769.

si andassero schierando¹⁸; anzi, non gli dispiaceva che la discussione su tale modello oscurasse, o comunque ponesse in ombra, l'esempio della costituzione inglese e della sua sedimentazione "gotica". Così come non lo turbavano quegli eccessi di rousseauismo che valessero a scongiurare il pericolo di una torsione montesquieuiana in direzione del costituzionalismo inglese.

Nel suo progetto del 20 e 21 luglio, nei confronti delle dichiarazioni di tipo americano l'atteggiamento proposto da Sieyès era di emulazione, anziché di imitazione, alla ricerca per la propria nazione di una dichiarazione migliore. Difetto di quelle americane era l'aver conservato una immagine antica del potere e delle sue limitazioni: immagine inaccettabile per un "popolo che rientra nella sua totale sovranità". Obiettivo di una Dichiarazione dei diritti, orgogliosa della propria natura "metafisica"¹⁹, doveva essere di non apparire "una concessione, una

¹⁸ Non appena l'11 luglio La Fayette terminò la lettura del suo progetto, fu Lally-Tollendal a evocare "l'enorme differenza tra un popolo nascente che si annuncia all'universo, un popolo coloniale che rompe i legami con un governo lontano, e un popolo antico, enorme, uno dei primi del mondo, che da millequattrocento anni si è dato una forma di governo". Di analogo tenore la considerazione di Malouet il 1 agosto: se gli americani, egli avverte, hanno potuto permettersi di "prendere l'uomo in seno alla natura, e di presentarlo al mondo nella sua sovranità primitiva", è perché la relativa uguaglianza che regnava in una società appena formata e composta nella totalità dei proprietari" rendeva la proclamazione dell'uguaglianza teorica inoffensiva; mentre in Francia sarebbe stato necessario che "gli uomini posti dalla sorte in una condizione dipendente vedano piuttosto i giusti limiti che l'estensione della libertà naturale". Assai più allineati sulle posizioni di Sieyès (né è da escludersi fossero stati da lui sollecitati) gli interventi di Montmorency e di Saint-Etienne. Montmorency il 1 agosto, su "Le Courrier de Provence", programmò di "perfezionare il grande esempio dell'America", rivendicando a "questo emisfero il vantaggio sull'altro di invocare la ragione a voce più alta e di lasciarle parlare un linguaggio più puro". Saint-Etienne il 18 agosto si levò a ricordare all'Assemblea: "Avete adottato il partito della Dichiarazione dei diritti, perché i vostri cahiers v'impongono il dovere di farlo, e i vostri cahiers ve ne hanno parlato perché la Francia ha avuto come esempio l'America. Ma con questo non si dica che la nostra Dichiarazione deve essere simile". Ai francesi, a suo dire, toccava dare prova di audacia andando oltre i limiti "contrattualistici" davanti ai quali si erano arrestati gli americani. (Sul dibattito che accompagnò i lavori preparatori della Déclaration cfr. l'attenta ricostruzione di tutta la prima parte del lavoro di S. Rials, cit.).

¹⁹ "... Quando - nota Sieyès, non senza compiaciuta vena autobiografica si è voluto vedere nei deputati agli Stati generali dei veri *rappresentanti*, quando da questo termine così fecondo si è inteso trarre le verità più utili, era della metafisica. Quando per la prima volta si è distinto il potere costituente dai poteri costituiti, ed in particolare dal potere legislativo, era della metafisica. Quando si è osato attraccare tutti i privilegi insieme, in un momento in cui non essere un privilegiato era un'onta, era della metafisica. Quando nel bel mezzo di una disputa a proposito della proporzionalità fra gli ordini, si è

transazione; una condizione di trattato, un contratto fra autorità e autorità. Non c'è un potere, una autorità".

Quello di Sieyès si configurava come un ragionamento sui diritti che sarebbero serviti da guida, prioritariamente enunciati, nell'elaborazione della Costituzione invece che come un articolato suddiviso per materia. Seguiva un riassunto per massime più facilmente comprensibile a tutti. Ma la forma scelta per presentare il proprio progetto di Dichiarazione era volutamente sconcertante e provocatoria²⁰ come, del resto, lo era quella sua filosofia del pieno riconoscimento dei fini e dei mezzi dello stato sociale fatti risalire alla natura dell'uomo, in cui le garanzie di individualità dovevan esser anche garanzie di socialità; equivicinanza, appunto, e al tempo stesso equilontananza fra Rousseau e Montesquieu; continuità e perfetta compatibilità fra quelli che il secolo XIX avrebbe definito diritti "sociali" e lo spirito individualista del costituzionalismo liberale.

improvvisamente denunciata la discriminazione fra gli Ordini stessi come l'assurdità più rivoltante e perniciosa per l'intero stato sociale, era ancora della metafisica. Quando si è posta la questione che cos'è il Terzo Stato, la risposta è parsa metafisica. Quando, in un paese in cui 26 milioni di abitanti erano men che nulla agli occhi di 200mila individui, si è professata l'eguaglianza personale, quella dei diritti civili, e si dichiarato che tale eguaglianza era non meno importante dei diritti politici, era della metafisica. Quando si è detto che una nazione libera era composta di cittadini, e non di vassalli e di signori, e quando ci si è meravigliati che una funzione pubblica potesse essere considerata come una proprietà, era della metafisica. Quando si è pronunciato il nome di Assemblea nazionale, e la si è considerata preferibile agli Stati generali di Francia, era della metafisica. Quando i deputati del Terzo Stato, divenuti deputati dei comuni, si sono poi considerati come la Nazione, e si sono costituiti in Assemblea nazionale, era della metafisica. Cos'era fino a meno di un mese fa una Dichiarazione dei diritti? Della metafisica ...” (J. - E. Sieyès, Preliminari della costituzione, in J. - E. Sieyès, cit., t. I, v. I, pp. 378 sg.).

²⁰ “Esistono - così esordivano i *Préliminaires* - due modi di presentare grandi verità agli uomini. Il primo consiste nell'imporle loro sotto forma di articoli di legge, di impegnarne la memoria più che la ragione. Molti ritengono che la legge debba sempre assumere questa forma. Se così fosse una *Dichiarazione dei diritti del cittadino* non sarebbe un insieme di leggi, ma un insieme di principi. Il secondo modo di presentare la verità consiste nel privarla dei suoi caratteri essenziali, il raziocinio e l'evidenza. Non si conosce veramente se non ciò che si è appreso attraverso la ragione. Credo che i rappresentanti dei Francesi del diciottesimo secolo debbano rivolgersi in tal modo ai loro committenti. Vi sono inoltre due metodi per esser chiari. Il primo consiste nell'eliminare dall'argomento che si vuol trattare tutto quanto richiede un'attenzione particolare, tutto ciò che esula dalle banalità spicciole a tutti già note. Bisogna convenire, nulla è più semplice e più chiaro per la massa dei lettori di uno scritto basato su tale principio; ma se si desidera trattare un certo argomento, presentarlo come lo esige la sua natura, esprimere la totalità di ciò che lo riguarda ed eliminare quanto non lo riguarda, allora è a un diverso tipo di chiarezza che occorre mirare. E questa non dispensa dall'attenzione ...” (J. - E. Sieyès, cit., t. I, v. I, p. 377).

“I vantaggi - scrive Sieyès - che si possono ricavare dallo stato sociale non si limitano alla protezione efficace e totale della libertà individuale; i cittadini hanno anche il diritto a tutti i benefici di un' associazione. Questi benefici si moltiplicheranno via via che l'ordine sociale trarrà profitto dai lumi, che il tempo, l'esperienza e la riflessione diffonderanno presso la pubblica opinione. L'arte di trarre tutti i vantaggi possibili dallo stato sociale è la prima e la più importante fra tutte. Una associazione concepita in funzione del bene di tutti sarà il capolavoro dell'intelligenza e della virtù. Nessuno ignora che i membri della società traggono i più grandi vantaggi dalle proprietà pubbliche, dai lavori pubblici. Si sa che quei cittadini che un destino infelice condanna all'impossibilità di provvedere ai propri bisogni hanno, a giusto titolo, diritto al soccorso dei loro concittadini, ecc. Si sa che nulla è più idoneo a migliorare la razza umana moralmente e fisicamente, che un buon sistema di educazione e di pubblica istruzione. Si sa che una nazione stabilisce con gli altri popoli relazioni di interessi che meritano una sorveglianza attiva, ecc. Ma non è nella dichiarazione dei diritti che deve trovarsi la lista dei vantaggi che una buona Costituzione può procurare al popolo. E' sufficiente affermare in questa sede che i cittadini nel loro insieme hanno diritto a tutto ciò che lo Stato può fare in loro favore.

Una volta ricordati i fini della società, è chiaro che i mezzi pubblici debbono adeguarvisi, e che debbono quindi aumentare secondo la ricchezza e la floridezza della Nazione. L'insieme di questi mezzi, rappresentato da persone e da cose, deve definirsi *sistema delle pubbliche istituzioni*, al fine di meglio ricordare la sua origine e la sua finalità. Il sistema delle pubbliche istituzioni è come un corpo politico che, avendo come il corpo umano dei bisogni e dei mezzi, deve essere organizzato in modo pressoché analogo.

Occorre dotarlo della facoltà di *volere* e della facoltà di *agire*. Il potere legislativo incarna la prima, e il potere esecutivo la seconda di queste due facoltà. Il *governo* si confonde sovente con l'azione o l'esercizio di questi due poteri, ma questa denominazione è più specificamente destinata a designare il potere esecutivo o la sua azione. Nulla è più comune dell'affermazione che si deve governare secondo la legge; il che dimostra che il potere di legiferare è distinto dal governo propriamente detto. Il potere attivo si articola in diverse diramazioni. Spetta alla *Costituzione* di seguire questa analisi”.²¹

Così argomentati e concatenati, i *Préliminaires* di Sieyès non parvero

²¹ J. - E. Sieyès, cit., pp. 388 sg.

a prima vista destinati a lasciar traccia molto larga in Assemblea. Anche perché la relazione di Champion de Cicé del 27 luglio li aveva valutati meritevoli di rispettosissima archiviazione.²² Ma nei fatti, seppur non nelle forme, Sieyès avrebbe prevalso anche stavolta. Un po' come al momento della "stretta finale" sulla verifica poteri, pure al momento della "stretta finale" sulla *Déclaration* in Assemblea fra il 20 e il 26 agosto, la talpa riuscì ad essere - sul piano dei principi, delle circostanze e del nesso fra gli uni e le altre - protagonista politico, assai più convinto e partecipe, seppur meno visibile e brillante, di Mounier e di Mirabeau.

Una proposta di *Déclaration* di Mounier, di cui Champion de Cicé aveva sottolineato quanto fosse, al contrario di quella di Sieyès, di agevole lettura²³, era incorporata nel suo progetto di Costituzione, a guisa di preambolo alquanto generico e svogliato. Perché in realtà l'identità e forse l'originalità del documento stava soprattutto nei trentacinque articoli del secondo capitolo, *Principes du Gouvernement Français*, dove era delineato un sistema rappresentativo che, nel quadro di una divisione dei poteri "morbida", prevedeva un esecutivo con rilevanti prerogative riconosciute al re, che era anche cotitolare della funzione legislativa.

Per certi aspetti tardivo, per altri prematuro, il testo di Mounier era stato presentato solo all'ultimo momento e solo per arrivare ad una mediazione con le istanze "metafisiche" di Sieyès. Ma il non aver creduto, a differenza di Sieyès, in una anticipazione, più o meno all'americana, della Dichiarazione rispetto alla Costituzione poneva Mounier abbastanza in fuori gioco e rendeva al momento intempestiva, se non addirittura controproducente, la sua esibizione di zelo monarchico.

Anche Mirabeau sarebbe finito in fuori gioco. Divenuto addirittura

²² " ... La Déclaration de M. l'Abbè Sieyès s'emparant, pour ainsi dire, de la nature de l'homme dans ses premiers éléments, et la suivant sans distraction dans tous ses développements et dans ses combinaisons sociales, a l'avantage de ne laisser échapper aucune des idées qui enchaînent les résultats, ni des nuances qui lient les idées elles-mêmes. On y retrouve et la précision et la sévérité d'un talent maître de lui-même et de son sujet. Peut-être en y découvrant l'empreinte d'une sagacité aussi profonde que rare, trouverez-vous que son inconvenient est dans sa perfection même, et que le génie particulier qui l'a dictée en supposerait beaucoup plus qu'il n'est permis d'en attendre de l'universalité de ceux qui doivent la lire et l'entendre; et tous doivent la lire et l'entendre ..." (Rapport cit., p. 7).

²³ "... Ce sont des formules pleines, mais détachées les unes des autres. Les personnes excées les liront aisément, et suppléeront les vides laissés entr'elles: les autres retiendront plus facilement, et ne seront pas effrayées, ou par la fatigue d'en suivre attentivement la génération, ou par la crainte de mal choisir dans une suite de propositions, celles où réside le resultat qui les interesse ..." (Rapport cit., p. 8).

rapporteur del Comité des Cinq incaricato di presentare in Assemblea un progetto di *Déclaration*, illustrato nella seduta del 17 agosto, nel corso del dibattito sulla sua stessa relazione, egli ebbe l'impudenza e - secondo Petion, Adrien Du Port, Le Chapelier - l'impudenza di prender le distanze dal suo compito di riferire in aula.²⁴ Fu a suo modo, da parte di Mirabeau, gesto di indubbia onestà intellettuale, pari ad altrettanto indubbia irresponsabilità politica, non tanto quello di servirsi anche in quell'occasione dell'apporto del gruppo di esuli ginevrini, che già lo aiutava al "Courier de Provence", quanto quello di farsi sincero portavoce delle perplessità avanzate dai propri collaboratori.

"... Après biend e modèls rejetés, il y eut - avrebbe rievocato uno di essi, l'anglofilo Etienne Dumont - un comité de cinq personnes chargées d'offrir un nouveau projet: Mirabeau, l'un des cinq, eut la générosité qui lui était orinaire de prendre sur lui ce travail, et de le donner à ses amis. Nous voilà donc avec Du Roverai, Clavière et lui-même, rédigeant, disputant, ajoutant un mot, en effaçant quatre nous épuisant sur cette tâche ridicule, et produisant enfin notre pièce de marqueterie, notre mosaïque de prétendus droits éternels qui n'avaient jamais existé. Durant le cours de cette triste compilation, je fis des réflexions que je n'avais point faites jusqu'alors. Je sentis le foux et le ridicule de ce travail. Ce n'était qu'une fiction puérile. La déclaration des droits, disois-je, peut se faire après la constitution, mais non pas avant car les droits existent par les lois, et ne les précèdent point. Ces maxime d'ailleurs sont dangereuses: il ne faut point bien les législateurs par des proposition générales, qu'on est obligé ensuite de modifier et de restreindre ...".²⁵

Formulata da Dumont e fatta propria da Mirabeau, l'osservazione per cui non bisognerebbe vincolare i legislatori a proposizioni che precedano la stesura della Costituzione, era davvero l'antitesi di quel che la Francia e la sua Assemblea, con la massima contiguità di intenti e stati d'animo fra loro in quei giorni, erano andate maturando. Sicché il risultato

²⁴ " ... Je propose, comme individu, et non comme membre du Comité des Cinq, d'arrêter de nouveau que la déclaration des droits doit être une partie intégrante, inséparable de la Constitution et en former le premier chapitre. Je propose encore, et le long embarras de l'Assemblée ne prouve que j'ai raison de le proposer, de renvoyer la rédaction définitive de la déclaration des droits au temps où les autres parties de la Constitution seront elles-mêmes entièrement convenues et fixées ...". L'ipotesi avanzata da Mirabeau avrebbe incontrato violentissime contestazioni in aula e non fu neppur posta in votazione dal presidente Clermont-Tonnelle.

²⁵ E. Dumont, *Souvenirs sur Mirabeau et sur les deux premières Assemblées législatives*, Paris, 1951, p. 97.

conseguito dal “rapporteur” Mirabeau fu proprio quello di rimettere in gioco Sieyès e con lui, al di là di ogni provocazione di *forma*, la *funzione* che occorreva venisse assegnata alla *Déclaration*. Concepite come ragioni della ragione, quelle dei *Préliminaires* di Sieyès, in quella faticosa concatenazione di circostanze e di principi rianalizzata da Gauchet come “*l’oeuvre de six jours*” (titolo di un capitolo) “*pour tous les hommes et pour tous les temps*” (titolo del suo primo paragrafo),²⁶ si imposero perché interpreti allora anche delle ragioni della ragione storica.

Ad imporsi era il bisogno di legittimità di un’Assemblea nazionale autoproclamatasi, che si accingeva ad “esercitare il potere costituente”, mentre la “rappresentanza attuale”, come Sieyès aveva ammesso in cima ai suoi *Préliminaires*, “non è rigorosamente conforme a ciò che esige un tale potere”. La dichiarazione rivestiva così un ruolo di *sostituto* in rapporto a questa carenza, perché la Costituzione emanasse direttamente dall’autorità dei principi “inalienabili e sacri” di ogni società, che l’Assemblea aveva titolo a scrivere.

Di qui l’obbligo alla universalità che incombeva sul testo. Solo una “dichiarazione dei diritti per tutti gli uomini, per tutti i tempi, per tutti i paesi”, stando al discorso di Duport del 18 agosto, era suscettibile di quella volontà irrecusabile e irresistibile di cui i membri della Costituente avevano bisogno a sostegno della loro opera. L’aggancio all’universale non era né il frutto di una trovata particolarmente geniale, né il segno di una “metafisica” propensione all’irrealtà. Era la risultante delle esigenze di una situazione.

Del resto, “l’intero testo - si può rilevare sotto il profilo giuridico, anche per ciò che attiene alla traduzione della *Déclaration* nel sistema costituzionale del 1791 - è giocato su due registri, quello universale (gli uomini nascono e rimangono liberi ed uguali) e quello della *citoyenneté* che inquadra i diritti politici. I diritti dell’uomo in società non sono solo richiamati genericamente, ma tassativamente enumerati; nell’ordine: libertà, proprietà, sicurezza e resistenza all’oppressione (art. 2). Un vasto sistema di riserve di *legge* (che codifica il principio di stretta legalità) rende effettivi questi diritti, stabilendo che limiti e modalità d’esercizio degli stessi vengono fissati per legge”.²⁷

²⁶ Cfr. M. Gauchet, *La Rev. cit.*, pp. 135-197. Assai più avara di riconoscimenti e di apprezzamenti per il ruolo di Sieyès (i cui *Préliminaires* vengono giudicati eclettici e banali e comunque con carattere di “Lezione” senza grande respiro politico) la ricostruzione di E. Walch, *La Déclaration des droits de l’homme et du citoyen et l’Assemblée constituante. Travaux préparatoires*, Paris, 1903, pp. 81-141.

²⁷ R. Martucci, *cit.*, pp. 629 sg.

Se il 1789 segnava l'ingresso dei diritti naturali nel nuovo diritto pubblico francese, era proprio per la esplicita maestosa centralità che la *legge* si assicurava nella *Déclaration*. Come parola, come concetto, come potere e perfino come potere dei poteri, la *legge* avrebbe dominato da protagonista le scene della Rivoluzione francese in tutti i suoi svolgimenti, in epoca robespierriana non meno che termidoriana. Il che sarebbe di peso proprio dal profilo tutt'altro che anglo-americano del costituzionalismo costituente di Sieyès, i cui tratti "politici" sempre si mostrano assai più pronunciati di quelli "giuridici".

Tali tratti, ovviamente, non sono da intendersi gli uni in rapporto agli altri come "corpi separati". Ma la priorità del momento "politico" su quello "giuridico", o viceversa, è priorità che, ove ricorra, la storia delle idee deve registrare e puntualizzare. La rappresentazione, ad esempio, dell'individuo astratto da ogni tessuto sociale, dotato di diritti innati e prepolitici, non è affatto sufficiente a dar conto della costruzione complessiva di un giusnaturalismo proteso a farsi costituzionalismo.

In un bel saggio del 1968, intitolato *Das Menschenbild in der Erklärung der Menschenrechte*, Dolf Sternberger cercava di illuminare il modello antropologico sotteso alle grandi dichiarazioni dei diritti del primo costituzionalismo americano e francese. Gli pareva che "i cosiddetti diritti prestatuali" fossero al tempo stesso i diritti che rendono possibile lo Stato: idonei a sopprimere e conservare se stessi nella nuova sfera pubblico politica; proiettati, insomma, sul doppio versante del "bourgeois" e del "citoyen", nella dimensione giuspubblicistico-politologica.

"Il senso - per Sternberger - è decisamente politico. Anche questi diritti naturali dell'uomo sono qualificazioni politiche. La loro proclamazione si richiama allo stato di natura o della creazione, soltanto al fine di rafforzare i cittadini che qui in persona fondano l'uno insieme all'altro un nuovo Stato. Se li interpretiamo come diritti *prestatuali*, questi diritti dell'uomo in genere non sono definiti esaurientemente. Il loro punto principale consiste piuttosto nel fatto che essi permettono e consolidano la fondazione dello Stato, il distacco dal sovrano, la repubblica, l'unione civile, la *civitas*. Dotare l'uomo di questi diritti, rappresenta contemporaneamente, e in primo luogo, la sua preparazione a diventare cittadino ... Il *bonum personale* concresce nel *bonum commune* e il *bonum commune* si alimenta del *bonum personale*".²⁸

Il fatto che questa osservazione provenga da uno studioso come Sternberger, il quale certo ha frequentato ed amato le pagine di Burke

²⁸ D. Sternberger, *Immagini enigmatiche dell'uomo*. (Saggi di filosofia e politica), il Mulino, Bologna, 1991, pp. 124 sg.

più intensamente di quelle di Sieyès²⁹, nulla toglie alla sua puntualità ed alla sua profondità. Anzi, essa consente di cogliere come, grazie a Sieyès, il diritto personale alla felicità del 1789 francese non fosse soltanto una pretesa verso lo Stato, ma un contributo allo Stato, un contributo costitutivo dettato - può ben dirsi - da costituzionalismo costituente.

“L’obiettivo dell’unione sociale - insiste Sieyès nei *Préliminaires* - è la felicità degli associati. L’uomo, s’è detto, tende costantemente verso questa meta, e certamente non pretese di cambiarla quando si unì in società con i suoi simili. Dunque, lo stato sociale non tende a degradare, ad avvilire gli uomini, ma, al contrario, a nobilitarli, a perfezionarli. Dunque la società non indebolisce, non riduce i mezzi particolari che ogni individuo apporta all’associazione per sua personale utilità; al contrario, li accresce; li moltiplica, sviluppando le facoltà morali e fisiche; li accresce ancora attraverso il fondamentale concorso dei lavori e dei pubblici soccorsi: così, se il cittadino versa un tributo alla cosa pubblica, questo rappresenta una sorta di restituzione, che corrisponde ad una minima parte del profitto e dei vantaggi che ne trae. Dunque lo stato sociale non aggiunge un’ingiusta ineguaglianza di diritti alla naturale ineguaglianza di mezzi; al contrario, garantisce l’eguaglianza dei diritti contro l’influsso naturale, ma nocivo, dell’ineguaglianza dei mezzi. La legge sociale non è fatta per indebolire il debole e rafforzare il forte; essa si preoccupa al contrario di proteggere il debole dalle iniziative del forte; e, estendendo la sua autorità tutelare all’insieme dei cittadini, garantisce a tutti la pienezza dei propri diritti”.³⁰

Il principio, o comunque il lessico, di eguaglianza veniva ad assumere in Sieyès un “rango logico” decisivo: il modo di esser cittadino fra i moderni mai avrebbe potuto più prescindere dall’idea dell’eguaglianza tra gli uomini e dell’universalità dei diritti umani. A dirla con lo Sternberger di *Drei Wurzeln der Politik*, l’antica nozione di “diritto civile” (*Bürgerrecht*) cedeva il campo alla moderna nozione di “diritto umano” (*Menschenrecht*), la tradizione dell’antica polis, dove non esistevano diritti umani ma solo diritti civili, diventava tradizione del moderno Stato costituzionale, dove i diritti universali della condizione umana vengono prima ed indipendentemente rispetto alla condizione civile.³¹

²⁹ Cfr. D. Sternberger, Edmund Burkes Verteidigung der Repräsentation gegen die Demokratie, in D. Sternberger, *Gesammelte Schriften*, Frankfurt a. M., Insel Verlag, 1977, vol. III (1980), pp. 227-259, e id., *Die Geburt der “Assemblée Nationale”*, ivi, pp. 305-336.

³⁰ J. -E. Sieyès, *Prel. cit.*, p. 384.

³¹ Cfr. D. Sternberger, *Drei Wurzeln der Politik*, in D. Sternberger, *cit.*, vol. III, 1978, p. 87.

Ed era pure significativo il fatto che da Sieyès “la felicità degli associati” venisse additata come “obiettivo dell’unione sociale”. Sarebbe una forzatura promuovere l’iscrizione d’ufficio del suo nome nella storia, per lo più anglo-americana, che scandisce negli ultimi tre secoli *the pursuit of happiness*: dai documenti della grande rivoluzione inglese, di ispirazione assai concreta, come la *Remonstrance* del 1647, alla classica sistematizzazione del primo libro dei *Commentaries* di William Blackstone; dalla Dichiarazione d’Indipendenza di Thomas Jefferson al Virginia Bill of Rights di George Mason; senza trascurare effetti e conseguenze che la formula della felicità ha prodotto nella giurisprudenza degli stati dove era assunta a norma di diritto positivo. Ma sarebbe egualmente una forzatura pretendere di rileggere, ripensare, rivivere tale storia in alternativa, o in contestazione, del costituzionalismo di Sieyès.

Anche nella Rivoluzione francese, “*happiness is no laughing matter*”, la felicità non è questione da ridere.³² Sieyès è buon diritto la talpa della rivoluzione, per averlo compreso e perseguito con ottimo tempismo: se il sentiero americano aveva visto la prima statuizione giuridico-formale di universali diritti naturali dell’uomo, sul sentiero francese dovrà esserci la loro prima esplicazione politico-sostanziale.

Diviene così evidente il carattere in fondo artificioso di alcune “classiche” polemiche sui rapporti tra le due rivoluzioni, come quella che oppose all’inizio di questo secolo Boutmy e Jellinek,³³ a proposito delle connessioni tra la Dichiarazione dei diritti dell’uomo del 1789 e le idee rivoluzione americana. Non v’era dubbio, notava Jellinek, che i costituenti francesi si fossero rifatti all’“esempio” americano, che ne avessero tratto idee provenienti da una tradizione già antica, protestante e liberale, e che la Dichiarazione francese si collocasse nella lunga serie dei *Bills of Rights* che avevano scandito la storia prima inglese e poi americana. All’inverso, era ugualmente certo, sosteneva Boutmy, che gli stessi Americani dovessero molto al fondo comune di filosofia illuministica e quindi pure alle sue fonti francesi.

Nonostante l’identica proiezione di universalità, l’oggetto delle due

³² La considerazione, relativa essenzialmente al mondo anglosassone, è dell’arcivescovo di Dublino, Richard Whateley (1787-1863), già professore di economia a Oxford ed autore di libri di teologia. Cfr. H. M. Jones, *The Pursuit of Happiness*, Cambridge, Mass., Harvard University Press, 1953, p. 8.

³³ Cfr. G. Jellinek, *Die Erklärung der Menschen und Bürger-rechte*, Leipzig, 1902: E. Bourmy, *La déclaration des droits de l’homme et du citoyen et M. Jellinek*, “*Annales des sciences politique*”, 1902, poi ripubblicato in E. Boutmy, *Etudes politiques*, A. Colin, Paris, 1907.

Dichiarazioni, guardato in profondità, non era altrettanto identico. In un caso si trattava di legittimare l'indipendenza americana davanti all'"opinione dell'umanità"; nell'altro di esporre sistematicamente i "diritti naturali, inalienabili e sacri dell'uomo. Di qui una irriducibile diversità di status conferita alla "legge". In un caso era fondamentale la *legge naturale*, nell'altro i *diritti naturali*.

La Dichiarazione d'indipendenza americana si basa sulla legge naturale istituita da Dio, che ha dotato gli uomini dei "diritti inalienabili" la cui tutela costituisce *il fine* dei governi, i quali perdono la loro legittimità quando disconoscono tale fine, ma sono sempre presunti legittimi finché lo rispettano. La Dichiarazione francese, invece, si impenna sui *diritti naturali* degli individui la cui tutela consiste in un concorso dei cittadini ("personalmente, o per mezzo di rappresentanti", recita l'articolo 6) all'attività legislativa. Il che rende sempre problematica la legittimità di tutti i governi stabiliti, e più in generale dei poteri costituiti, esistenti ed operanti solo riconducendoli all'idea di sovranità nazionale.

Quanto nella Dichiarazione americana resta quasi sempre implicito e subordinato alla legge naturale (dal consenso dei governati al diritto popolare a modificare le istituzioni) si trova nella Dichiarazione francese in primo piano, recando con sé l'esigenza - costituente eppur costituzionale - di rigenerare *ab imis* l'ordine politico, sociale, morale. "Le dichiarazioni dei diritti - osservava con successo "Le Courier de Provence" - non sarebbero difficili, se nel dichiarare ciò che deve essere, non si lanciasse un proclama contro ciò che è".

Dalla riluttanza a pubblicare la Dichiarazione separatamente dalla Costituzione, questa difficoltà si trasferisce all'inquietudine sul tenore di una Dichiarazione adottata in condizioni tanto precarie. La necessità di consolidare la loro legittimazione di rappresentanti della nazione spinge i costituenti a risalire invariabilmente ai principi primi di ogni società e a basarsi sulla loro autorità. Ma essi avvertono pure come la proclamazione in astratto debba legarsi al proposito di impegnarsi in una opera di autentico ricomposizione di una società: società di cui è arduo ignorare quanto nella sua attuale realtà sia lontana dalla norma che si fissa.

Poiché qui non si tratta dell'uomo nello stato di natura, ma dell'individuo che si dibatte nei vincoli della società, come ripeteranno in tanti, non basta parlare delle sue prerogative, ma occorre che vengano menzionati anche gli obblighi, i doveri, gli oneri imposti all'uomo dalla convivenza con i suoi simili. L'abate Grégoire, uno dei membri dell'Assemblea proveniente dalle fila del clero ma niente affatto reazionario, si farà ardente avvocato dei *doveri dell'uomo*. Il fatto di vivere nella società implica limitazioni alla libertà naturale dell'uomo? I *Preliminari* di Sieyès lo avevano escluso. Ma non avevano per niente convinto Grégoire.

“... L'uomo, - per Sieyès, entrando in società, non sacrifica una parte della sua libertà: anche quando non esisteva il vincolo sociale, nessuno aveva il diritto di nuocere ad un altro. Questo principio è valido per tutte le situazioni nelle quali potremmo supporre che la specie umana si trovi: il diritto di nuocere non ha mai potuto appartenere alla sfera della libertà. Lungi dal limitare la libertà individuale, lo stato sociale ne amplifica e ne assicura il godimento; esso allontana una moltitudine di ostacoli e di pericoli ai quali era esposta, quando era garantita unicamente dalla forza privata, e la affida al controllo onnipotente dell'intera associazione. Così poiché nello stato sociale l'uomo accresce i suoi mezzi morali e fisici, sottraendolo nello stesso tempo all'inquietudine che ne accompagna l'uso, non è errato affermare che la libertà è più completa e assoluta nell'ordine sociale di quanto non possa esserlo nello stato detto *di natura* ...”³⁴

Era, appunto, da questa affermazione che dissentivano i sostenitori di doveri che equilibravano i diritti: niente vincoli sociali, insomma, senza obblighi che intervenissero ad imbrigliare l'indipendenza primitiva degli individui. A Sieyès sembrava invece che tutto si svolgesse nella reciprocità: ho doveri verso gli altri nella misura in cui riconosco loro gli stessi diritti che ho io; dunque, vi sono solo diritti, dei quali i cosiddetti doveri rappresentano una fattispecie particolare nello spazio interpersonale.

Non è vero che i doveri si deducano dai diritti, avrebbe obiettato Grégoire. Non sono sufficienti i diritti dei suoi membri per formare una società. Il suo funzionamento richiede l'esercizio di una costrizione limitativa la cui legittimità attinga ad altre fonti.

Ma anche qui sarà Sieyès ad avere sostanzialmente il meglio. “Alla dottrina dei doveri - suggerisce Gauchet - viene preferito l'individualismo radicale. Ma le obiezioni scacciate dalla porta ritornano dalla finestra. Scongiurata solo in teoria, la preoccupazione di questi limiti da assegnare ai diritti in realtà segnerà profondamente il testo finale. Si può dire che il fantasma dei doveri non lascerà più i diritti: ancora prima del ritorno ufficiale dell'anno III, la loro ombra aleggia sul dibattito del 1793”.³⁵

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³⁴ J. - E. Sieyès, *Prel. cit.*, p. 385.

³⁵ M. Gauchet, *Dir. cit.*, in F. Furet-M. Ozouf, *cit.*, vol. II, p. 771.

COMMENTS

THE PRESUMPTION OF INNOCENCE: AN ESSAY ON THE JURISPRUDENCE ON THIS HUMAN RIGHT

GIUSEPPE MIFSUD BONNICI

1. This study is directed at an analytical review of certain aspects of the application and interpretation of the Presumption of Innocence in the European Court of Human Rights [ECHR] and of a salient judgment of the Maltese Constitutional Court, up to 31 December 1995.

2. It is unanimously recognised that the great difficulty of Criminal trials lies in the transition which, he who has to judge, has to undertake to move from the initial stage of simple suspicion to the final finding of guilt or innocence. There is no doubt that for centuries this represented the accepted *forma mentis* of those who had to judge. It is of course true, and important to underline, that the basic rules of Evidence in judicial proceedings which were generally followed were those which were bequeathed by the Roman Tradition “ei incumbit probatio qui dicit non qui negat” [L.2 D. XXII. 3] and “actore non probante reus est absolvendus etiamsi ipse nihil praestet” [L.23 Cod. de Prob.]. However, observance of these rules in civil proceedings was one thing, but it was another in penal matters. Here the inevitability of “suspicion” as being an essential first ingredient of the proceeding had an inordinate weight. It is not intended here to trace the historical iter which eventually brought about, practically in this century, the recognition that in order to obviate against this it was

necessary to redress the balance by proclaiming as a basic rule of criminal procedural justice that the accused is to be presumed innocent of all the charges proffered against him, until the contrary is proved according to law.

3. For our present purpose it is sufficient to note that in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10 December 1948, Article 11 proclaimed that:-

“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

and thereby the right to the presumption of innocence acquired a formal universal recognition as a “human right” distinguishing it from other “rights” not so qualified.

4. Less than two years later, on 4 November 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome and in Article 6 [2] it was enunciated that:-

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

5. The wording used in the Constitution of Malta of 1964 in Article 39 [5], is not so simple:-

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.”

6. The proviso in the Constitution brings immediately into play the procedural problem of the burden of proof, as this is closely connected with the presumption of innocence. In fact, the presumption means that in a criminal trial the accused is not called upon to prove his innocence. The presumption even exempts him from making even a simple declaration of innocence or a simple denial of guilt. Articles 390 {1} and 392 {1} {c} and {5} of the Criminal Code prescribe that at the beginning of every criminal proceeding “the court shall examine without oath, the party accused” and “shall ask the accused if and what he wishes to reply to the charge” and “If the accused stands mute, the court shall note down the circumstance and shall proceed with the case as if the accused has pleaded

not guilty." The burden of proving the guilt of the accused falls upon the prosecution.

7. After these introductory paragraphs, what now follows is a general overview of what the jurisprudence of the ECHR has contributed to the application, interpretation and implementation of the principle. In addition, special reference will be made to a judgment, on this matter, delivered by the Maltese Constitutional Court.

1. "Trivial" guilt

8. The judgment of 26 March 1982 in the Adolf Case [Adolf vs. Austria]¹ can from a chronological point of view be considered as the first judgment which examined in some depth the problem of the general aspects which are involved in the implementation of the presumption of innocence as set out in the Convention.

Mr. Gustav Adolf, an accountant and financial consultant, living in Innsbruck, Austria, was reported to the public prosecutor by a Mrs. Irmgard Proxauf for having caused her an injury when he threw at her a bunch of keys. The federal police were asked to investigate. They heard the witnesses of the complainant and also Adolf himself but not the witnesses he indicated. The investigation file was registered with the District Court which ordered that a medical report should be added. When this was completed the public prosecutor requested the court to apply Article 42 of the Austrian Penal Code, which states:

"[1] Where an act requiring public prosecution as a matter of course, involves liability to no more than a fine, a custodial sentence, not exceeding one year, or both, the act shall not be punishable [*strafbar*] if:

1. the guilt [*Schuld*] of the author of the act is slight [*gering*];
2. the act had no or only trifling consequences, and if in addition;
3. punishment is not necessary in order to deter the author of the act or other persons from committing criminal offences [2] The decision whether or not the conditions of paragraph [1] hereof are met shall be taken by the court; where the court decides in the affirmative, it shall bring the proceedings to a close no matter what stage they may have reached." [para. 22].

On the basis of the investigation file of the police and the medical

¹ Adolf Case. 26/3/1982. A. Vol.49.

report, the District Court by a decision of 10 January 1978 applying Article 42, deemed that the conditions therein specified had been met and accordingly declared that the proceedings were terminated.

Adolf's appeal to the Regional Court was rejected on 23 February 1978, as according to law appeals from the decisions of the District Court, based on Article 42, could only be entered by the prosecutor [*Anklager*].

On 7 June 1978 Adolf applied to the European Commission of Human Rights which on 6 July 1979 declared his application admissible. However, on 25 January 1980 the *Generalprokurator* attached to the Supreme Court of Austria applied to that Court for the annulment of the decision of the District Court. This request was however rejected on 28 February 1980.

The Supreme Court declared that the decision of the District Court in applying Article 42 is based on the existence of a state of suspicion and that even where the description of the conduct of the suspect takes the form of findings of fact the statements in question cannot be regarded as judicial findings within the meaning of what is provided for in the Code of Criminal Procedure. That kind of decision can only be understood to mean that further proceedings are to be avoided because even at that stage it is clearly recognised that the matter is of a trifling nature and therefore any further consideration would be a waste of time for the Court.

Nothing in that decision could be considered as equivalent to a finding of guilt and it could in no way harm the person affected i.e. Adolf.

9. Adolf maintained that both decisions, that of the District Court and that of the Supreme Court, had violated his right to be presumed innocent and that in effect even if, as the Supreme Court held, the first decision could only be understood to mean that he was only suspected of having committed a trifling fault and not guilty of an offence still this was not compatible with that innocence to which he was entitled.

10. The Court, by a close majority of four votes against three,² held that no violation had occurred:-

² President G. Wiarda and Judges F. Matscher, B. Walsh and Sir Vincent Evans formed the majority, while Judges J. Cremona, L. Liesch and L. Pettiti dissented. However, Judge Matscher in a concurring opinion, in explaining his vote with the majority, *inter alia*, said:- "On the other hand I well understand the way of thinking of my colleagues who have felt unable to concur with the majority. In point of fact, the present case is the result of a chain of unfortunate circumstances and of mishandling on the part of the relevant authorities, something which can make it difficult in the particular event to reach the conclusion that there is no breach of Article 6[2] of the Convention." (page 22).

"The Court recognises that the District Court's reasoned decision dated 10 January 1978 must be read with the judgment of the Supreme Court and in the light of it. That judgment has cleared Mr. Adolf of any finding of guilt and thus the presumption of his innocence is no longer called into question. By reason of the nature of section 42 of the Penal Code, the proceedings, on that section being applied, did not, and could not terminate with any finding of guilt; it was therefore not necessary for the District Court to proceed with any hearing in the case or examination of evidence." [para. 40].

11. The dissenters after noting, *inter alia*, that the decision of the District Court had concluded that:-

"The injury found is insignificant as it does not exceed the three-day limit; the fault [*Verschulden*] of the accused may be described as insignificant and his character gives cause to expect that he will conduct himself properly in future".

They, on their part, observed:-

"In our view that reasoning clearly amounts to a judicial finding, in the context of a criminal charge, that the applicant [i.e. Adolf] inflicted bodily harm on another person and that he was in a state of guilt in doing so. The net result is that notwithstanding the applicant's persistent denial of the allegations made against him, and without holding a public trial, hearing any witnesses and giving the applicant the opportunity to challenge the aforesaid medical opinion, that Court made findings establishing both the disputed facts and his contested guilt." [page 20].

12. It is difficult not to agree with this dissension. There is no doubt that the District Court did not respect the presumption of innocence enjoyed by Adolf because if it had done so it would juridically follow that that presumption can only be overcome by the proof of guilt and that proof of guilt could only be reached according to the rules of a proper trial. The majority relied on the attenuation of the District Court decision by the 'explanation' offered to that first judgment by the Supreme Court but that again is not satisfactory because after that extenuating explanation, the first decision was confirmed without amendment, and therefore that confirmed decision was not cancelled and that registers Adolf's 'fault'. Finally, it is to be noted that the attenuating intervention of the Supreme Court came about only incidentally, following the application of the *Generalprokurator* to have the first decision annulled

by the Supreme Court. Adolf himself did not even have that remedy at his disposal. And that intervention, in fact, occurred more than six months after Adolf's application to the European Commission of Human Rights had been declared admissible by that Commission [para. 14].

Of course the whole affair was trivial and insignificant but if this is a juridically valid consideration then surely it should have been brought to an end by the police or by some juridical form, similar to a 'nolle prosequi', immediately after the police preliminary investigation had come to an end, and thereby Adolf's innocence would have been maintained. But brushing away a person's innocence because of the triviality of a person's *fault* cannot be satisfactory. Especially to the person concerned; and it is his human right which is being considered and it is that human right which, if violated, is to be protected.

13. The first encounter of the presumption of innocence with the ECHR did not come off as well as one would have expected.

2. Violation by implication

14. In the next case the Court had to consider the claim of a person who submitted that he was a victim of an indirect violation, by implication, of the presumption of innocence which he should have been accorded.

15. A Swiss journalist by the name of Minelli³, was charged with defamation in the press [libel] by Tele-Reportoire S.A, and its director Mr. Vass, before the Uster [Zurich] District Court. The complaint was filed on 29 February 1972. The company and its director had already filed a similar complaint against a Mr. Fust for an article published by the latter in a daily called "Blick". This case came up before the 1st. Criminal Chamber of the Canton of Zurich, a higher Court. Mr. Vass requested the District Court to suspend the proceeding against Minelli, pending the proceedings in the higher court, and this request was accepted and the proceedings were suspended on 3 July 1974.

The 1st Criminal Chamber, on 2 September 1975, found Mr. Fust guilty and fined him, 200 SF, and condemned him to pay 1400 SF to Mr. Vass as compensatory damages and a further 1400 SF for court costs.

Even before that judgment was delivered, on 22 August 1975, Mr. Vass requested the District Court to resume the hearings of the proceedings

³ Minelli Case [vs. Switzerland] 23 March 1983. A Vol. 62.

against Mr. Minelli and pointed out that the case had to be terminated before the end of February 1976 to avoid the extinction of the proceedings owing to the four year absolute term of prescription of the action as provided by Swiss Law. On 12 September 1975 this request was accepted. However, now, the District Court, on Minelli's request, relinquished jurisdiction in favour of the Assize Court.

The Prosecution Chamber of the Zurich Higher Court, directed that the case be remitted to the Canton of Zurich Assize Court, but Minelli appealed this decision before the Federal Court. The appeal was dismissed on 6 January 1976, but by now it was too late to allow the Assize Court to reach a decision before the February deadline. However, that Court, in view of the impending deadline asked the parties to make submissions as to the question of the costs. Written submissions were filed but Minelli also requested the Court to obtain certain evidence.

On 12 May 1976 the Zurich Assize Court decided that it could not hear evidence because of the time bar, but decided also that Minelli should bear two-thirds of the court costs and to pay to each of the complainants 600SF compensation in respect of their expenses. This decision was reached on the strength of article 293 of the Zurich Code of Criminal Procedure, which provided that the losing party is to bear the costs of the proceedings and compensate the other party for his expenses unless special circumstances indicated a different adjudication.

The Chamber rested its decision on the consideration that it "depend[s] on the judgment which would have been given had there not been limitation", [para. 13] and in settling the matter of the possible judgment, the Chamber referred to the finding in the case of Mr. Fust, successfully concluded in favour of Mr. Vass and his company.

Appeals by Minelli failed and his position was even worsened by the final decision of the Federal Court.

16. When the case came up before the ECHR there was no doubt about what was at stake and what had to be decided:-

"The applicant and the Government agreed that the case raised a question of principle: is it consonant with the presumption of innocence to direct that a person shall pay court costs and compensation in respect of expenses where he has been acquitted or where the case has been discontinued, discharged or, as here, terminated on account of limitation?" [para. 34].

To this question the Court unanimously answered as follows:-

"In the Court's judgment, the presumption of innocence will be

barred, according to German Law. The District Court held that, on the basis of the file Lutz 'would most probably have been convicted of an offence' if the case had continued and the Regional Court, in confirming what had been decided by the District Court, remarked that if the proceedings had continued "the defendant would almost certainly have been found guilty of an offence" [para. 17]. It is difficult to conclude that the presumption of innocence which Lutz should have enjoyed, was respected when these Courts reached those conclusions. Moreover, it was as a consequence of those findings that the German Treasury was not ordered to pay Mr. Lutz's costs and expenses, which would indeed have been ordered if no fault against Lutz, would have been found. [pages 28 to 30].

On this last matter, it appears that it was not convincing on Lutz's part to argue that the fact that he had to bear his costs and expenses amounted to 'a penalty'. This is not so, as one can agree with the Court that the German Courts, in this respect, acted on an equitable basis [para. 63] but, in any case, the absence of a penalty or other punitive measure does not exclude the incidence of the presumption of innocence in the proceeding as a whole.

23. The Englert Case was not substantially different. Englert, a German citizen, had a criminal record. In February 1981 he was arrested on suspicion of extortion with threats, bodily harm and rape. He was tried by the Heilbronn Regional Court for extortion accompanied by menaces of homicide and rape. He was on 2 November 1981 found guilty of extortion but acquitted of the charge of rape. He was sentenced to one year and three months imprisonment. On appeal, the Federal Court of Justice set aside the judgment and remitted the case for retrial to a different Chamber of the Regional Court. This was done because the Regional Court had not heard evidence from a parish priest to whom, as alleged by the defence, the victim had said that she had consented to the sexual intercourse. This did not materialise however as the priest refused to testify unless he was authorised to do so by the victim. At this stage, the public prosecutor moved for a stay of the proceedings as provided by Article 154[2] of the German Code of Criminal Procedure [para. 19]. The Court stayed the proceedings and ordered that the court costs should be borne by the Treasury, but that Englert was to bear his own costs and expenses. This was clearly envisaged by Article 467[4] of the same Code [para. 20]. Moreover, it refused Englert's claim for compensation for the prejudice he may have suffered on being detained on remand.

Englert appealed but the Stuttgart Court of Appeal declared the appeal inadmissible.

24. When Englert brought his case to the ECHR his claim that by its last decision the Heilbronn Regional Court had violated his right to be presumed innocent unless he is declared guilty at the termination of a trial according to law, was rejected by sixteen votes to one.⁹ The reasoning was similar to that of the Lutz judgment and in conclusion it stated:-

“The competent court, acting on an equitable basis and having regard, among other things, to the strong suspicions which seemed to it to exist concerning him, did not impose any sanction on him but merely refused to order that the said costs and expenses or any compensation should be paid out of public funds. And, as the Court has already pointed out, the Convention - more particularly Article 6[2] - does not oblige the Contracting States, when a prosecution has been discontinued, to indemnify a person ‘charged with a criminal offence’ for any detriment he may have suffered” [para. 40].

25. The third of these series of cases was that of Nolkenbockhoff. Only the facts of this case were slightly different from those of the Englert case. The applicant was a widow who was claiming the costs and expenses which her husband had to incur in a trial at the end of which he, along with three others, was convicted of breach of trust, criminal bankruptcy and fraud. He appealed but died before the appeal was heard. This automatically terminated the proceedings and the widow filed her claims. The outcome in the German Courts, which this time included the Constitutional Court, was the same as that of the previous cases. The ECHR pronounced the same decision as those of the other cases in this trilogy.

26. In conclusion it can be stated that the ECHR, in these cases, held that the presumption of innocence does not protect a person from being considered as a suspect of having committed a criminal offence or to put it in the same words as those of the Court, for that Court to “having regard to the strong suspicions which seemed to them [the German Court] to exist concerning Mr. Nolkenbockhoff” [para. 40]. The decisions of the German Courts not to exempt a person suspected of having committed a crime from having to pay the costs and expenses which that suspicion involved and not to grant any compensation for detention on remand to a person who is only suspected of having committed a crime, do not imply that the presumption of innocence has not been respected or that, albeit indirectly, that human right has been violated.

⁹ Once again Judge J. J. Cremona was the only dissenter, in the three cases.

27. In the Sekanina¹⁰ judgment however, the Court found that it could not follow the same path for, although in similar circumstances, the presumption of innocence this time, had not been respected and no amount of lingering suspicions after a trial could justify its neglect by the Court.

Mr. Karl Sekanina was tried for the homicide of his wife but acquitted as the jury considered that there was no conclusive evidence to justify a conviction. Mr. Sekanina claimed reimbursement of the costs he had incurred and also compensation for the period he was kept in detention. These claims were rejected and the Court of Appeal concluded:-

“Having had regard to all these circumstances, the majority of which were not disproved at the trial, the jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of that suspicion being dispelled” [para. 13].

28. The ECHR, this time did not accept the pleas of the Austrian Government that it should follow what had been decided in the Lutz, Englert and Nolkenbockhoff cases, and pointed out the difference between those cases and the instant one. Here the decisions for refusing the claims of Sekanina were indirectly or by implication founded on the non-recognition of the presumption of innocence:-

“Despite the fact that there had been a final decision acquitting Mr. Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant’s guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding the accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence. Accordingly there has been a violation of Article 6[2].” [paras. 30-31].

3. Disciplinary charges and proceedings

29. Whenever the right to the presumption has been invoked, the first task of the ECHR has been taken to be that of establishing whether the claimant was indeed charged with a criminal offence and subjected to

¹⁰ Case of Sekanina vs. Austria. 25 August 1993. A. Vol. A 266.

criminal proceedings. As already noted a number of claims founder on this first hurdle.

30. In this context, 'disciplinary charges and proceedings', have created difficulties which have not received concordant solutions. Is a disciplinary charge a criminal charge? Are disciplinary proceedings equal to criminal proceedings? The answers to these questions will establish whether the person who faces a disciplinary charge and is subjected to disciplinary proceedings is entitled to be presumed innocent of that charge until proved otherwise. Therefore what follows is a review of cases where the principal issue is the solution of the preliminary question as to whether the facts qualify as "criminal" or as "civil" for the purposes of Article 6 of the Convention. It is only when that hurdle is mastered and the "criminal" element is selected that the presumption of innocence may come up for consideration. It is from this point of view that the relevance of this section to the general theme of this study, is to be gauged.

31. These questions came up in the Case of Engel and Others against The Netherlands of 8 June 1976, already mentioned.

The applicants were all conscript soldiers serving in the Netherlands Armed Forces. They committed various offences against military discipline and received punishments for the same, through their commanding officers.

32. The Court devoted great attention to the problem of whether disciplinary charges can be considered as equivalent to criminal charges for the purposes of Article 6 of the Convention, but at the end of a lengthy and cautious consideration [paras. 80 to 85], it came down to taking into account only the 'specificity' of military service and the facts in the case, and opted for a finding that with regard to two of the applicants there was a breach of Article 6[1] 'insofar as hearings before the Supreme Military Court took place *in camera*' [clause 11 of the operative part, page 45.]. {contrary to that publicity of trial which is a general civil / criminal guarantee,} but excluded any relevance to the problem of having to consider Article 6 in its 'criminal' context, in those disciplinary proceedings.

33. It can safely be said that the problems connected with disciplinary proceedings were left wide open and unprejudiced. A minority among the judges were not happy with the 'criminal content' exclusion, but of this later.

34. As was to be expected, the same or similar questions came up again in the Case of Albert and Le Compte¹¹, of 28 May 1982.

Dr. Alfred Albert, a medical practitioner, was asked to appear before the Brabant [Belgium] Provincial Council of the *Ordre des medecins* [Medical Association] in order to explain allegations that he had issued certificates of unfitness for work without a proper examination and without having at his disposal the relative medical record of the patients concerned. The Council found against Dr. Albert and suspended him from the practice of his profession for two years, "a very severe sanction" imposed in view of "the very serious disciplinary record" of Dr. Albert [para. 9]. Appeals to the Appeals Council and the Court of Cassation were dismissed. Dr. Herman Le Compte, also a medical practitioner, was informed by the West Flanders Provincial Council that an Inquiry had been ordered against him on the grounds of improper publicity and contempt of the *Ordre*. He had given three interviews to magazines and wrote a letter to the President of the Council.

Dr. Le Compte challenged all the members of the Council, but the latter, after rejecting his comprehensive challenge of the members of the Council, found against him and suspended his right to practice medicine for two years.

Dr. Le Compte appealed but the Appeals Council not only rejected it but ordered that the name of the applicant should be struck off the register of the *Ordre des medecins*. On his further objection to this decision, he lodged a challenge against the members composing the Appeals Council, but both were rejected by the Council. The appeal to the Court of Cassation was also rejected [para. 16].

35. Before proceeding with the consideration of this judgment however, it is necessary to go back in time to a decision of the Court in the Case of Le Compte [the same person of the previous case], Van Leuven and De Meyere of 23 June 1981.¹² The applicants were medical practitioners who had been, for different reasons and for different periods of time, suspended from exercising their profession by decisions of Councils of the *Ordre des medecins*. The first question before the Court was whether matters of this kind attracted problems of determination of civil rights and obligations or were problems which involved criminal charges against the person concerned, in terms of Article 6 [1] of the Convention; that is to say, how and in what way is that article applicable.

¹¹ Case of Albert and Le Compte [vs. Belgium] 28 May 1982. A. Vol. 58.

¹² Case of Le Compte, Van Leuven and De Meyere. [vs. Belgium] 23 June 1981. A. Vol. 43.

The reply was the following:-

“..... disciplinary proceedings as such cannot be characterised as ‘criminal’; nevertheless, this may not hold good for certain specific cases [Series A no. 22, pp. 33-36, paras. 80-85].¹³

Again, disciplinary proceedings do not normally lead to a *constestation* [dispute] over “civil rights and obligations” [ibid., p. 37, para. 87 in fine]. However, this does not mean that the position may not be different in certain circumstances. The Court has not so far had to resolve this issue expressly; [para. 42].”

And in fact, in that case the Court decided that Article 6[1] of the Convention was applicable in so far as its ‘civil’ aspect is concerned and resolved the case on that basis without having to get to grips with the ‘criminal’ aspect, which would then call into play all the guarantees which that article invokes for criminal proceedings.

36. Now in the *Albert* case, 11 months after the *Le Compte* judgment, the Court once again elected to be non-committal. Once again it considered by fourteen votes to four, that only the ‘civil’ element of Article 6 was applicable, although it did consider, briefly, in para. 40, the presumption of innocence claim, just enough to say that it does not stand up to examination [para. 40], as the fact to which objection was raised, in this respect, was that the applicant’s previous record was taken into consideration only for fixing the sanction [para. 40].

37. The majority of the Court - sixteen out of twenty judges - found that Article 6[1] was “applicable to the hearing of the case {in French ‘*cause*’} and that there was a breach of this guarantee because the cases {in French ‘*causes*’} were not heard in public by the Appeals Council and the judgment was not pronounced in public [clauses 2 and 3 of the operative part, page 22].

Judges J. J. Cremona and D. Bindschedler-Robert concurred with the majority but were of the opinion that the proceedings concerned the determination of a criminal charge, while Judges L. Liesch, F. Matscher, J. Pinheiro Farinha and Sir Vincent Evans, for different reasons, all held that the matter does not come in at all under Article 6, it being neither “civil” nor “criminal” in terms of the Convention. All these judges were thus confirming the opinions they expressed in the previous similar case

¹³ The reference of the Court is to the *Engel* Case.

of Le Compte, Van Leuven and De Meyere. Judge Thor Vilhjalmsson who was in their company in that case, now voted in favour of applicability.

4. The burden of proof

38. With the Salabiaku Case of 7 October 1988¹⁴, we arrive at the consideration of the presumption of innocence in connection with the broader issue of the burden of proof in criminal trials, to which reference has been made in paragraph 2 of this study.

39. Mr. Amosi Salabiaku, a Zairese, lived in Paris. He went to Roissy Airport and collected from there a trunk with which he passed the "nothing to declare" channel at the Customs. Before Mr. Salabiaku boarded the bus for Paris, Customs officials forced the lock of the trunk and in a welded false bottom found 10kg. of herbal and seed cannabis.

The Tribunal de Grand Instance, Bobigny, found Salabiaku guilty of [a] illegally importing narcotics, and [b] of smuggling prohibited goods. He was sentenced to two years imprisonment, fined 100,000 FF and prohibited from residing on French territory. On appeal, the finding of guilt for the illegal importation of narcotics was set aside while the other finding was confirmed. Salabiaku now appealed to the Court of Cassation, principally on the ground that the Paris Court of Appeal when deciding that:-

"..... he cannot plead unavoidable error because he was warned by an official of Air Zaire not to take possession of the trunk unless he was sure that it belonged to him, particularly as he would have to open it at customs. Thus, before declaring himself to be the owner of it and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods;

..... by failing to do so and by having in his possession a trunk containing 10kg. of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods"

it had placed upon him an "almost irrebuttable presumption of guilt" as Article 392[1] of the Customs Code provided that "the person in possession of contraband goods shall be deemed liable for the offence" [paras. 10-15].

¹⁴ Salabiaku Case [vs. France.] 7 October 1988. A. Vol. 141.

40. The ECHR observed that presumptions of fact or of law operate in every legal system and the Convention only requires the States to remain within certain limits in this respect, as regards criminal law. Thus “persons in possession” are deemed liable for the offence but a possessor is not without a means of defence as he is accorded the benefit of extenuating circumstances and he can establish *force majeure*. Accordingly, the task of the Court is to determine whether the presumption of liability as applied to the applicant is done in a manner which is compatible with the presumption of innocence. In the instant case the Court found that no automatic presumption of liability was applied against the applicant and therefore there was no breach of Article 6[2]. The French Courts had, in practice accorded the benefit of the doubt even where the offence was one of strict liability.

41. This is a particularly important judgment for the Maltese position vis-à-vis the Convention. On signing the Convention on 12 December 1966 and in the instrument of ratification which followed and which was deposited on 23 January 1967 a Declaration of Interpretation was made as follows:-

“The government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts.”¹⁵

No such declaration will be possible under Protocol 11 and therefore it is judgments such as the Salabiaku one which will have to guide the Maltese legal operators.

5. The right to remain silent

42. A corollary of the right of every person to be presumed innocent until he is proved to be guilty according to law is the right of that same person to remain silent and not be compelled to prove his innocence as long as he is shielded by the presumption.

43. Up to 1909 according to the Maltese Criminal Code the accused was not an admissible witness in a criminal trial. However, what occurred

¹⁵ European Convention on Human Rights. Collected texts. Council of Europe Press 1994. page 97. The declaration reflects the proviso of article 39[5] of the Constitution of Malta, 1964. Vide para. 5 supra.

in the Christian Affair induced the government to amend the law and Article 634 of the Criminal Code was introduced, which as amended in 1911, now reads as follows:-

“[1] The party charged or accused, shall at his own request, be admitted to give evidence on oath immediately after the close of the prosecution, saving the case where the necessity of his evidence shall arise also at a subsequent stage, or the court sees fit to vary the order of the evidence; and such party may be cross-examined by the prosecution, notwithstanding that such cross-examination would tend to incriminate him as to the offence charged.

Provided that the failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecution.

[2] The provisions of the law relating to witnesses shall apply to the accused who gives evidence on oath.

[3] The provisions of subsection [1] of this section shall not apply to cases on appeal.”

The proviso just quoted pays due homage to the presumption of innocence and affords a concrete procedural consequential safeguard to its application. However, it does not go the whole way as it allows adverse comment by the judge presiding the trial and this can have a decisive influence on the verdict of the jury.¹⁶ Respect for the presumption of innocence should not allow even the possibility of adverse comment by the court or the jurors as such a comment implies that the accused cannot rest on his innocence in silence but has to expressly proclaim it; if not actually prove it by his own testimony under oath.

44. All European legal structures seem to expect the accused, in certain circumstances to have to prove certain *facts*, when *other facts*, as proved by the prosecution, would of themselves, involve the liability of the accused because of those facts. There are quite a number of such provisions in the Maltese Criminal Code, as, for example Article 290:-

“Whosoever shall purchase or otherwise receive from any other person or shall be found to have in his possession any article bearing any

¹⁶ Vide the criticism and suggestions for reform by extending the proviso in order to join in the prohibition also the court and the jurors; Prof. Dr. Carmelo Mifsud Bonnici: “A proposito della testimonianza dell'imputato” in “Scientia” Anno IV. No. 4. pp. 383-390. “Empire Press” 1938, and reproduced in “De Jure” Vol. 1 No. 2 June 1983 pag. 49. with an introductory note on the same lines by Dr. U. Mifsud Bonnici. Sixty years later the position has not changed.

mark or sign denoting such article to be the property of the Republic of Malta, or any article which the possessor knows to be the property of the Republic of Malta, for the disposal of which no written permission shall have been given by the competent authority, and *shall fail to give a satisfactory account as to how he came by the article or thing found in his possession*, shall, on conviction

In this and similar provisions certain facts shift the burden of proof on to the accused and in all these cases a neat but strict balance has to be struck between the respect of the presumption of innocence and a legitimate expectation to have from every person, no factual indication which is “prima facie” incompatible with that innocence. It is the facts which compel the accused to have to defend his innocence and not a merely unfounded suspicion of the prosecution.

45. It appears therefore sufficiently safe to conclude that the right to remain silent will not serve the accused in those cases where certain facts are proved by the prosecution and those facts are presumed, in themselves, to burden the accused with a consequent and essential, and perhaps necessary, liability. This is the reasoning which underlies the Salabiaku Case [paras 39-40, *supra*] and the quite similar Pham Hoang vs. France Case which came later.¹⁷

46. Certain aspects of this matter were in issue before the ECHR, in the Funke Case¹⁸, where however, it appears to this writer that the necessary prejudicial and preliminary facts which have to be proved by the prosecution were not in fact present and that therefore Salambiaku and Pham Hoang could not be followed.

Mr. Jean-Gustave Funke, a German national lived in Strasbourg. In January 1980 three customs officers and a police officer arrived at his residence, and that of his wife, to obtain “particulars of their assets abroad” for tax purposes. The officers requested Funke to produce statements for the preceeding three years of various accounts from banks in Germany, Poland and Switzerland and also of his share portfolio in a Kiel bank. In 1982 the Strasbourg District Court ordered Funke to produce to the customs authorities the documents requested and imposed a fine of 20 FF per day for any delay and a fine of 1,200 FF. The Colmar Court of Appeal confirmed the first judgment with a slight variation in the list of

¹⁷ Case of Pham Hoang vs. France. 25 September 1992. A. Vol. 243.

¹⁸ Funke vs. France. 25 February 1993. A. Vol. 256 A.

documents to be produced but also increased the per day penalty for delay to 50 FF. The Court of Cassation rejected Funke's further appeal. At all levels, Articles 65-1 and 413 bis of the Customs Code were applied:-

"Customs officers may require production of papers and documents of any kind relating to operations of interest to their department." [Article 65-1]

While article 413 bis makes any refusal to produce documents and any concealment of documents, in the case contemplated in Article 65-1, and others, punishable by imprisonment [paras. 30 and 13].

47. Clearly the cumulative effect of the provisions of the French Customs Code was that of compelling the suspected person of producing documents to prove that he was innocent of certain criminal charges connected with fiscal matters of which he was suspected. And the Court said as much:-

"The Court notes that the customs secured Mr. Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence', within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself.

There has accordingly been a breach of Article 6 [1].

The foregoing conclusion makes it unnecessary for the Court to ascertain whether Mr. Funke's conviction also contravened the principle of presumption of innocence" [paras. 44-45].

It is usual for the Court to proceed in this way, that is, of finding that it is not necessary to answer all the claims for alleged violations, especially after finding a violation on the first claim. But sometimes this way of proceeding lacks a principle of guidance as to what facts, in the Court's judgment, would constitute a violation of a human right. In this particular instance on the strength of what is said in paragraph 44, in the operative part we read:-

"2. Holds by eight votes to one that, for want of a fair trial, there has been a violation of Article 6[1];

3. Holds by eight votes to one that it is unnecessary to consider the other complaints raised under Article 6;"

Now the want of a fair trial is here identified in that Funke was denied the right 'to remain silent and not to contribute to incriminating himself'. But this is not a satisfactory account of what right was breached in the whole proceeding. It may very well have happened that Mrs. Funke [as in the meanwhile, Mr. Funke had died] did eventually produce the documents which did not have an incriminating value. Even the element of silence comes into consideration only if that concept is given a very wide interpretation. On the contrary, what was really wrong in the whole aspect of the Funke affair was the juridical pretension of the Customs Code that in the circumstances, *on mere suspicion*, Funke was compelled to produce documents to prove that he was innocent of the suspected infringements and those alleged infringements would be proved by the supposed existence of those documents, as the Court in fact found and stated in paragraph 44. What this really violates is the presumption of innocence and not its corollary - the right to remain silent - precisely because one is safely within the tower of innocence.

6. Who can violate the presumption of innocence?

48. Strangely enough, in this writer's opinion it is this last question to be considered, which has caused certain unexpected difficulties.

In the early Wemhoff Case of 27 June 1968¹⁹, Judge Zekia, in his dissenting opinion had, apropos of paragraph 2 of Article 6, remarked;

"This is a fundamental provision. It clearly implies that until a man is proved guilty he is entitled to be treated as innocent. This should constantly be borne in mind in dealing with persons kept in custody pending trial."

It may be asked whether *all* the persons who are somehow or other connected with the custody of a person pending trial can commit a breach of the presumption of innocence. There is no doubt that the judge [in Malta, in the preliminary stages, a Magistrate] or other officer authorised by law to exercise judicial power before whom the person in custody has to be brought²⁰ has to respect that presumption and therefore he can be guilty of its violation. But the same cannot be said of the prosecuting police officer or of the Attorney General or Public Prosecutor as they are

¹⁹ "Wemhoff" Case [vs. Germany] 27 June 1968. A Vol. 7. page 39.

²⁰ Article 5[3] of the Convention.

set to prove their suspicion, if not conviction, that the person in custody is the perpetrator of the crime with which they are charging him.

49. In the Deweer Case of 27 February 1980²¹, the Court, although it did not have to consider paragraph 2 of Article 6, did say *en passant*, that:-

“The presumption of innocence embodied in paragraph 2 and the various rights of which a non-exhaustive list appears in paragraph 3 [“minimum rights”, ‘*notamment*’] are constituent elements, amongst others, of the notion of a *fair trial in criminal proceedings*”, but it would not be safe to understand this in the sense that the Court is here delimiting the area of applicability of the presumption *in so far as the violation of a human right is concerned*, to the field of criminal proceedings. However, it is also worthwhile to note that those are the natural areas of reference for the Court, whenever the presumption comes up before it; as for example, in the fairly recent case of Barbera’, Messegue’ and Jabardo²², when it said:-

“The presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty. In this case, does not appear from the evidence that *during the proceedings, and in particular the trial*, the *Audencia Nacional* or the presiding judge had taken decisions or attitudes reflecting such an option.”

It would appear, indeed, that all this is not only obvious but also definite. However, there are difficulties.

50. On 13 April 1972 Giuseppina Formosa was killed by an explosive charge placed in her residence in Tarxien, Malta. On 28 April 1972, the Commissioner of Police attended by two Superintendents and two Inspectors from among his officers, held a press conference at the Police Headquarters and amongst other matters, he announced that Emmanuel Formosa, the husband, had been arrested, that he had confessed to the killing of his wife and had requested Police protection as he was afraid of the reaction which could be expected from his wife’s relatives. The next day 29th April 1972 he was brought before the inquiring Magistrate and formally charged with the homicide.

²¹ Deweer Case [vs. Belgium] 27 February 1980. A Vol. 35. para. 56.

²² Case of Barbera’, Messegue’ and Jabardo. 6 December 1988. A. 146. para. 91.

On the same day Formosa sought and obtained free legal aid and immediately gave notice that he was going to proceed with an application before the First Hall of the Civil Court to obtain a remedy for the flagrant violation, by the Commissioner of Police, of his right to be presumed innocent until proved guilty [vide para. 5 supra].

The First Hall rejected the application finding no violation principally because although it was proved that the Commissioner had given to the press a detailed account of the case and that Formosa confessed to the crime when he was faced with the evidence mastered by the Police he had also said that it was now up to the Court to say whether Formosa was guilty or otherwise.²³

On appeal, the Constitutional Court confirmed the first judgment and declared that everything considered, it formed the conviction that a valuation of the incident itself and all the relevant circumstances, "including naturally the wisdom of the usual directives which the presiding judge shall give to the jurors" are not such that it can be said that they are 'likely' to amount to a violation of the applicant's constitutional rights and therefore no violation has in fact occurred.²⁴

Formosa was convicted of the homicide of his wife on 13 July 1973.

51. It is difficult to accept these judgments. The first judgment seems to say that the Commissioner of Police balanced the matter out when he

²³ Emmanuel Formosa vs. Kummissarju tal-Pulizija. 16 ta' April 1973. Qorti Kostituzzjonali tal-Maestà Taghha r-Regina. Deciżjonijiet Kostituzzjonali. Ghaqda Studenti tal-Ligi. 1979. Vol. I. pp. 341-359. This operative part of the first judgment is at page 352 and in the original reads as follows:- "Wara li qieset il-provi kollha li nġiebu, din il-Qorti tiddikjara li ma ssib xejn antikostituzzjonali fl-aġir tal-Kummissarju tal-Pulizija, għalkemm huwa verament ta diversi dettalji dwar dan il-każ, u semma ukoll il-fatt li meta ir-rikorrent gie rinfaċċjat bil-provi li l-pulizija kienet gābret huwa konfessa, però huwa wissa ukoll lil kull min kien preżenti għal dik l-intervista li issa kien imiss lill-Qorti li tghid jekk l-imputat kienx hati jew le;"

²⁴ The Constitutional Court at the time was composed of five judges: Prof. Dr. J. J. Cremona, President; Prof. Dr. J. Xuereb, Dr. M. Caruana Curran, Dr. E. Magri and Dr. V. R. Sammut. The original of the conclusive paragraph reads:- Kollox meqjus, din il-Qorti ifformat il-konvinciment illi l-incident lamentat, valutat kif imiss fih innifsu għal dik li hi l-entita tiegħu u fl-isfond taċ-ċirkostanzi kollha nkluża naturalment is-saġġezza tad-direttivi li soltu jinghataw lill-gurati mill-Onorevoli Imhallef li jkun jippresjedi l-gudizzju, ma huwiex tali li jista' jinghad li hu 'likely' [l-espressjoni tal-artikolu 47[1] tal-Kostituzzjoni li giet sottolineata mill-appellant fir-rikors tiegħu quddiem din il-Qorti] li jivvjola d-dispożizzjonijiet kostituzzjonali tad-drittijiet tal-bniedem invokati mill-istess appellant, u ma jistax fil-fehma tal-Qorti jinghad li giet fil-fatt kommissa vjolazzjoni ta' dawn id-dispożizzjonijiet. L-appel għalhekk ma jistax jiġi milqugħ." [pages 358-359.]

first said that Formosa had confessed to the crime and then later said that it is up to the Court to say whether he is guilty or innocent when the whole point is whether the first statement spread out to the whole country by the media of the guilt of the person held in custody by a Commissioner of Police violates the presumption of innocence. It could be said that the Court implied that there was a violation, but then considered that violation was atoned for by the Commissioner when he said that the Court will be deciding on the guilt or innocence. The second judgment, taking up an argument already mentioned by the first court, held that the applicant would not suffer from one of the possible effects of that press conference, the prejudice which it may have sown in the minds of those who will be the jurors in the case, by the naive consideration that this prejudice will not occur simply because the presiding judge, as is customary, will address the jurors in the sense that they have to decide only on the evidence presented in the trial.

On the basis of these arguments no violation was found and the applicant was even condemned to pay the costs of the proceedings.

52. It is pertinent to mention that in the second judgment the Court made reference to the problem of media comments when criminal proceedings are still going on and before judgment is delivered. It refers to proceedings taken for contempt of court especially when there is a breach of any court decree forbidding publication of the proceeding or of parts of it. Unfortunately, the court does not notice that at least some of those prohibitions are motivated by the possible prejudice which the accused may suffer when a potential juror before he is chosen reads, hears or sees material which appears to stay with him even after the judge's final exhortations. The Maltese judgments insist all along on speculating as to whether there is going to be any future harm to the applicant as a consequence of the press conference rather than examining whether what had already happened had indeed violated the applicant's right to be presumed innocent. This approach is not very logical, or rather, it confuses cause and effect, where the potential effect is set to eliminate the actual cause.

From the juridical point of view, every violation of a human right is harmful in itself. The estimation of that harm concerns the *remedy* which is called for, but does not have any relevance to the question whether a violation has been committed or not. In the concrete case, in finding a breach the Court could only have said that the judgment itself is a satisfactory remedy. But that would have been not only ephemeral but even harmful; although it is doubtful whether this is permissible according to the Maltese Constitution which in art. 46 (2) enjoins the Court to enforce

or secure the enforcement of any one of the protected human rights. The writer is of the opinion that there was no violation simply because only a Court, a judge or a juror can breach the presumption of innocence and not the Commissioner of Police. The Constitutional Court came very near to this when it said that although it finds that there was no violation, its judgment was not to be taken as an encouragement for the pronouncement of superfluous and unnecessary remarks by the Police, but it stopped short of saying that the Police, when they do so may be committing a crime but they are not violating the constitutional "human right".

It is a particularity of the Maltese Constitution [art. 46 (1)] that any person who has grounds to fear that one of his human rights is *likely* to be violated - not an actual but merely a potential violation - he may request the Court for adequate measures to avoid that the applicant will suffer a violation; that he has grounds to fear that this is likely to happen when he is put on trial and this fact added to the difficulties of the Courts, who could not therefore be guided by usual principles of concreteness and actuality.

The applicant had claimed both an actual as well as a potential violation.

53. An almost identical case came up before the ECHR; the Case of *Allenet de Ribemont vs. France*.²⁵

Mr. Jean de Broglie, a Member of Parliament and former Minister, on 24 December 1976 was murdered in front of the residence of Mr. Allenet de Ribemont, who was arrested by the Police on 29 December. On the same date Mr. Michel Poniatowski, the Minister of the Interior, held a press conference on the police budget for the coming years, but eventually the subject of the murder which had just been committed became the topic of the conference. The Minister was accompanied by Mr. Jean Ducret, the Director of the Paris Criminal Investigation Department, and by Superintendent Pierre Ottavioli, the Head of the Crime Squad. On questions by the journalists present, the following statement, among others, was made:-

"Mr. Ducret - The instigator, Mr. De Varga, and his acolyte, Mr. de Ribemont, were the instigators of the murder." [para. 11].

De Ribemont was on 14 January 1980 charged with aiding and abetting the homicide, but, after some months, on 21 March 1980, he was released and was not put on trial.

54. On the strength of Article 6[2] of the Convention, de Ribemont

²⁵ Case of *Allenet de Ribemont vs. France*. 10 February 1995. A. Vol. 308.

sought compensation from the French Government for the damage he had suffered following the press conference, but he was unsuccessful from start to finish, as the final judgment against his claim was delivered by the Court of Cassation on 30 November 1988.

Before the ECHR, the French Government

“..... maintained that the presumption of innocence could be infringed only by a judicial authority, and could be shown to have been infringed only where, at the conclusion of proceedings ending in a conviction, the court’s reasoning suggested that it regarded the defendant as guilty in advance.” [para. 32].

55. The court rejected this submission as:

“..... the scope of Article 6[2] is not limited to the eventuality mentioned by the Government.” [para. 35]

and no doubt this is quite correct in so far as it refers to the second limb of the Government’s submission where it is claimed that the violation can only be ascertained at the conclusion of the proceedings. Clearly, if a violation is detected during the proceedings it is incumbent that it should be estirpated there and then, as long as this is possible and thus avoid the greater harm which can ensue if nothing is done until the conclusion of the trial. In fact it is difficult to understand why the Government’s pretension was taken so far.

56. It is otherwise with the first contention of the Government, that the presumption of innocence can only be infringed by a judicial authority; although the great majority of the Court rejected this as well by eight votes to one; the present writer being the sole dissenter [Clause 2 of the operative part, [page 24].

In fact the Court in the most important paragraph of the whole judgment said:-

“The Court considers that the presumption of innocence may be infringed not only by a judge or court by also by other public authorities.” [para. 36]

This is a very important enunciation indeed. No previous judgment or even obiter statement came anywhere within this precision in prescribing the obligatory force of the presumption of innocence upon all those persons who are somehow vested with public authority. On this wide spreading of the net it is manifest that in the Maltese case the Commissioner of Police had breached the presumption and no amount of considerations of

surrounding facts could possibly justify that blatant violation which on the facts, at least, is hardly distinguishable from the French case.

57. It is here important to note that this pronouncement of the Court was preceded by another one which the Court considers as a confirmation of previous enunciations:-

“Moreover, the Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are *practical and effective* as opposed to theoretical and illusory That also applies to the right enshrined in Article 6[2]” [para. 35].

The judgment was the expression of a vast majority:-

“1. Holds by eight votes to one that there has been a breach of Article 6[2] of the Convention” [page 24].”

the only dissenting opinion [pages 25-26] being that of the present writer.

58. The dissension is based on the reflection that if, besides judges and jurors, even “other public authorities” can be found to have violated the presumption of innocence, it is not possible to expect that the right can be upheld in a “practical and efficient” way. No practical and efficient remedy is possible in breaches by public officials while practical and efficient remedies are clearly available when the violation is committed by a judge or a juror.

This is clearly illustrated by the two cases just mentioned. In the Maltese case where, by Convention standards, at least, the violation was as clear and as blatant as that of the French case, what practical and efficient remedy was available once the violation by the public authority, the Commissioner of Police, occurred *before* criminal judicial proceedings had commenced but immediately after the person’s arrest? In the French case the ECHR, judging the matter *a posteriori* could and did provide a remedy in the form of a pecuniary compensation, which may be considered as practical but, even here, hardly efficient; but this was because that Court was not faced with the immediacy of a remedy before the trial; the problem which faced the Maltese Constitutional Court. This is, in the writer’s opinion an insurmountable difficulty caused by the inclusion of public authorities among the possible perpetrators of violations of the presumption of innocence. This inclusion appears to be incorrect because it loses sight of the fact that the presumption is there to insure the preliminary judgment which all those who have to judge do or may form, before and during the proceedings until their final decision. Public authorities do not come within this decisional area of activity and they should not be considered as being within the circle of relevance of the presumption.

59. Of course, this is not to say that interventions of the type just considered by public authorities should be allowed to happen without a proper criminal sanction, once it is considered that this kind of behaviour is reprehensible, and the appropriate insertion in the Criminal Code should be considered. This in fact may be based on the consideration that certain public interventions by this or that category of persons, is an undue interference in the administration of Justice. It would be similar to the present situation vis-à-vis the commentaries in the media before and during criminal proceedings, where the usual formula used is that of contempt of Court which has proved to be not very satisfactory, in any case.

But the main point remains that neither the European Convention nor the Maltese Constitution are concerned with punishing violations of what they pronounce to be 'human rights' but rather with providing remedies by protecting or compensating.

7. Conclusions

60. These comments on the 1995 case of de Ribemont conclude this survey on the jurisprudence on the presumption of innocence.

Summing up concisely what so far is the jurisprudence of the ECHR on article 6(2) on the Convention it can be said that:-

A A person who, without undergoing a proper trial is nevertheless considered by a judicial authority to have been in criminal proceedings, at fault, albeit trivial and inconsequential cannot claim that his right to be presumed innocent has been violated.

Comment - Practical but juridically unsatisfactory.

B (i) the right can be breached even indirectly or by implication when a judicial decision is reached on the basis of residual suspicions of guilt persisting after a previous judgment of absolution.

Comment - Satisfactory

(ii) there is however no indirect violation by implication when the consequential judicial decision is based on the residual suspicions or suppositions following criminal proceedings which were terminated for other causes other than absolution.

Comment - Doubtful

C Disciplinary charges and proceedings do not automatically qualify as criminal charges and proceedings and every specific case has to be examined on it's own merits to establish whether the person charged was protected by the presumption.

Comment - Uncertain as still wide open.

D When the accused is expected to disprove certain proved facts which taint him with liability, no breach of the presumption is involved. It is otherwise when in the absence of those facts the accused is expected to answer mere suspicions and provide proofs, even documentary, against those suspicions.

Comment - Satisfactory

E The right to the presumption has to be upheld and enforced in a practical and efficient manner.

Comment - Satisfactory

F The right can be breached not only by a judge or a court but also by other public authorities.

Comment - Extremely difficult to reconcile E with the remedies available when "violations" are committed by "other public authorities" other than by any one who is vested with criminal jurisdictional authority or any Court or tribunal vested with that jurisdiction.

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RIGHTS, COMPENSATION, AND THE MARKET IN MALTESE CASE LAW

E. P. DELIA

Claims for compensation following infringement of human rights, accidental damage to property, loss of business arising from the abuse of copyright and patents, and loss of life through someone else's negligence are nowadays common in many countries. Even governments are demanding payment from unwilful transgressors for damage due to the natural wealth of the society they represent. A case in point is Egypt's recent claim from a British shipping line for damage to a coral reef in the Red Sea following the grounding of a passenger liner, the *Cunard Royal Viking Sun*. At the same time countries could be requested to pay other countries which suffer as a result of activity carried out in the process of business or research: Holland demanded payment from Switzerland for pollution of the River Rhine by Swiss chemical plants in 1986, and an Australian Royal Commission concluded in 1985 that Australia was entitled to charge Britain the costs of carrying out work on the decontamination of land affected by Britain's nuclear tests twenty years earlier.

It is therefore, of interest understanding those conditions which are conducive to such claims being made. In particular it is useful to identify the relationship between national and international law and decisions to seek redress. In turn, the impact of such decisions on the way in which people behave as producers or consumers could be addressed.

A world in which payment for any accidental harm done or benefits received is a real possibility is bound to be organised differently from one which ignores completely such rewards. Economies will have to adjust their productive systems in order to account for such payments. Besides as people become aware of the need to uphold basic human rights and safeguard the natural environment, the close interrelationship between the law, its interpretation, and the markets becomes evident.

Indeed, it may be claimed that Common Law, the system of legal precedents that has evolved over time from court decisions, promotes economic efficiency when it creates incentives for problems to be solved

in the least expensive way and when it acts to reduce transactions costs so that the parties to a dispute can reach low cost solutions not directly observable by the courts. A court's decision could affect future behaviour and have important consequences in a country as well as internationally.

Thus, a legal tradition which assigns liability on a *negligence* criterion is expected to induce different future behaviour from a tradition which emphasises *strict liability*. In general, negligence would provide incentives for individuals to take appropriate precautions once an activity, like driving or transporting fuel, is under way, whereas strict liability can provide incentives for people to make decisions about whether to undertake an activity in the first place, say manufacture cigarettes.

Common law could condition what is termed in welfare economics the 'initial position' and choice. An initial position is one where, once the basic rights are identified, all have an equal probability of being affected by the rules chosen. Because such a choice of position is likely to account for the utility of all, rather than the utility of the individual who makes the decision, it is consistent with the utilitarian philosophy which upholds that everyone's utility should count equally. In turn, choice in an initial position is consistent with a hierarchy of rights in which rights to choose are dominant (Harsanyi, 1955; Zerbe and Dively, 1994:263).

Since utility cannot be measured, proxy variables, like money income or wealth, are used instead. Analysis centering on utility distribution in a society could consider the distribution of income or wealth and express the impact of a person's behaviour on another person's welfare in monetary terms.

Analyses tend to focus on rights, in particular property rights. An important role for the courts is to maintain a system of well-defined property rights. Uncertainty about property rights can be an important source of economic inefficiency. In addition, public policy makers in a country, concerned with distributive justice beside efficient resource allocation, have to decide on a hierarchy of rights as the concept of initial position suggests. Conflicts could occasionally arise between expressed human rights, say, the right to work and the right to live in a clean healthy environment. From an economic efficiency perspective which right ranks first may be immaterial, but from an equity point of view it need not be so. Hence when duties or rights come in conflict, a moral judgment based on a conscious deliberation has to be made.

A society may believe in the libertarian principle: people are free to make their informed choices, even if these are self-destructive, and free to accept the consequences. Or it may believe that the young cannot make informed choices and therefore somebody ought to intervene on their behalf. The economic policies following from the first belief on, say, tobacco

or alcohol sales and production would consequently be different from those which emerge from the second.

Social deliberations like these are reflected also in case law. The Maltese position is examined in this paper. In particular, analysis is made of the contributions of Maltese courts towards the upholding of rights and towards economic efficiency. The economic concepts of externalities, transactions cost and marketable property rights are defined within the context of the Coase Theorem, a proposition which relates property rights, liability and potential government intervention to optimal resource allocation in an economy. In turn, an examination is made of some emerging positions identified in Maltese case law in so far as these bear on those factors considered important for efficiency by the Coase Theorem. The courts would be considered efficiency conscious, apart from championing human rights, if their decisions lead to the reduction of search and waiting costs in the future. A summary of the main deductions concludes the paper.

1. Externalities and Property Rights

An external effect arises when the behaviour of an individual or firm generates direct effects, beneficial or detrimental, on some other individual or firm. An externality is an accidental by product of a person's behaviour. When externalities arise private costs and benefits diverge from social costs and benefits which include harm or gains accruing to third parties. Under such conditions resources are inefficiently allocated: the scale of activity would be too large or too small to attain a social optimum.

A common example of a divergence between private and social cost is that of factory smoke which harms people in a neighbourhood, or cigarette smoking in an office, or noise from a discotheque. The issue is whether or not the rate of activity and smoke discharge, or noise, is too high and if so by what mechanism it is best reduced. Following A.C. Pigou (1920) economists considered the following options:

- i. introducing zoning regulations, excluding certain activity from specific areas;
- ii. imposing a tax on the pollutor, ideally with the proceeds assigned to the party suffering harm;
- iii. assigning liability to the one causing externalities;
- iv. assigning property rights to those suffering externalities.

However, a critical evaluation of the Pigovian tradition by R.H. Coase (1960) highlighted two important aspects regarding economic efficiency. Firstly, social costs are mutual. When A accidentally inflicts harm on B,

a policy which avoids harm to B by restraining A implies inflicting harm on A. Policy's objective is therefore the avoidance of the more serious harm. Secondly, the existence of a problem of social cost in itself indicates the presence of transactions costs, defined as the costs of negotiating or enforcing contracts.

Coase concluded that in the absence of transactions costs the assignment of property rights or liability rules has no effect on resource allocation and, hence, on social welfare. Therefore there was no need for government intervention via taxes, subsidies or public provision. So long as property rights already exist the market system would induce an optimal resource allocation.

Property rights are legal entitlements which could operate in exchange like other goods and services. It has been shown that markets for such titles can operate effectively; contractual arrangements arise to account for services rendered or inconveniences caused (Cheung, 1978). Thus, the factory owner in the above example can 'bribe' neighbours to compensate them for the discomfort they receive if the right to a smoke-free air, or a peaceful environment, is assigned to them. Conversely, neighbours can pay the factory to reduce smoke if the producer is free to behave as required by trade. Similarly, votes may be 'traded' at election time, even though the right to vote may not be considered marketable!

However, although the choice of property rights might not affect economic efficiency it would affect the distribution of income. The initial allocation of rights therefore matters to transactors. So those who are suffering an external cost would prefer to collect a Pigovian tax, a compensation for the discomfort they have to live with. But those who create the externality would prefer to be 'bribed'. Consequently, if the reallocation of property rights changes people's wealth enough to have significant effect on market demand curves, then it might cause resources to be diverted from one efficient allocation to another.

Besides, the initial distribution of rights conditions the amount of compensation requested. For a normal good, one whose consumption adds to the welfare of an individual, a person being asked to give up a right, say, to tranquillity so that a discotheque could operate nearby, would demand a higher sum than the one the person would have been prepared to pay the owners of the discotheque to move away. The distribution of property rights lead to differences in the optimal resource allocation because they condition the total money worth of people's willingness to pay (WTP) and of their willingness to accept (WTA). Giving up a right to which one is entitled by law implies a loss of welfare and therefore requires a higher compensation than the sum offered to obtain that right.

Settling for clearing price involves transactions costs. In their presence it might not be possible to negotiate side-payments leading to efficient outcomes. Consequently, Coase's conclusion regarding the relevance for economic efficiency of property rights allocation need not hold.

Transactions costs arise as an outcome of several factors two of which have direct legal connotations. These are:

i. the inadequacy of legal and political institutions, particularly in international issues. Unless there is a recognised competent legal authority which can evaluate a claim and decide on an issue time will be lost in searching for such authority. Witness the long search for a court of law recognised by all parties concerned with the case of the Pan Am passenger aircraft which blew up over Scotland in 1988.

ii. the inadequate specification of property rights.

Social costs often arise in resources which shift from being free to being scarce as a consequence of economic activity. Clear air is slowly polluted as industry expands. In such circumstances, the right to pollute or not to pollute would not be determined as the industrial development proceeds gradually. Without an initial delineation of property rights there cannot be market transactions of the legal entitlements and industries' output would remain socially inefficient. Sometimes an unequivocal decision on property rights may be all that is required to resolve the difficulty and internalise economic activity.

Faced with a great deal of uncertainty about the costs of various solutions, a judge could assign property rights according to some secondary criterion and then attempt to reduce transactions costs between the parties. If the judge can do so, say by appointing a spokesman for the 'party' in which many persons are involved to speak on their behalf with the other party, then any mistake in the initial allocation of property rights could be mitigated by the action of the Coase Theorem.

Rights are not all of equal value. The right to life, say, supercedes the right to smoke and pollute. There exists a hierarchy of rights which represents the 'initial position' on which resource allocation and any compensation arising therefrom are derived. In its strong version, the Coase Theorem states that the allocation of property rights is immaterial for economic efficiency; any allocation is said to be Pareto-symmetric. But it need not be equity-symmetric because rights are not equal. The simple utilitarian principle of assigning equal weights to individual utilities has to be qualified. The utility a thief gets from spending stolen money ranks surely lower than the utility loss suffered by the person whose money had been stolen; hence the demand for restitution. Expressed in generic terms, the difficulties involved in reaching a solution - the transactions costs - may look trivial. But they may be not, even when a

consensus exists on the ranking of rights. Decisions made by law courts could be critical in this context. The long history of law suits made by Americans against the tobacco industry is instructive. At stake are the lives which could be saved from not smoking, the principle of free choice, and the millions of dollars in investment, income and the thousands of jobs involved in the production of tobacco and related products. Product-liability suits have driven into bankruptcy businesses notably asbestos firms in the 70's and 80's and procedures of silicone breast implants in the 90's. (The Economist, 1996: 19-21).

In situations where the nature of the externality itself may not be clear, such as the cause of death of a particular individual which is attributed to smoking, or where the number of persons involved is large, then transactions costs would probably be very high. The search for internalising negative externalities would be long. It could deter the working of the market mechanism which induces an economy to respond to the new conditions. In this situation, output and consumption would be higher than the social optimum. The additional social costs would not be accounted for in producers' and consumers' decisions.

In sum, by ranking and defining clearly property rights a society could attain an optimal resource allocation in consonance with a set of expressed moral convictions. A market could attain such a state provided that transactions costs are nil or lower than the expected benefits. The law supports such an efficiency-generation process when it defines property rights unequivocally thereby minimising transactions costs.

The contribution made by Maltese case law to the process of internalisation of costs and benefits is reviewed below. Analysis is carried out in three stages, namely, court decisions which affect directly transactions costs; the stand made by Maltese courts with regard to human rights infringement; and the award of compensatory payments to persons who suffer disability or to relatives of persons who lose their life in a wrongful manner.

2. Maltese Case Law, Externalities and Economic Efficiency

A market solution to externalities needs to be supported at law. Court decisions could be effective in reducing transactions cost enough to render viable the inclusion of externalities in producers' and consumers' decisions. Maltese courts have enunciated legal principles which could guide behaviour in the future or which could speed up the resolve of a claim making it worthwhile for plaintiffs to seek redress and compensation. Three examples are illustrated below. They refer to the right to compensation by a third party for harm accidentally received; the linkage

between negligence and liability; and the responsibility of employers for the harm to third parties caused by incompetent employees.

2.1. *Quasi-Contracts, Externalities and Compensation*

Maltese law upholds the principle that damages to third parties have to be compensated. By whom depends on the circumstances of the case. In 'A.I.C. Herbert Debono vs Mario Ellul and Paolo Agius' (1989) the Commercial Court laid down that an employer and a contractor were responsible to damages caused to third parties: the employer, if he knew that the works were not being carried out properly and did not take any step to ensure that the damage was avoided; the contractor if he did not carry out such works with due care and diligence. The court ordered compensation be paid to plaintiff.

The court of Appeal further specified that the undertaking of a project implies a tacit agreement or quasi-contract between the agent and owners of adjacent property ensuring them that the rights they enjoy would not be disturbed as a result of the changes the project may induce. In addition, an agent can only be held responsible for harm suffered by third parties as a result of factors directly related to the project. (Carmelo Wismayer *et noe* vs Chev. Anthony Falzon *et noe*, 29th April 1996). The plaintiff's claim for compensation was not upheld.

The verdict of the Court of Appeal refers to a case which happened in 1965. The case took three decades to establish a legal principle. If such ruling could free resources in the future from settling issues to generating wealth by reducing settlement time, then it would contribute to economic efficiency.

2.2. *Compensation and Indemnity Insurance*

Only grave mistakes and lack of diligence and attention expected from a **bonus pater familias** would find Maltese courts favourable to upholding claims for damages following intervention by medical practitioners.

This ruling given by the First Hall of the Civil Court in a rare case against doctors in Malta - Josephine Borg *et noe* vs Dr Anthony Fiorini (1994) - was considered important by the medical profession and insurance companies. It was seen shielding doctors against frivolous and capricious action. Doctors in Malta are generally not covered by insurance and insurance premia are considered relatively high in relation to doctors' fees.

Thus, an indemnity limit of Lm250,000 has an annual cost of Lm1,125 for pathology, dermatology, geriatrics and general medicine. Cardiology,

general surgery and neurology would cost Lm1,800; plastic surgery, ENT and anaesthesia cost Lm2,700; while a high of Lm4,500 is asked for insurance in obstetrics and gynaecology (Curmi, 1996).

What applies to medical doctors could hold for other professionals. Auditing firms, for example, could be sued for damages suffered by economic agents who undertook business transactions guided by audited reports. Indeed, auditing firms abroad have started changing their status from partnerships to limited liability companies. In cases of proved negligence, they could be made to pay for damages arising to parties who acted on accounting reports audited by them.

Heavy indemnity insurance costs would alter the existing pricing structure of professional firms. Hence, the lower such costs are maintained the cheaper of services could be profitably provided and the greater the volume of services consumed. Clear rulings by the courts on which claims are acceptable at law for consideration of compensation would reduce the number of law suits saving resources for the courts, service providers and customers. They lead to an economic system which concentrates more on wealth generation than on avoidable litigation.

2.3. Respondeat Superior

The principle of respondeat superior holds employers liable for torts committed by employees. It creates an incentive for employers to select capable employees and to oversee their activities. Supervision is costly. And it would be more effective to place the burden of care entirely on the employee. However, since liability for accidents cannot deter an employee with a low income respondeat superior means that someone who is wealthier will have an incentive to take appropriate safety precaution. Otherwise the employer will have to pay for claims which are proven justified.

Maltese courts follow in a way these general principles. Employers are held responsible only for **culpa in eligendo** i.e. the fault in choosing and appointing persons that are or may be incompetent in carrying out the work entrusted to them. Otherwise the individual is responsible for damage caused as a result of lack of diligence, prudence or attention. It still has to be seen whether employers in the private and public sector will be required to finance compensation on behalf of their employees who cannot pay a reward!

Maltese courts distinguish clearly the liability of employers and employees. In a case in which an employer, the Commissioner of Police, referred to the **culpa in eligendo** principle, claiming that the police officers involved in the case were 'competent personnel', the First Hall of

the Civil Court rejected this plea on the ground that the officials concerned had repeatedly shown incompetence in carrying out their duties. The Commissioner was consequently responsible for damages caused by his subordinates for failing to supervise them effectively (Dr Joseph R. Grech vs the Commissioner of Police, 1986).

In a similar case, the defendants, employees this time, again referred to the same principle contending that the case was not correctly instituted. The Court concluded that since the defendants could be considered technically competent in their jobs, their employer was not responsible for their action. They were condemned to pay damages. (Alfred Zammit vs Charles Xuereb and Raymond Briffa, 1994). The two court rulings could be considered an application of the same principles. But the effect of the court's decision on market efficiency could be significantly different. In the second case, the compensation was paid by the defendants from their own income. They have a direct incentive to avoid committing similar mistakes in future. In the first case, however, the damages paid for by the Commissioner of Police were financed from taxpayers' money. There may be no direct pressure on a public official to behave differently in future, and hence rectify a system which has been generating negative external effects, because the costs of such negligence are not borne out of own income.

Unless such asymmetric effects on resource allocation are adjusted, the results of court decisions would refer solely to a retarded compensation for a harm received in the past, but they would not condition behaviour in the provision of public services in future. The positive contribution the courts can make to economic efficiency would be lost as a result. This point is developed further in the following subsection of the paper.

The situations examined above referred to states where legal principles were enunciated and amplified in the process of their application. They could therefore guide future behaviour. However, where certain institutions are missing, or where conventions are inapplicable in the first place, the law could be neutralised as an instrument of justice and economic efficiency. A legal system lacking instruments to operate effectively would lead to a rise in transactions costs and market failure. This could be the situation in Malta with regard to parents seeking the return of an abducted child.

The Maltese government has not ratified the Hague Convention and the Council of Europe's Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children. Countries adhering to the Hague Convention agree to return wrongfully removed or retained children to the State of the child's habitual residence so that the authorities in that State may exercise the power to

determine the long term custody between the disputing parties. The convention requires signatories to establish an office whose function is to act on behalf of the person seeking the return of the abducted child and to discharge the duties imposed by the convention upon such authorities.

Failure to ratify the conventions means an increased burden on lawyers and financial costs for persons seeking recontrol over their children. At the same time it conditions the legal parameters within which Maltese courts operate. According to one interpretation, recent court decisions on two cases, Tracey Sample vs Joseph Portelli, Melanie Anne Farrugia vs Paul Michael Farrugia, risk projecting Malta as 'a safe haven for abductors' (Sullivan, 1996).

In sum, Maltese case law established clear guidelines regarding external effects and liability. In general, damages to third parties have to be compensated. Everyone is responsible for damages caused as a result of lack of diligence, prudence and attention. Employers are responsible for damages committed by their subordinates if they employ incompetent persons and/or fail to supervise them effectively.

If compensation is paid out of one's pocket it could be assumed that more attention would be made while carrying out duties in future. This assumption need not hold in the case of public officials where payments are made from tax payers' funds. Besides, in cases where certain executives officers are missing, the search for redress could be more expensive and time consuming than desired, with the result that nothing would be done to remedy the situation. Transactions costs would be high enough to discourage the internalisation of social costs.

3. Human Rights Violations and Market Failure

Acts committed by public officers in the exercise of their duty could result in accidental physical and/or moral violence on individuals. Such effects remained for many years either unrecognised or uncompensated by Maltese courts. Indeed, Human Rights were codified in Malta in 1961, but it was only in 1986 that a Maltese court awarded compensation for a breach of human rights, namely, political victimisation (The Sunday Times, Malta, 1989: p13). Since then the courts awarded compensation for material damages, pain and suffering, illegal arrest and for moral damages (The Sunday Times, Malta, 1991: p13).

Court decisions refer to a fairly wide range of Human Rights. They include Protection from Arbitrary Arrest, Protection from Inhuman Treatment, Privacy of the Home, Freedom of Conscience, Freedom of Expression, Freedom of Association, and Protection from Discrimination (The Sunday Times, Malta 1990: p13). Since the late eighties such rulings

have been complemented by the decisions of the Injustices Commission which recommends to the Prime Minister what action could be taken to redress a situation brought to its attention. In future, court rulings would add to the verdicts reached by the Office of the Ombudsman, instituted in 1995, in addressing claims of discrimination or injustices and remedies for them. The process of internalising in the market system a wider range of external effects is extended and accelerated by the setting up of such institutions as the Ombudsman's office.

The acknowledgement by the courts and similar institutions of a breach of human rights without effecting compensation would not be conducive to economic efficiency. Human rights may not be open to trading, but so long as the costs in utility lost are not given a monetary value and included in the total costs of producing a service, say, the maintenance of law and order, there is no way in which the number of violations can be optimised. The optimal number of human rights breaches is not likely to be zero, because the costs of supervising an entire population would be exorbitant. But the fact that individuals, including public officials, will be liable to pay could minimise the number of human rights violation per period. Indeed, if punitive penalties were to be levied against anyone who violates human rights, that is, the compensation would be equal to a full liability for the damage and a criminality penalty, the private cost could be raised above the social cost, thereby over-restricting the violations to below the optimal. But such a procedure, though morally justified perhaps, could be economically inefficient unless it is applied to those cases where evidence can be brought to support the claim that the breach of human rights was premeditated, deliberate and not accidental.

Over the past decade the demand for compensation claiming human rights violation gave rise to Maltese courts distinguishing between recognising a breach of rights and deciding on whether compensation is due. Thus in the case 'William Tanti Bellotti vs Melita Cable TV Ltd', 1995 the First Hall of the Civil Court accepted the plaintiff's claim that his rights, as protected by article 37 of the Constitution, had been violated when a tap lock box was clandestinely attached to the facade of his home causing him damages. But the court could not provide a remedy because the Constitution expressly provided that the 1934 Ordinance regulating the supply of electricity, cited by defendants, could not be deemed to violate the Constitution.

Instead the court ordered that the case be remitted before an independent and impartial tribunal so that compensation could be provided for, and ruled that sections of the 1934 ordinance violated the Constitution and the European Convention of Human Rights.

This case could be described as one where the property right is

incomplete. As a result transactions costs are higher than warranted. It is also a case where the courts are assessing the compatibility of existing legislation with the evolution in thought regarding human rights as expressed in charters enacted after certain laws came into effect. In doing so, the courts remove the deficiencies or incompleteness in property rights definitions, thus facilitating the internalisation of future accidental effects of economic activity.

State officials have been repeatedly found guilty of violating human rights in Malta. This fact raises again the issue of the effectiveness of compensation in inducing adjustment in costs of providing a service thereby optimising output. Unless such compensation is paid directly by the officials concerned, or unless it leads to steps being taken to reprimand or dismiss same officials, the deterrent to desist or to think carefully before acting could be lost. The number of human rights violations per time period would be higher than the optimal as a result.

Furthermore, if the compensation given by the courts is very high, and the official is not financially well-off to pay, it remains to be seen whether the Government would pay according to the **respondeat superior** doctrine. Such a payment would lead again to the effectiveness of such rewards on future employee behaviour and service organisation.

If instead, the employer is a company subsidised by taxpayers' money it could react to shouldering the compensation awards by topping up its losses. This could be the case of the Malta Drydocks. The company was ordered by the Employment Commission to pay a worker for denied overtime work for the period January 1, 1992 to November 19, 1993. This person had already been awarded by the same commission compensation for denied overtime for the period 1989 - 91. The employee was compensated for income lost, but the company did not remedy the factors which made the claim for compensation necessary in the first place. The incentive to adjust, the addition to the private costs of the company, is not present. Whatever losses are made they are not borne by the company, the workers in this case since the Malta Drydocks is a self-managed concern, but by Maltese taxpayers.

In sum Maltese courts presently acknowledge the right of compensation for both physical and moral damages. They decide on payments awarded. Indeed, they could even resort to other tribunals to foresee compensation if the courts are not in a position to award payment because of legal constraints. This approach implies a direct contribution to economic efficiency defined as the attainment of the 'optimal' human rights violations per year. However, such a mechanism is thwarted unless eventual payments are accounted for in personal considerations. Paying from taxpayers' funds for breaches of human rights by officials in the

public sector is not conducive to a change of officials' behaviour in the future with the result that human rights violations could remain higher than optimal.

4. Wrongful Death Claims and Compensation

Compensation is also awarded by Maltese courts for accidental harm leading to partial or complete disability or loss of life. Assigning a value to life could be considered unethical and immoral. It could be argued that lives should only be discussed in terms of rights and justice. However, from an economic perspective determining the value of life is no different from determining the value of any other good. Individuals, companies and governments must make implicit or explicit determinations of the value of life all the time especially when the value of life must be compared with the value of other goods such as health and safety standards or environmental protection.

The value placed on human life depends on the purpose of evaluation. Life may be valued *ex post* for the purpose of compensation, or *ex ante* for the purpose of preventing death and injury. Lives may be considered in the abstract, where no names are known, as in the construction of a dam to avoid floods or a guard rail to prevent accidents. Lives may, instead, be given names and faces such as people trapped in a fire. Valuing life does not lend itself to a single and direct approach which applies to all occasions.

Indemnification for a life wrongfully lost, or for permanent disability, should not be considered a payment for life. It is a pragmatic approach to a situation where a person has been disabled or a life wrongfully lost. However, efficient compensation promotes greater care and could reduce accident, and is desirable from resource allocation point of view.

In determining compensation Maltese courts follow the foregone earnings approach which sees the value of life as flowing from one's lifetime income or consumption. The value of life is approximated by what a person would add to the national output over a time period (*lucrum cessans*) discounted to the present using a zero discount rate. A percentage, generally 20% is deducted from the damages to be liquidated, to arrive at a lump sum payment. (Vid: First Hall of the Civil Courts - Saviour Caruana, Antoinette Caruana, Dolores Caruana vs John Busuttil and Paul Grech 1985; John Mary Muscat vs Charles Gatt, 1987; Silvio Farrugia vs Anthony Theuma, 1994; Joseph Desira *proprio et nomine* vs Joseph Cassar, 1995). The individual characteristics considered by the court are: age, health condition, present job, potential earnings growth, the percentage to be deducted from damages to arrive at the lump sum

payment, the nature of disability, and the relation of beneficiaries to disabled or deceased.

The approach adopted by Maltese courts, like other courts abroad, has the advantage of being subject to fairly objective calculation. It makes sense as a measure of the economic loss to survivors. Some courts abroad deduct a person's estimated consumption to reach an estate value, that is the expected value of savings that the deceased might have had built up to leave to others. But compensation for death must necessarily be arbitrary.

The foregone earnings approach, however, bears little theoretical relationship to the concepts of Willingness to Pay (WTP) or Willingness to Accept (WTA) for risk which underlies the economists' approach. Economists' estimates of the value of life are estimates of the WTP for additional safety or the WTA payment for bearing additional risk to life. Assuming a right to life, the value of accepting an increased risk is the amount one is willing to accept to undertake it. This approach aims to identify what one accepts as monetary compensation to undertake an additional risk. Generally, WTP measures benefits and WTA measures costs.

The different values obtained in the foregone earnings approach and the economists' methodology could be seen from the following example. According to the foregone earnings method, a person with a lifetime earnings of Lm4,000 per year for 20 years has a present value of Lm80000 at zero discount rate, from which 20%, or Lm16,000 are deducted to arrive at the lump sum payment of Lm64,000. If this person would be willing to pay Lm4,000 for a reduction in risk of 1×10^{-3} , the implicit value of life would be Lm4,000,000. This value exceeds by far the sum of Lm64,000, confirming the view that the awards made by courts for wrongful death are not payments for the life lost or the permanent disability incurred. The court's estimates are objective, the economist's estimates are subjective: they are based on an individual's own willingness to pay for small reductions in risk or the individual's willingness to accept payment for accepting small increases in risk. 'Danger money' and bonuses to Formula One drivers fall under this category.

Maltese courts are guided by the prudence or otherwise applied by actors before deciding on liability. Under these conditions all have an equal responsibility of safeguarding life. Unlike a strict liability rule, where, for example, drivers would always be liable to compensate pedestrians, no-matter how recklessly these may dart into traffic, the stand adopted by local courts instigate responsibility in all concerned. And only those who fail to show prudence could be found guilty and made to pay.

5. Summary

Societies are engaged in a continuous process evaluating their fundamental beliefs and adapting the behaviour of consumers and producers to such values. The courts have an important role in this deliberation process. They interpret the legislators' vision of how society works. They could also initiate a reconsideration of the framework within which judges have to operate in reaching their decisions. In doing so, the courts condition future behaviour of market players. Market failures arise from uninformed decisions. Market agents would be deciding on the wrong premise if some costs or benefits arising from their decisions are not considered before a decision is reached. Hence, by integrating such costs in the form of compensation, actual or potential, the courts would induce a change in the parameters on which transactors decide. Account will have to be taken of an eventual compensation for accidental harm to third parties either through the purchase of indemnity insurance, or through more attention and investment in carrying out work. In this way costs would change, so do prices, and in turn, the value of goods and services produced and consumed.

Maltese case law is conducive to economic efficiency. The courts uphold that damage to third parties has to be compensated. They consider prudence, or its absence, in determining liability, hence exerting pressure on all transactors to behave diligently. Such guidelines lead to a reduction in transactions costs, the costs incurred in search, waiting and implementing contractual obligations.

Indemnity in the case of wrongful deaths is based on an objective criterion, forgone earnings. This approach is different from the subjective one in which value of life is measured from a person's willingness to pay to reduce risk or willingness to accept payment for marginal increase in risk. But it is an approach used by courts in many countries and it is pragmatic.

Maltese courts had failed in the past to consider compensation for human rights violation. This position has now changed. They acknowledge both physical and moral damages and remedy, financially, for both. Indeed, they have sometimes gone further: when unable to award compensation because of a legislative constraint they recommended an independent tribunal be set up to treat specifically the question of compensation of a case under consideration.

Compensation is meant to translate former social costs into the private domain. So long as such payments are made by private citizens or firms out of own resources the incentive exist for a change in future behaviour. Social costs, now internalised, would condition decision making. But if a

defendant is in public office, either as an employee or as an employer facing liability claims for harm resulting from the performance of incompetent subordinates, the compensation would be funded from taxpayers' money. In such circumstances, the internalisation of costs for the official in question would not take place. The deterrent to behave differently arising from potentially higher private costs would remain missing. The volume of harm emanating by accident in the course of performing official duties, and the number of human rights infringement, would exceed the optimal level which is greater than zero.

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References

- Cheung, Steven N.S. (1978) *The Myth of Social Cost*, Institute of Economic Affairs, U.K.
- Coase, R.H. (1960), 'Problem of Social Cost', *Journal of Law and Economics*, October, pp 1-44.
- Curmi, David G. (1996) 'Medical Malpractice Insurance - The Maltese Scenario' *Insurance Quarterly*, March, pp 17-21.
- Harsanyi, J.C. (1955) 'Cardinal Welfare, Individualistic Ethics and Interpersonal Comparisons of Utility' *Journal of Political Economy*, August, reprinted in Phelps, E.S. (1973).
- Phelps, E.S. ed (1973) *Economic Justice*, Penguin Education, U.K.
- Pigou, A.C. (1920) *The Economics of Welfare*, Macmillan, U.K.
- Sullivan, Vanessa (1996) 'Parents turned Kidnappers' *The Malta Independent*, 17th March p 16.
- 'The Cigarettes Wars', (1996) *The Economist*, May 11-17, p 19-21.
- Page Thirteen, (1989) 'Human Rights Violations: The obstacle race to financial compensation', *The Sunday Times*, Malta, 12th November, p 13.
- Page Thirteen, (1990) 'All the Human Rights Violations established by the Courts', *The Sunday Times*, Malta, 21 January 1990, p 13.
- Page Thirteen, (1991) 'Tourist Guide Wins Lm14000 damages', *The Sunday Times*, Malta 10th February, p 13.
- Zerbe, Richard O. Jr & Dwight D. (1994) *Benefit Cost Analysis In Theory and Practice*, Harper Collins College Publishers, U.S.A.

THE PROCEDURE OF ADOPTING THE DECISIONS OF THE HUMAN RIGHTS COMMITTEE RELATING TO COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

VOJIN DIMITRIJEVIC

One of the most important functions of the Human Rights Committee, established under the International Covenant on Civil and Political Rights (henceforth: the Committee), which was adopted on 16 December 1966 and entered into force on 23 March 1976, was determined by the Optional Protocol to the same Covenant (same dates of adoption and entry into force).

The Optional Protocol provides for the competence of the Committee to consider communications from private individuals claiming to be victims of violations of the rights and freedoms recognised in the Covenant by a State party to the Optional Protocol. In recent years this function of the Committee has become more and more important, which can be judged by the increasing number of ratifications of or adhesions to the Optional Protocol, the almost exponential growth of the number of communications (complaints) received and registered, and consequently, by the amount of time the Committee has had to devote to the consideration of the communications, which is visible from the data provided in regular annual reports of the Committee to the UN Economic and Social Council and General Assembly.¹

The procedure for the examination of communications submitted under the Optional Protocol is governed by the general provisions on decision making in the Committee contained in Art. 39, para. 2 of the Covenant, by special rules regarding that matter in the Optional Protocol, and by the Committee's Rules of Procedure, which it is empowered to establish itself, according to the same Article of the Covenant.²

¹ These reports are published as GAOR, Suppl. No. 40.

² The latest version of the Rules of Procedure is contained in UN Doc. CCPR/C/3/Rev. 3 of 24 May 1994.

The formal norms, from which the Committee cannot depart when adopting its Rules of Procedure, are the following. For all the decisions of the Committee a quorum of twelve members must be present, which is significantly above the simple majority of the members of the Committee, who are eighteen. Decisions of the Committee are made by a majority vote of the members present.³

More specifically, Art. 5,3 of the Optional Protocol stipulates that communications shall be examined in closed sessions.⁴ In the practice of the Committee, this means that only the members of this body and the necessary personnel from the United Nations Secretariat can be present during the deliberations, and that the summary records of such meetings are not generally distributed. However, from the very beginning, when in 1979, the Committee adopted its first views on a communication, it was decided that the views should be made public generally, and that they should appear as annexes to the annual reports of the Committee. Some authors⁵ seem to consider this as a departure from the text of Art. 5 paras 3 and 4 of the Protocol, which has the following wording:

3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual.

It is the opinion of the undersigned that the Committee was right in adopting such a course. Irrespective of the possible divergent views of some drafters of the Protocol, its "ordinary" meaning is sufficiently clear. Art. 5 para. 3 refers expressly only to meetings and not to the results thereof. Furthermore, para. 4 mandates the transmission of the views to the State Party and the author of the communication, without imposing on them the duty to maintain their confidentiality. Accordingly, the State and the individual concerned are free to let the views be generally known.

³ Although this problem has not arisen in practice, the wording of Art. 39,2,b of the Covenant ("majority vote of the members present") shall be interpreted so that possible abstentions are not counted in the sense of the expression "present and voting"; the majority must consist only of positive votes exceeding the half of the members present. In the case of the minimum quorum, this majority would be seven.

⁴ The reader will understand that any member of the Committee is thus limited in reporting to the general public many details and impressions concerning his or her experience in the examination of the communications.

⁵ E.g. B. Graefrath, *Menschenrechte und internationale Kooperation*, Berlin: Akademie-Verlag, 1988, p. 162. To be more precise, Graefrath considers this conduct of the Committee to be different from the attitudes of the drafters of the Protocol ("Abweichung von der Auffassung der Autoren des Protokolls ...")

In deciding to publish the views as official documents, the Committee was guided by the wish to have them presented in their entirety, so as to prevent the interested parties from making public only those parts of the decision that suit their interests and are favourable to them. The established practice is to publish the views in full, whereas in the published decision on admissibility of the communication the authors of communications are referred to only by their initials. In addition to the distribution of decisions as separate documents and in the annual reports, volumes and selected decisions of the Committee were issued by the United Nations.⁶ This the Committee has done irrespective of the rather confusing Rule 64,2 of its Rules of Procedure:

All reports, formal decisions and other official documents of the Committee and its subsidiary bodies relating to ... the Protocol shall be distributed by the Secretariat to all members of the Committee, to the States parties concerned and, as may be decided by the Committee, to members of its subsidiary bodies and to others concerned.⁷

The Protocol also determines, in its articles 2,4 and 5, that the procedure before the Committee should be in written form. Although at some times the representatives of some States and some members of the Committee have considered the possibility of holding oral hearings, examining witnesses, etc. this has been considered to be clearly in contradiction with the aforementioned provisions of the Protocol and has not met with the approval of the Committee. In addition to legal reasons, it has been felt that the introduction of oral procedures would have serious disadvantages in increasing the costs both to the United Nations and the parties. An important advantage of the procedure based on the Optional Protocol is that it is relatively easily accessible to many individuals and that it is not expensive.⁸ If the United Nations would not have the means to cover the costs of representatives of the applicants and the States

⁶ See: Human Rights Committee, Selected Decisions under the Optional Protocol, New York: United Nations, 1985. International Covenant on Civil and Political Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, New York: United Nations, 1990.

⁷ See the interesting comment of Nowak, who believes that the Committee in adopting Rule 64,2 had departed from the principles set out by the Optional Protocol, but then in practice ignored its own decision. M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll, CCPR-Kommentar*, Kehl - Strasbourg - Arlington: N.P. Engel, 1989, p. 754.

⁸ Cf. *Protecting Human Rights: International Procedures and how to Use Them*, London: Amnesty International (AI Index IOR 03/02/87), 1987, p. 6.

Parties and the possible witnesses (and this is certainly now the case), those with lesser means would be put in an inferior situation.

On the basis of the general provisions, set out in the Covenant and the Optional Protocol, more detailed procedural rules have been established by the Committee in its Rules of Procedure. They delegate some rights to the UN Secretariat, which under the Covenant provides the necessary administrative support to the Committee. Thus, under Rule 78, the Secretary-General may even exercise some discretion in cases when from the text of the communication it is not clear whether it is directed to the Committee under the Optional Protocol. The Administration is in such cases free to judge whether the communication "appears" to be submitted for consideration by the Committee and to bring it to its attention. Of course, the final decision rests with the Committee, but this means that the Secretariat may choose not to bring the communication to the attention of the Committee in instances where in its opinion the communication is not intended to be presented to the Committee under the Optional Protocol. Naturally, the Secretariat is bound to clarify with the author his or her wishes and in case of doubt to bring the communication to the attention of the Committee. Rule 80 enables the Secretary-General to request the authors to provide additional information, relevant for the admissibility of the communication; it is important to note that the Secretariat is free to indicate appropriate time limits for replies, in order to avoid undue delays.

The Committee may decide on communications without the participation of some of its members. Under Rule 84 participation is barred to those members that have any personal interest in the case or have taken part in any capacity in the making of any decision relating to the matter covered by the communication. However, members may abstain from participation, if they feel that they should do so "for any reason", by simply informing the Chairman (Rule 85). In practice, some members have used this opportunity not to participate in decisions on communications against countries of which they happen to be nationals. As independent experts, elected in their personal capacity, they are not expected to do so, since this would imply doubts as to their integrity and impartiality, but they have nevertheless chosen to act in such a manner. In fact, their abstention has not been total - it has only amounted to not taking part in the vote. As to the debate, they have found a good measure between excessive efforts to influence the decision and the need to satisfy the natural desire of other members to profit by their expertise on questions of the municipal law of their States. It can be stated with assurance that in the practice of the Committee there have been no difficulties regarding this subject.

In order to cope with the increasing workload the Committee has adapted its Rules of Procedure so as to decrease the number of decisions taken at plenary meetings. Some functions relating to the procedure on communications on the Optional Protocol can be performed by special rapporteurs or by a working group of the Committee.

Special rapporteurs can act in two capacities. Initially, the Committee had appointed special rapporteurs for cases of great complexity, for which it was believed that special research was necessary, either because this was the immediate impression of the Committee, or because it was felt, after the debate, that the Committee was unable to reach a decision.⁹ This function is covered by Rule 89, 3 of the Rules of Procedure.

However, the Rules of Procedure were amended in 1989 to provide for a colloquially called "special rapporteur for new communications", who is not assigned a particular case, but has the power to receive communications between the sessions of the Committee and to request the State Party concerned or the author of the communication to submit additional information or observations relevant to the admissibility of the communication (Rule 91, 1). This has been done in order to expedite the proceedings (the Committee meets only three times a year), so that the special rapporteur has also the power to indicate appropriate time-limits for replies. It is quite evident, and this was expressly stated in Rule 91, 3, that the action of the special rapporteur belongs to the so-called "pre-admissibility" stage of the procedure - it does not prejudice in any way the final decision on admissibility.

The Committee has always prepared its decisions on matters relating to communications with the assistance of a working group, composed of some of its members who meet before each session of the Committee. As a rule, relevant material (including a rough draft) is prepared by the Secretariat and presented to the working group, which produces a draft decision to be submitted to the Committee. This applies to all decisions, both on admissibility and the merits. Rule 89 determines that the group should have no more than five members.

In the past, working groups on communications (the Committee can establish working groups for other matters within its jurisdiction) have as a rule consisted of three members. This is not the case anymore, because the amended Rule 87, 2 delegates to the working group the right to act on behalf of the Committee in declaring a communication admissible. When making such an important decision, the group must be composed of five

⁹ This was certainly influenced by the desire to decide by consensus, which will be addressed below.

members, and they must be unanimous. This was again done in order to reduce delays and it was believed that with due safeguard (the unanimity of a large working group) no great harm could be done, not only because a decision on admissibility does not touch on the merits, but also because it is reviewable under Rule 93, 4, when the matter comes to the full Committee to decide on the merits. It can be argued that a decision on admissibility, which can be changed only in connection with the discussion on the merits, may place additional burdens on the State Party concerned, which has to take pains to furnish explanations regarding the substance of the case, but the Committee has been guided by the interests of the possible victims, for whom a decision on inadmissibility is generally of a definite nature. Of course, if the working group does not reach unanimity, it has to refer the question to the Committee for ultimate decision. The principle remains valid that a decision on admissibility cannot be taken unless the State Party concerned has received the text of the communication and has been given the opportunity to furnish necessary information and observations (Rule 91).

Before deciding on admissibility the Committee has on numerous occasions appealed to the State Party to take interim measures in order to avoid irreparable damage to the victim of the alleged violation. A typical example is when the person submitting a communication has been sentenced to death and is awaiting execution. The applicants have claimed that the sentence to death had been imposed in violation of the provisions of the Covenant, but, on the other hand, it has appeared that the authorities of the State have considered it to be final so that the execution had been possible. The death of an individual resulting from official action that may be found to be in violation of the Covenant is certainly the supreme example of "irreparable damage". In view of the lengthy procedure before the Committee, even at "pre-admissibility" stage (the need for additional information etc.) the Committee has found it necessary to appeal for the stay of execution until it would be able to decide on the merits of the case. For that purpose it has referred to Rule 86 of the Rules of Procedure¹⁰, interpreting it somewhat extensively. Not only did it empower its working group to issue the appeal, but, according to the literal sense of that Rule, interim measures seem to be warranted only *after* a communication has been declared admissible:

¹⁰ See e.g. the views of the Committee on communications nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica) of 6 April 1989 (violations found). Report of the Human Rights Committee, GAOR, 44th Sess., Suppl. 40 (1989), p. 224.

The Committee may, prior to forwarding its final views on the communication to the State party concerned, inform that State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.¹¹

However, there is some justification for this attitude of the Committee because the interim measures are not expressly ruled out at the pre-admissibility stage and, in view of systematic interpretation of the Rules of Procedure, Rule 86 is not under the heading "Procedure to determine admissibility", but in the chapter relating to "General provisions regarding the consideration of communications by the Committee and its subsidiary bodies".

The Committee has gone even further and asked for interim measures even after declaring communications inadmissible. This has been done in cases where the reason for inadmissibility was the non-exhaustion of domestic remedies (Art. 5, para 2 (b) of the Optional Protocol). In such instances the Committee has referred to Rule 92, 2 of its Rules of Procedure, which establishes that decisions on admissibility may be reviewed and to the "spirit and purpose" of Rule 86, because the non-exhaustion of local remedies was understood to be a formal barrier which the author of the communication could eventually overcome and turn again to the Committee, which would be pointless if irreversible action would be taken by the government in the meanwhile.¹²

The most important practical departure from the general rules on decision making in the Committee results from a decision of the Committee, at its first session, which was inconspicuously reflected in a footnote to Rule 51 of the Rules of Procedure:

1. The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee.

¹¹ Italics supplied.

¹² See e.g. the decision on admissibility on the communication No. 231/1987 (A. S. v. Jamaica) of 21 July 1989. *Report of the Human Rights Committee*, GAOR, 44th Sess., Suppl. 40 (1989), p. 276.

2. Bearing in mind paragraph 1 above, the Chairman at any meeting may, and at the request of any member shall, put the proposal to a vote.

As a result of this decision the Committee has never voted on any matter and no member has so far insisted on a decision being put to a vote. The introduction of consensus as a principle of decision making was principally due to the insistence of Anatolii Movchan, the then member of the Committee from the USSR. His reasons, and the motives of the members supporting him, were not so much related to decisions on the communications under the Optional Protocol, but on other matters, where at that time the danger of a "politicisation" of the Committee was perceived and where not only members from the so-called socialist countries, but also from other regions, felt that they could be outvoted to the detriment of fruitful international cooperation in the field of human rights.¹³

At that time, this was certainly a wise decision. Efforts to reach consensus relating to the exercise of many competencies of the Committee, including especially its general comments, together with the spirit of understanding and cooperation of the first group of personalities elected to be members of the Committee, have certainly contributed to the regulation of the Committee as a body that has not been torn by political and ideological divisions and has refused to be involved in any kind of manoeuvring, where human rights would serve as tactical weapons for ends unrelated to the improvement of the human condition and dignity.¹⁴

Naturally, insistence on consensus has had its shortcomings, which are inherent to this kind of decision making. Let us mention only some of them. In many instances, more time than necessary is needed to reach a decision. An insignificant minority, or even an individual, can prevent effective decision making. The most important drawback is that some decisions, in order to accommodate very divergent views, are watered down, phrased in ambiguous language or reduced to the lowest common denominator. Some general comments have been criticised for showing

¹³ See Graefrath, *op. cit.*, p. 131 f; A. P. Movchan, *Prava cheloveka i mezhdunarodnye otnoshenia*, Moscow: Nauka, 1982, p. 116f.

¹⁴ Cf. V. Dimitrijevic, *The Roles of the Human Rights Committee*, Vorträge, Reden und Berichte aus dem Europa-Institut, Nr. 37, Saarbrücken: Europa-Institut der Universität des Saarlandes, 1985, p. 17.

such characteristics, but it should be immediately added that other critics found other comments adopted by consensus to be too daring.¹⁵

Another disadvantage may be construed as some kind of restriction of the freedom of opinion and expression of individual members of the Committee: in order not to "spoil" the consensus and not to prevent the taking of a decision altogether, a minority or an individual dissenter have had to pretend that they are for it, in spite of their deeply held convictions.¹⁶

If we concentrate on the application of the rule of consensus to decisions on communications submitted under the Optional Protocol, the first impression is possible that in that respect insistence on consensus has not been necessary for several reasons.

The political anxieties should not have been valid in this realm, for, until 1988, when Hungary acceded to the Optional Protocol, no "socialist" country had been exposed to the risk of being demeaned in the Committee by a "bourgeois" majority. In a quite different vein, the solution could be regarded as impractical in a procedure which is quasi-judicial; in most countries the courts, although composed of judges from the same country and similar professional and cultural backgrounds, pass by majority judgments that have much stronger effects than the unbinding views of the Human Rights Committee. Furthermore, experience has shown that the questions debated in the course of the proceedings under the Optional Protocol tend to be purely legal, and that the varying attitudes and opinions of the members of the Committee cannot be explained by their ideological beliefs or political convictions.

For example, one of the most difficult questions that the Committee has had to face in deciding on admissibility is whether the domestic remedies have been exhausted. In that context, problems arise that are primarily related to the interpretation of domestic law (what is in fact a "remedy" and whether it is "available"), but there are also judgments on facts, related to the condition that the application of the remedy not be unreasonably prolonged (Art. 5,2,b of the Optional Protocol) and that the

¹⁵ This applies especially to General Comment 14 (23) relating to Article 6 of the Covenant, where the Committee stated that the production, testing, possession, deployment and use of nuclear weapons represented a menace to the right to life and that they should be recognised as crimes against humanity (UN Doc. CCPR/C/21/Rev. I). In this case the critics were joined by at least one member of the Committee, Felix Emacora, who openly expressed his belief that the Comment had been contrary to international law and that, had it been put to a vote, he would have voted against it. See Nowak, *op. cit.*, p. 581; Dimitrijevic, *op. cit.*, pp. 6, 21.

¹⁶ See M. J. Bossuyt, *Le règlement interieur du Comité des Droits de l'Homme*, *Revue belge de Droit International*, Vol. 14 (1978 - 1979), p. 119 f.

remedy is "effective" (Art. 2,3,a of the Covenant). These are matters where reasonable people may differ in their opinions, but it is very hard to attribute such differences to political opinions, except possibly in relation to the possible meaning of "effectiveness". Even in that matter, when dealing with a number of very similar communications complaining against the military regime in Uruguay, the Committee found no difficulty in agreeing that in the situation prevailing at that time in that country, the remedies to which the State party had referred were not in fact effective.¹⁷

Without divulging too much the goings-on at the closed meetings of the Committee the undersigned is convinced that a casual visitor listening to the debate on a communication in a room where the name plates before the members of the Committee were removed would not be able to ascertain the countries of members' origin. In order not to rely only on impressions, one could usefully look at the signatories of individual opinions, published together with the decisions of the Committee. They tend to show differing "alliances" of members, but there is nothing to indicate that they act on the impulse of some kind of ideological or political propinquity. Let us give only two examples. The views of the Committee on communication No. R.2/9 of the 26 October 1979 were accompanied by an individual opinion signed by members from Canada, Tunisia, Senegal, the German Democratic Republic, Yugoslavia, and Jordan.¹⁸ In a more recent case (views on communication No. 203/1986 of 4 November 1988) individual views were submitted by members from Sri Lanka, Yugoslavia, Mauritius, and Sweden.¹⁹ Following the now largely artificial United Nations division of countries into "regions", this group of "dissenters" was from Asia, East Europe, Africa and the "West". It should not be forgotten that the "majorities" in such cases were also as heterogeneous.

The reader will justifiably ask how the practice of individual or dissenting opinions can be reconciled with reaching decisions by consensus. The possibility formally exists for "individual" opinions in Rules 92,3 (decisions on inadmissibility) 94,3 (views) of the Rules of Procedure. These provisions were originally intended to be used in connection with Rule 51, which provides for a decision by majority vote. In practice, the

¹⁷ See e.g. the views of the Committee on communication No. R.2/0 (Alice Altesor and Victor Hugo Altesor v. Uruguay) of 29 March 1982, Report of the Human Rights Committee, GAOR, 37th Sess., Suppl. No. 40 (1982), p. 123. See Nowak, *op. cit.*, p. 753.

¹⁸ *Report of the Human Rights Committee*, GAOR, 35th Sess., Suppl. No. 40 (1980), p. 110.

¹⁹ *Report of the Human Rights Committee*, GAOR, 44th Sess, Suppl. No. 40 (1989), p. 206 - 209.

Committee has respected the aforementioned footnote to Rule 51, suggesting consensus, so that an individual opinion in the sense of the general understanding of consensus in international organisations could only amount to some kind of reservation, where the party or the member expresses support for the essence of the decision, but would like to indicate separate reasons for this or a different understanding of the decision.

To be sure, many individual opinions of the members of the Committee have been of that nature and they could be justly called "individual". However, some of them have been "dissenting" opinions in the true sense of the word and this is how the Committee has tended to overcome the self-imposed difficulties related to consensus. In other words, in spite of some voices that favoured, for the sake of expedience and clearer decisions, the return to voting at least as regards decisions on communications, the Committee has been hesitant to depart from established practices, but has encouraged members who find themselves in isolation or small minorities not to prevent the decision from being taken without the vote, in exchange for the opportunity to explain their views in full, and not only a summary of them, as stated in the rules that were referred to in the preceding paragraph.²⁰

The present settlement amounts to a vote, with some important qualifications. First, all efforts are made to reach consensus, which implies important amendments to draft decisions. Only when it becomes obvious that a small minority cannot accept the decision, there is a feeling, usually expressed by members belonging to such a minority themselves, that they should not obstruct the work of the Committee by further insisting on their views. The procedure is very flexible because it remains unclear what is a "small" minority. The decision certainly cannot come from a divided Committee, with a slight margin in favour, which would be possible if the Committee were to vote in accordance with the provisions of the Covenant and the Rules of Procedure, but this is the only statement which could be made with certainty. The highest number of dissenting voices so far has been five. In such a case, is it really fair to pretend that the decision has been reached by consensus?²¹

This kind of "disguised voting" appears to work satisfactorily and to protect the authority of the Committee's views, which are, strictly

²⁰ See examples quoted in A. de Zayas - J. Th. Möller - T. Opsahl, Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee German Yearbook of International Law, Vol. 28 (1985), p. 16.

²¹ Thus Nowak, *op. cit.*, pp. 581, 758.

speaking, not legally binding on States parties²² and therefore depend not only on the persuasiveness of the arguments but also on the unity of the members of the Committee. One could therefore not expect that the Committee would revert to voting in the near future, although some of the original circumstances in favour of the consensus have changed.

It should be added, however, that “not legally binding” does not mean that the views of the Committee have no legal effects. Admittedly, they are not titles that can be immediately executed within states, but they amount to the statement of the competent supervising body that the state party has not fulfilled its obligations under the Covenant. This has been reflected in the uniform final paragraphs of the views adopted by the Committee since 1994:

Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee’s views.

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²² See e.g. the views on communication No. 434/1990 (*Lal Seerattan v. Trinidad and Tobago*) of 26 October 1995 - CCPR/C/55/D/434/1990, para. 10.

HUMAN AND INSTITUTIONAL ASPECTS IN THE ADJUSTMENT-GROWTH PROGRAMS FOR MEDITERRANEAN DEVELOPING COUNTRIES

FRANCESCO FORTE

I.

1. Among the economists and in the business community of the Western countries a new area of economics is now gaining momentum: ethics economics.¹ It seems appropriate to consider the ethic point of view of economic matters, not only in market economy, but also in public economy and in economic policy; not only in national economic issues but also in international economics.

The ethic point of view of economics is now gradually and increasingly entering the World Bank philosophy of adjustment and growth.² I believe that it should also increasingly enter in the view of the European Union as for the relation between the developed countries belonging to EU of Europe and the less developed which belong to the surrounding area: as the Mediterranean countries, which from Slovenia to Turkey, to Malta, to Cyprus, to the African side of the Mediterranean sea and to the Middle East countries are partners of the "Mediterranean projects" together with the four EU countries overlooking on this sea (Spain, France, Italy, Greece).³

¹ See, among others, Amarthia Sen (1987) *On Ethics and Economics*, Oxford, Blackwell; (1991) *Money and value: on the Ethics and Economics of Finance* (Denaro e valore: etica ed economia delle finanza), Banca d'Italia; Lezioni Paolo Baffi di Moneta e Finanza, Roma, Edizioni dell'Elefante F. Forte (1996) *Etica pubblica e regole del gioco. I doveri sociali di una società liberale*, Napoli, Liguori; A. Fazio.

² World Bank, (1994) *World Development Report 1994. Infrastructure for Development*, Oxford University Press.

³ An EU initiative for a Mediterranean policy has been officially set up in the European Council of Madrid of 15-16 december 1996 which, among others, considered also the controls to prevent illegal immigration and work to EU. The developing countries to be included, in the Mediterranean EU initiative are 17: Albania, Algeria, Bosnia, Croatia, Cyprus, Egypt, Jordan, Israel, Yugoslavia, Lebanon, Libya, Malta, Morocco, Slovenia,

The Mediterranean developing countries have problems of foreign debt and, therefore, of "adjustment". However, they have also the "need" of growing because of their unemployment and poverty issues. An ethical perspective in the adjustment growth issues implies to consider these and other human aspects of them.

Table 1

	Algeria	Cyprus	Egypt	Jordan	Israel	Palestine
Population	27,8	0,74	57,8	4,6	5,7	2,3
GDP *	44,3	7,5	36,7	4,9	72,7	2,6
Inflation rate	38,5	5,6	12,0	4,9	14,4	6
Analphab.rate	38,4	6,0	48,6	13,4	5	n.d.
Urbanis. rate	55	53	44,5	70,0	90,5	94,3
Exp. Educ.						
% GDP	5,7	4	5	4,0	5,8	n.d.
Scholaris.						
12-17 years (%)	59,3	94	61	19,4	86	n.d.
Higher Educ.	11,8	14	12,2	19,4	34,4	n.d.
GDP per head	1593	10135	635	106	12754	113

	Lebanon	Malta	Morocco	Syria	Tunisia	Turkey
Population	2,9	0,37	26,6	13,8	8,7	59,6
GDP*	2,8	2,7	27,6	15,8	15,3	135
Inflation rate	10,6	3,5	5,7	15	5,3	125
Analphab. rate	7,6	13	56,3	29,2	33,3	17,7
Urbanis. rate	86,6	89	47,9	52	56,8	67,3
Exp. Educ.						
% GDP	2,0	4,0	5,8	4,2	5,9	4,0
Scholaris.						
12-17 years (%)	72,8	85	38,2	54,8	65,8	5,1
Higher Educ.	27,8	13,1	10,2	18,7	10,7	14,8
GDP per head	965	7297	1037	1144	1759	2265

* Billion dollars

2. The most recent Nobel prizes on economics lay emphasis on institutions (public laws, contracts, etc.) and micro behaviours of public and private actors i.e. of individuals. This has been particularly explicit

Syria, Tunisia, Turkey. Already Turkey has entered as a partner of the custom union with the EU on the 31 December 1995. A free trade agreement with Slovenia is in the conclusive stage. Agreements have been signed with Israel, Morocco and Tunisia while there are deals of the EU with Egypt, Jordan and Lebanon; and proposals of deals have been made by the EU to Algeria and Syria.

with the Nobel to Douglas North. But also the Nobel to James Buchanan, head of the Public Choice School - letting aside its peculiar biases - recognises the importance of micro approach to macro economics i.e. of the individuals' point of view and the interaction between the rules of the game, at the constitutional and at the parliamentary level and at the level of bureaucracies i.e. among institutions and the actual public choices. This comment aims to emphasise that a mere conventional macroeconomic approach either of the post Keynesian kind or of the Chicago monetarist variety may result unsatisfactory also (and may be particularly) in relation to the problems of adjustment and growth of "low-middle income" developing countries characterised by external indebtedness, by lack of infrastructures, unemployment and, in several cases, also inflation and budgetary unbalance.

This is not to deny the relevance of the macroeconomic views both monetarist and of post Keynesian structuralism. Obviously sound economic policy and sound public finance are prerequisites of sustained growth and cannot go without a general macro economic view. Financial macro targets in the area of budget and money are needed to keep money supply and aggregate demand under control. Public deficit ideally should be limited to capital expenditures and should not be financed by the Central bank and should be kept within an amount which can be absorbed by the market not only without inflationary pressure but also and primarily without crowding out too much productive investment by the firms and the families. There is no point in discussing whether the monetary point of view should prevail on the fiscal (budgetary) point of view or viceversa. Both matter as two sides of the same coin. Structural macro indicators as the share of savings devoted to public infrastructures and that devoted to production, the share of private versus public enterprises in the aggregate investments and product, the share of public debt on GDP, that of interests on foreign debt on GDP and on exports do matter. But these objectives cannot be effectively constructed and pursued without a disaggregate analysis of the structures and capabilities of the public institutions of the considered country (Central Government, Central Bank, local authorities, central bureaucracies, local bureaucracies) and of their public and private or quasi private counterpart (public corporations, unions, business organisations, main banks, main economic groups, foreign investors) and of the socioeconomic situation of the various social groups and communities. The social and human impact of the various policies should be considered more carefully than has been the case in the macro plans traditionally produced by the international and supranational institutions working on the problems of less developed countries and of their economic adjustments and reforms.

3. It should be noted that both Harvard and Chicago economists beside a basic macro economic view have adopted in their philosophies of the adjustment and of the economic reforms specific shock views. Thus, suggesting rapid deregulation at national as well at international trade level and great immediate changes to free market economy, they have often overlooked the human and institutional aspects calling for a less simplistic and more gradual therapy, to more attention to small business, independent workers and human aspects.

Even if of fundamental importance in the adjustment process, the deregulation and the free market economy regime, cannot be conceived either in an institutional vacuum or without considering on one side the availability of infrastructures and on the other side the human capital. And in the area of infrastructures as the 1994 Report of the World Bank emphasises, appropriate institutions guided by fair rules of the game are extremely important.

The strategy of adjustment reforms and growth, while carefully aiming to basic tenets in the area of sound money and sound public finance, should be generally more process and institutions conscious, and consequently appropriately disaggregated and selective; and more oriented to individuals both for the public and the private sector of the economy. Adjustment process clauses and related conditionality clauses on domestic deficit and on the external should consider as priority points also gradual institutional changes and reforms and related human and ethical issues.

II.

1. The approach which I am suggesting here, develops through six interrelated areas of issues and principles: each of which is considered after a basic exploration of the relevant processes of decision making and of the human conditions. Obviously the first area of issues is that of *monetary and fiscal policy*.

Why and how the political process has worked to produce - in the considered country - a sizable external debt, a resilient propensity to inflation and a weak monetary system together with unemployment and inadequate infrastructure? How are the choices in the area of money and budget made? Is the Central Bank autonomous? And has the Government an adequate control over the other public bodies: public enterprises, social security institutions, health institutions, regions (if any) and local authorities?

Who is producing deficits and external debts, among these institutions? And how is it financed? Are the banks allowed to finance these institutions

without control of the Central Bank? And is the Central Bank free to refuse to absorb public debt? Is the Government allowed to have an account with the Central Bank? How does the tax bureaucracy work? Is the tax system fitted to the socioeconomic condition of the country? How efficient are the various public expenditures?

To obtain consensus to the monetary and fiscal discipline clauses and objectives of a foreign debt restructuration, appropriate incentives should be given to the authorities of the considered country as linking financial assistance by international institutions with given performances in the money supply area and in the budgetary area. The Central Government should be made fully responsible of the Budget with appropriate reforms of the Budgetary laws vis-à-vis the parliament and the various public bodies operating outside the Central Government. The external public bodies should be prevented from being able to borrow from the banks particularly abroad. To prevent them from being able of drawing on Central Government finance on an ex post basis one should remove the *automatic* legal guarantee by the state on their debts.

Institutional reforms hindering unsound finance practices may increase the credibility of the considered country more than a shock therapy with only momentaneous effects. Obviously, however one should not confuse such substantial changes, with platonic declarations of interest as a solemn approval of a medium term financial adjustment plan, with optimistic data. The credibility of future behaviour is increased when signals of the players are costly, not when they are cheap.

In the frame of a better control on the financial policy variables, the macro quantitative targets and priorities to be assigned to the budgetary policy may be rendered selective, conscious of the operational difficulties and realistic in their timing, while the breakdown of the items of the aggregate public budgets may become more attentive to the ethical-humanitarian implications of the various choices both in the area of economies in public spending and in that of improving the revenue side of the budgets.

A paramount aspect in which the analysis of the effectiveness of institutions of the public administration should be strictly correlated to the policy suggestions is that of public revenues. One of the reasons of heavy indebtment of the central and local governments of developing countries may be their poor performance in the public revenues. But how to increase the tax yield is a problem to be considered not only from the abstract point of view of an ideal good tax system. Taking account of the operational difficulties of assessment, less sophisticated tax means may be preferable. One should also consider the "Laffer curve" effects of high progressive income taxes and of important wealth taxes, in the presence

of high capital mobility. A sincere tax ethics may suggest more enforceable and less demagogic taxes, while the organisational aspects are also extremely important to combat evasion.

2. A key policy issue is that of *infrastructures*. Who are the authorities doing the choice? Are these unnecessarily bureaucratic? If there is a deficit in their budget where does it come from? On the cost or on the revenue side or from bad projects? How is the procurement of capital done?

When priorities of the public budgets are examined one can hardly find a reason for a *global* reduction of these expenditures. Some items may be cut but others need to be increased. However, public infrastructures may be expanded also without relying on the efforts of public finance.

In the 1994 Report the World Bank points out that infrastructures can deliver major benefits in economic growth, poverty alleviation and environmental sustainability, but only when they provide services that respond to effective demand and do so efficiently. It seems to me important to add that wastes may also come out because of inefficiencies in the infrastructures' area and the scarce attention devoted to maintenance expenditures, once the investments are realised.

The 1994 World Bank Report argues that the causes of past poor performance and the source of improved performance are strictly connected with appropriate incentive provisions. Its suggestions in this direction are:

- 1) manage infrastructures like a business not as a bureaucracy;
- 2) introduce competition either directly or indirectly;
- 3) give users and stakeholders a strong voice and a real responsibility;
- 4) public-private partnership.

These suggestions, together considered, lead to a conclusion which is very important from the point of view of the budgetary puzzle: while reducing the level of public expenditures and public deficit, you may (and must) increase the availability of good infrastructures through innovative policies. Infrastructures' choices, their finances, their management should be "privatised" as much as possible, both from the legal-organisational point of view of adopting a privatistic business form and from the financial-substantial point of view of ample participation of private capital and of private entrepreneurship to their realisation and management.

One does not need here to review the various options a BOT (a company obtains a concession, then with its finances builds and operates the considered infrastructure until recovers its costs and then transfers it to the Government) or BTO (a company builds and transfers the

infrastructure to the Government; then the same company operates the infrastructure paying - for a period - a lease to the Government owner who, thus, services the interests and amortisation the debt made with the company to finance the project) or TBO (the ownership is transferred to the company which builds and operates the infrastructure under the control of the Government).

It is important, however, to point out that in the Mediterranean developing countries there is ample room for financing the cost of infrastructures, at least partially on the market, particularly if the raising of the capital is done with the cooperation of European financial institutions. The domestic savings of these Mediterranean countries, which often outflows for lack of attractive and safe domestic financial opportunities, may find an interesting opportunity in these projects.

Severe bottlenecks may be originated by inadequacy of infrastructures serving the export industry, agriculture and, more generally, the productive activities. Sometimes, these bottlenecks may be remedied with low cost interventions. Often bureaucracies and politicians prefer big, prestigious projects to modest, more fruitful interventions. Here again, appropriate incentives may be found to modify these attitudes, introducing the above described incentives, constraints and opportunities.

In doing these choices one should, however, consider that infrastructures (as the World Bank underlines) do also perform civil and social functions and not only productive functions. The investment priorities should be considered from both points of view. Obviously, price policy too should be discriminated accordingly: where a social function emerges, in civil infrastructures, there may be a reason for reduction of prices. Scarcity of urban tram and bus service makes painful the increase of the low price of gasoline, practiced by some oil producing countries. Policies of increase of the price of oil should take account of the need to ease the transportation of the low income people, through some public service.

To public services for human capital too some of the above considerations and suggestions seem applicable. Here too "privatisation" - at least in the organisational form - may increase the efficiency of the activity.

Sometimes, it is the scarcity of public services for human capital which aggravates the social problems of urbanisation. A cause of excess of urbanisation and of the related social distress is the lack of schools, medical services and transportation services in the rural areas.

One should try to limit the expression of the financing of infrastructures through foreign debt, if the level of foreign indebtment is a problem for the balance of payments. This policy implies to be able to develop equity financing and the like. But one should also consider that some infrastructures give origin to inflow of foreign currency (as those in the

sectors of tourism, of mining, and of ports) or to savings in imports. One should try to link as far as possible the foreign component of the financing and the foreign benefits of these infrastructures, if any. Tolls, fees, prices and contributions of various kinds should be enhanced in infrastructure, finance and management; however, not overlooking the social needs which may require selective low prices for those who truly lack the ability to pay.

3. A third group of issues has to do with *savings*, particularly those of small savers. Why domestic savings are low? What determines the choices of the savers? How institutions could be changed to enhance the propensity to save of low income earners and of the middle class and to better address their savings to investments?

An important component of the adjustment and growth policy is the equilibrium between the savings supply and the demand of them.

At first it may seem that in less developed countries, the propensity to save must, *by necessity*, be very low, because the average income level is low. However, this view is superficial for low-medium income less developed countries as those which we are discussing here. Beside the fact that affluent people here too exist and have a high propensity to save, many modest income earners may like to save for various reasons. Among them: to protect their families from the risks of unemployment, from the risks of severe illness and from old age. They may wish to save, to be able to buy a house or a piece of land; to start a small business; to support the education of children; and to leave them some wealth to allow them to improve their income level.

Therefore it is important to analyse the various reasons which may lead to a low *domestic saving ratio* to GNP and the performance of the institutions of savings. An important group of issues has to do with the outflow of capitals and with the conditions for a comeback of them. Uncertainty on property rights is among the reasons of capital outflow together with the risk of being subject to new extraordinary taxes on wealth and the like. Uncertainty of property rights and fear of property taxes may also be very important in reducing the propensity to save of less affluent families. And scarcity of attractive financial products and financial intermediaries as well as an underdeveloped banking system may also be responsible for the above phenomenon.

The development of insurance products and the promotion of fringe benefits to wage and salary earners in the form of insurances may help to increase the rate of saving. In the area of popular housing too one might develop institutions to promote savings by individuals, which, together with a subsequent loan, may allow to acquire immovable property.

Taxation devices favouring savings may be important, particularly for the low and medium earners, to stimulate savings.

Inflation may destroy the value of bank deposits, of bonds and so on. Various forms of indexation may be studied as a temporary remedy, even if the true solution lies in moderating inflation. On the other hand, the increase of savings may help in reducing inflation.

The savings deposits to unpopular housing financial institutions may easily be indexed on the cost of constructions of a standard popular house since the money is used to finance their acquisition by those who have reached a given amount of savings (indexed as above) and decide to buy the house with an additional loan. The bonds of an oil company of an oil producing country may be indexed to the price of domestic oil on the international market. The bonds of electricity companies may be indexed on the fuel employed. Saving for old age may be indexed on the cost of life and the revenue may be employed in the above mentioned public utilities.

Lotteries giving as a reward a small flat or a small piece of land, may entice the modest savings of low income savers who, in this way, may hope to increase their economic status: according to the Friedman Savage utility theory this would be an entirely rational behaviour.⁴ One must think of banking institutions to which humble people may have easy access and of other easy financial institutions as the Post Office.

4. Human aspects must have a proper place in the choice of the policies. To respect *basic social policy priorities it is necessary to have social consensus on severe adjustment measures*. Ethics and economic policy may go hand in hand, at least to a certain extent.

In the traditional adjustment policies relating to foreign debt, often, one finds drastic suggestions about cutting exemptions or / and subsidies to given goods and services, to pursue an improvement of the public budget. But some of them may have a negative social impact too big in proportion to the budgetary improvement. A selective ethically conscious approach is required.

But what are and how do the existing "social institutions" and the "social components" of the public sector's activities work? A detailed analysis is needed to ascertain which social institutions and provisions are really effective in alleviating poverty, in coping with poor health conditions, in providing the low wage workers living in distant places the

⁴ See M. Friedman and Savage (1948), The utility analysis of choices involving risk, *Journal of Political Economy*, n. 56.

means of transportation to and from the places of work, in providing minimum housing facilities and infrastructures to really low income families. The priorities vary from one country to the other and from one region to the other of the same country. Accurate knowledge of these differences is important to make feasible highly selective policies of reduction in the "unnecessary" social expenditures and to avoid unnecessary exacerbation. Sometimes the change in policy should be diluted and accompanied by remedies for the transitional period. For instance, low gasoline prices may have developed the habit of buying second hand cars with a high fuel consumption. Smaller (second hand) cars might be rendered available at accessible costs with an appropriate custom and tax policy in a transition period in which the price of gasoline is revised.

Often the existing social interventions and institutions are inefficient: they waste their expenditure in bureaucracy, in scarcely useful or excessive purchases of goods, in inutilised apparels and grandiose buildings, while offering poor services because of bad management, of low productivity, high rate of absenteeism of the personel, etc. Other social interventions are efficient but their expenditures mostly benefit medium income classes and not the most needy part of the population. Obviously, there are situations where both kind of failures are combined together.

Reforms of the social institutions to render them more effective for the priority purposes often may be pursued through introducing incentives and measures analogous (in so far as applicable) to those suggested for the infrastructure sector. Any way, there is an area of overlapping between social policy and infrastructures' policy.

It is important to consider the social and human aspect in order to gain consensus on macroeconomic monetary and fiscal objectives of the adjustment process, and to avoid the impression that the main interest of the International Agencies administering the aid to which the adjustment process is conditional are merely concerned with the problems of the financial institutions, with the interest of the international business community and with those of the domestic rich people. The adjustment and growth policies must be shared and must be perceived as involving the interests of the entire populations. If these policies demand sacrifices to everybody, the justification is that they intend to pursue the interests of any social class. Everybody should have a positive perspective, after and because of the sacrifices involved in them.

The adjustment program should, as far as possible, include new social benefits given or promoted by the international financial institutions which control the adjustment process as a counterpart of the sacrifices required: its "conditionality" should not be limited to mere economic incentives.

These social benefits may be a small thing from the point of view of their financial costs, but highly important from an ethical point of view.

To the maximum possible extent the "social dossier" should be discussed from the beginning with the humanitarian associations and the social organisations, both to know their judgments about the most urgent needs and about the possible intervention and to try to convey to them the long run reasons of the general program.

5. This last point leads us to a fifth group of issues to be considered: those relating to the policies of business incentives and job creation. What is the institutional frame-work of the *productive sectors of the economy*? How are medium/large firms organised internally? Who exerts property rights on them and what are their financial and technical resources? How can one vitalise and modernise the small business sector? Disaggregate studies at the statistical level are needed to analyse the various sectors of the economy and of their potentiality: from agriculture, to mining, forestry, fishery, industrial production, transportation, electricity, telecommunications, banking, insurance, handicraft, retail trade, professional services, repairing services, tourism and related services, medical (private) services, cultural and entertainment services, new professions. It is also necessary to consider the institutional frames of each of these sectors i.e. of the laws regulating their contracts and entities (commercial law, laws regulating land property and land use, agrarian contracts, corporations law and so on), the public regulations of them (licensing of domestic activity, price controls, customs duties, rent controls, licensing of imports and exports, subsidies to export); their labour contracts regulation, the unions' role in wage and employment policy; the ways through which they are financed and how manpower and managers are skilled.

Bottlenecks in the finance for the investment and for the going concerns often hinder both the growth and modernisation of the existing firms and the new initiatives. Development of productivity may be hindered also by lack of human capital and of technological, managerial and financial know hows. Typical examples are that of marketing of agricultural products and that of touristic activities: which often either are of a poor quality or are left to foreign inventors, who - obviously - do not necessarily realise the kind of investments and activities which mostly benefit the local community. These issues have both an economic and social ethical aspects because a proper solution of them may allow small farmers, small business and workers to have a better remuneration of their efforts.

While discussing the timing and ways of privatisations and the timing

and areas of international trade liberalisations - which are important to have a modern, efficient market economy - one should also consider the above questions.

In order to reach positive results which may be obtained in the two crucial areas of privatisation and of international trade liberalisation, one should think about the financial and entrepreneurial forces to be mobilised.

In the area of privatisation and deregulation a crucial question is how to make them effective and fruitful, if the bureaucrats and executives who control and manage the public bodies to be privatised are unwilling to depart from their power positions. One may hardly expect successful privatisations and appropriate deregulations, if the interests of these bureaucracies are not considered. Public managers must find a positive personal interest in the process of privatisation. In the "deregulation" issues, one needs the cooperation of the regulatory bureaucracies to reach good results instead of a chaotic situation.

One should also keep in mind that regulations and deregulations are interconnected. Entrepreneurial private activities may be hindered by bureaucratic regulations and by excessive constraints in the labour relations, but sudden international trade liberalisation may cause perverse result: because opening the doors is no aid to firms sclerotised by excessive constraints in the above mentioned areas. On the other hand, clearly, to take advantage from multilateral or bilateral liberalisations and increase domestic exports, one needs acquaintance with marketing know hows. Sometimes coordination by public policies and international cooperation in investment policies is needed. For instance, if new export opportunities are opened, but good domestic transportation facilities and good sea port facilities to export are not available, the result may be deluding. This is particularly true as for small business, which may be the most important sector for exports and for job creation also in the Mediterranean developing countries. They have been and are in most of the Asiatic new incoming countries (NIC's) and in developed countries, like Italy, export oriented. But while in developed European countries small business is enough skilled and organised to be able to export without government promotions this may not be the case in the Mediterranean developing countries. However, in this kind of services public intervention is not an easy task.

These kinds of concertations and informal coordinations and plannings should be favoured, in order to promote more broad minded and efficient business activities in the considered countries. While public enterprises may be an inefficient way to perform manufacturing activities in developing countries too, public agencies of technical assistance may be useful to promote private and particularly small business. It is naive to

assume that the trade relations of now developed countries are a mere "spontaneous order" process. International cooperation and planning by *groups* of business firms of the developing and of the developed countries, interested in the new markets and investment opportunities should be pursued in this area: which according to reliable estimates, shall include about 350 millions inhabitants (only 100 in the early fifty) but not yet is a "common market". In general, in development policies, one should not give a preferential treatment to capital intensive big business, but to medium and small business which more easily create employment.

The process of acquiring the appropriate information, by those who shall make the "country programmes" cannot be of an "arm chair" kind. Often institutions of economic life have a practical meaning different from that which may result from reading and dissecting the texts of the laws and by-laws or even from that which may be given in the textbooks, which often tend to "idealise" or to "stylise" the situations. Hidden economy often is overlooked: and yet here there is an important potential of growth, which needs institutional changes: here again deregulation and regulation may be combined together to have a better economic and social framework.

6. A sixth point has to do with *interregional cooperation*. In our case, i.e. for the Mediterranean countries, this cooperation may have a peculiar ethical-humanitarian value because it has to do with two groups of interrelated problems. Those of development of less developed regions of Southern Europe, close to the regions to whom the programme of adjustment and development has to be addressed, and those of the immigrants from the Mediterranean underdeveloped countries to the European Mediterranean countries. This potentially huge immigration flow is officially controlled through quotas and other rules, which however are often violated by clandestine immigration. With some of these flows a solution might be found by providing to seasonal workers for agriculture and other activities (e.g. tourism) organised means of transportation and official recruiting systems in the countries of origin.

But more generally joint discussion of the issues relating to these immigrant by the countries of immigration and emigration may help to find solutions, for both parties, more satisfactory than the present ones.

On the other hand, it seems important to coordinate the job creation and growth policies in the less developed areas of the Mediterranean part of EU with those in the Mediterranean developing countries, because of the strong complementarity among these regions. This is particularly true in sectors as tourism and fishery, but it is also relevant as for the energetic resources and other natural resources which exist in the developing countries. In addition, while in the EU less developed

Mediterranean regions there is an excess of unemployed skilled labour, the opposite seems to be true on the other side. The same may be true in the area of public social services, as those of health and social assistance.

Finally, clearly, new initiatives in both parts of this vast area may prove more successfully if one may consider this as a single market.

III.

1. It is certainly difficult to advance *new sensible* views about facing properly (i.e. in an “effective” and “persuasive” way) the issues of economic and financial adjustment structural reforms and growth policies of developing countries with their unemployment and social unbalanced problems. The six points methodology here presented to tackle the issues related to a new Mediterranean policy, has not the pretence nor the aim of offering *radically new* suggestions. In the past the recipes suggested by the international organisations have encountered difficulties, and those really carried on have offered mixed results. The reasons lay in a mix of factors: the intricacy of the situations, the lack of adequate coordination, the political and bureaucratic difficulties of the institutions of the considered countries; the scarcity of financial resources available to cope with the various situations, the excess of macro over micro and institutional interventions, the poverty of the social dossier. However, broad opportunities exist for employment and growth in these areas from which a continuous immigration pressure is exerted in Europe. A new interest by Europe in their economic and humanitarian problems is needed for ethical reasons, but also for mere economic interest. This is a potentially big market, with an important population growth while the EU market is stagnating along with its population. It is a common interest that the abundant labour supply should find in the Mediterranean developing region their jobs, rather than increase the immigration to EU countries.

2. The six components of the suggested strategy try to encompass the interconnected issues of “readjusting” to sound finance, to sound market economy and to ethical priorities the institutions and energies of these countries and of the less happy parts of the aiding countries. A close connection among the various components and among the various regions is vital to obtain a well balanced strategy, capable of synergic effects. It is necessary to stress that the fiscal and monetary policy measures and institutional changes need a social policy “envelope” and a social policy consultative procedure to gain enough support for the prescriptions suggested. On the other hand, all these are necessary ingredients to give “credibility” to the programs and therefore to spur savings and investment

to the considered areas. Institutional reforms in the sector of finance are needed both to increase the rate of saving particularly of the low-middle class and to promote the improvement of the infrastructures. These are required to make these economies more productive and more livable, and particularly to give a positive framework to small business and to create new initiatives. But to finance them one needs additional capital together with the modernisation and privatisation of the managerial practices. Institutional changes in the direction of simplification, transparency, and certainty about "the rules of the game" are needed to entice private initiative together with flows of know how and ad hoc facilities to promote modernisation. But to make these changes acceptable one needs to consider also the ethical humanitarian aspect of them.

3. Market economy, as we observe it in a highly developed country is a complex network, whose smooth functioning does not depend on a sort of "fiat" but from years and years of trials and errors and of operation of the competitive selection, from an accumulation of know hows and human capitals, together with real capital accumulation, and - last but not least - from a frame of institutions combining - certainly not without imperfections - efficiency with equity, and giving positive perspectives to most citizens. Recently, however, the welfare state and the "Rehin model" who dominate the European institutions and social culture have entered in a crisis.

To have growth and accomplish ethical objectives - among whose job creation is paramount - avoiding the mistakes and failures of the welfare state, is not an easy task, to be accomplished in the new policies for the Mediterranean countries. But one must also consider that there are self enforcing factors, which - once started - may develop on themselves. As often, what is important is to be able to catch the knot by the slip.

Often it has been talked about adjustments and growth with human face. Often the proposals mentioned under this name aim to simply milder the macro economic asperities of the adjustment processes; some time they aim to water down the entire economic philosophy of sound adjustment and development through market economy: which is a big mistake.

Here I tried to develop a different approach where the ethical and human factors are instrumental to growth factors, beside having a per se value. After recognising that the prescriptions by Chicago and Harvard economists to the Eastern European countries and Russia and some South American countries with their philosophy of "global macro-shock" are too naive and objectionable from the point of view of the human sacrifices which they unnecessarily provoke, I have tried to suggest a more gradual,

selective, pragmatic, institutions - conscious process - oriented approach involving coordination of programs for the developing countries with those of the less developed regions of mature European nations looking in the Mediterranean sea.

Happily, the initial conditions are different from those of the former Soviet bloc countries. The Mediterranean countries already know market economy, private property, private business; their bureaucratisation differs from that existing in the former Soviet economies. Gradualism toward "ortodox" public finance and toward modern market economy principles here are less risky politically and more viable. And these countries do not have the uper inflation and financial disorders of some of the South American countries to whom the shock therapy was suggested, to make them financially credible.

4. I have tried to underline two "matters of principle". Firstly, working through a careful, selective approach, it is possible and - I believe - necessary to insert a "social envelope" in the adjustment growth program: while financially bearable, it may change dramatically its ethical meaning. Secondly, it is often possible to link the humanitarian (ethical) objectives and the efficiency objectives. I have tried to show this in all the five components of the approach following the first and preliminary, dealing with the (sound) fiscal and monetary policy issues (in this part of the program, the ethical prescription consists in avoiding an unnecessary "shock therapy"). Let me briefly summarise these interconnections.

As for savings policy, I have pointed out that there are reasons to promote saving in the area of insurances for worker, of popular housing, of small farmers etc.: these policies while useful for economic growth, may also perform social functions. As for the infrastructures and public services, I have drawn from the philosophy of the 1994 Report of the World Bank where sound finance, efficiency and equity aspects are combined. As for the various productive sectors of the developing Mediterranean economies I stressed the measures for small business which, while helpful to promote exports and growth are also important for the level of employment, since this is generally the sector where jobs are most easily created. On the other hand, as for the industrial policies, in general, I have suggested that financial aid should be preferably given to labour intensive and to medium and small firms rather than to the big, capital intensive ones. Finally, I have suggested to link the policies of development of the Mediterranean developing countries with those to promote job creation in the less developed regions of the EU Mediterranean countries.

At the beginning of this paper I stressed that the recent Nobel prizes

signal new tendencies of economic science, as a study of institutions and of political aspects of public choices and as study of micro behaviour, which may stimulate a revision of the macro shock approaches prevailing in the current philosophies of adjustment and reform programs for developing country. At the end I would like to mention that until now the EU policy has substantially overlooked the issues of mutual interest in the growth and employment of the Mediterranean area, surrounding the South of Europe.

The European agricultural policy is a typical case of this neglect. But also in the recent Intergovernmental Conference of Florence of EU the Mediterranean dossier has been neglected. Political, cultural, religious factors may have hindered a strict integration of the two great regions of Mediterranean sea similar to that accomplished two thousand years ago. In a broad ethical perspective the existing reciprocal cultural barriers and suspicions appear unsound and certainly there is a common interest in a new Mediterranean "common market" area: which may eradicate the plague of unemployment both in the South of EU and in the Mediterranean developing countries.

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IMMIGRANTS' RIGHTS AND THE RECENT ITALIAN CONSTITUTIONAL EXPERIENCE (*)

CESARE PINELLI

1. Introduction

According to continental Europe's general theory of public law, sovereignty, land and people were, and still are, the three "constituent elements of the State". This theory was partly built upon, and can be harmonised with the dualistic theory of international law, which considers the State as the only subject of the international community and its laws as the supreme and exclusive expression of a sovereign power to grant rights to aliens who reside on its land.

Nevertheless, it is also certain that the legal status of citizenship was born during the French Revolution, and has been considered an obvious issue of constitutional provision since then.

This is why, in continental Europe countries, the historical roots of the concept of citizenship are so ambiguous. From one side, this concept is linked with a theory of public law whose main task was to affirm the sovereignty of the State. From the other side, it is linked with a political and constitutional promise of freedom and equality.

In this way one can explain, for example, some scholar's proposal of the first period of Italian republican experience tending to a direct insertion among constitutional provisions of the status of citizenship, against the "too liberal tendencies" which were considered as a permanent threat to national values, and in order to end "the absolute contradiction between universalism and the idea of citizenship".¹

Even in those years, there was no room, in Italy, for such a suggestion. While the legal culture was ideologically state-centered, parties and people's political culture didn't pay any attention to national values after the fascist regime and the war's defeat.²

* Report of the XI Colloquio Internazionale Romanistico Canonistico of the Pontificia Universitas Lateranensis, "Etica e diritto nella formazione dei moderni ordinamenti giuridici", Rome, 22-25 May 1996.

¹ See R. Quadri, *Cittadinanza*, in *Novissimo Digesto*, Torino 1959, 317.

² F. Cerrone, *Identità civica e diritti degli stranieri*, in *Politica del Doherty*, 1995, 441 ss.

In Italy, as in other countries of continental Europe, legal culture has changed also in this field. Some scholars try to find in the constitutional provisions a chance for the development of a “*common* international law regarding aliens treatment”, that could recognise human rights even where there are no international treaties or conventions on the matter.³

There can be no doubt that constitutional scholars are now aware that the old German *Staatsrecht* and the classical international doctrines, organised around the States sovereignty, can no longer be the baseline for aliens discriminations. We are bound to Constitutions, and we have to find through constitutional interpretation any baseline for an equal or for a different treatment of citizens and aliens.

This does not mean that things are easier. First, as we will see through a quick glance to Italian provisions, constitutional interpretations may themselves be very controversial. And, second, the old cultural ambivalence of citizenship between a democratic and a state-centered conception has been replaced by new and sometimes dramatic contrasts. The translation of the “human rights common law” in terms of constitutional law is partly due to immigration waves, which are changing completely the social landscape of western countries. So far it means an enjoyment of fundamental rights, and especially welfare rights, by aliens, this translation is often perceived by citizens as a threat to their own rights, to their cultural if not ethnical identity, to their religious beliefs.

2. The different interpretations of aliens’ rights according to the Italian Constitution and recent trends in constitutional jurisprudence

Enforcement of constitutional rights to aliens is a very controversial issue in Italy, even on a strict interpretation ground.

While art. 2 of the Constitution of 1948 recognises and grants inviolable rights of man, and requires the fulfilment of duties which cannot be derogated, equal protection of the laws is granted only to citizens (art. 3), and art. 10 states that the legal status of aliens is fixed by the laws according to international law and treaties.

One can distinguish a core of rights granted to everybody (citizens and aliens) as expression of universal features of mankind, and classes of constitutional rights which could be reasonably differentiated between citizens and aliens. But one can also distinguish different spheres of rights

³ G. D’Orazio, *Lo straniero nella Costituzione italiana*, Padova 1992, 126-127.

(civil, social, political), in order to find the treatment each one reserves to citizens and aliens. The difficulty does not consist in having no solution, but in having too many.

In its thirty years jurisprudence, the Constitutional Court has always stated that the equal protection of the laws can be extended to aliens to the extent that a question of fundamental rights is at stake (see decisions nn. 120/1967, 104/1969, 109 and 244/1974, 62 and 283/1994, 28 and 58/1995).

But if we search the concrete applications of this general rule, we have to consider the cultural and social framework, that is to say, the evolution of the concepts of "citizen" and "alien", and many factual changes, the most relevant of which are the big waves of migration Italy has known in the last years.

In one case of deportation of an alien who was submitted to preventive detention, the Court, after having repeated once again the general rule of non-discrimination of aliens in the enjoyment of fundamental rights, *habeas corpus* included, has stated that, while aliens have no relation with the national community and with the State, citizens are granted in their general *status libertatis* also the freedom of circulation.

This means, for the Court, that Parliament is free to regulate the entry and residence of aliens, balancing among different interests, "the national immigration policy", with the only limit of reasonableness (decision n. 62/1994).

Here the Court seems to feel very strongly the contrasts between immigration policy and the consequences of an unrestricted extension to aliens of fundamental rights. This explains why, going much further than the occasion required, the Court introduces the distinction we have seen. While the regulation of entry and residence can be left almost entirely to legislative discretion, in the regulation of fundamental rights of resident aliens, Parliament has to respect strictly constitutional provisions.

More recently, the Court has smoothed this distinction, arguing that the discretionary power of Parliament has to be restricted even in the regulation of entry, residence and deportation of aliens when fundamental rights are at stake. In decision n. 28/1995, the immigrant worker has the right to join with his parents, and this is considered a right entirely applicable to citizens by artt. 29 and 30 of the Constitution. And in decision n. 58/1995, the Court has stated that when deportation is considered a security measure depending on a legal presumption of a socially dangerous person, the *habeas corpus* principle, which is "a fundamental right of man, citizen or alien", must prevail.

One has to remember that the right of the immigrant worker to join his family had been recognised by the European Court of Human

Rights⁴, and international lawyers note that State duties regarding aliens safety and personal freedom have been generally recognised just in cases of deportation.⁵

This is the first reason why the distinction outlined by the Italian Court in decision n. 62/1994, and followed, as we will see now, by other courts, suddenly becomes very problematic. In order to succeed as a general framework in immigrants discrimination cases, the distinction between regulation of entry, residence and deportation and regulation of fundamental rights should correspond to the distinction between immigrants as non citizens and immigrants as persons. But this correspondence does not work when, in entry and deportation cases, immigrants have to be considered as persons, and when, vice versa, regular immigrants are denied fundamental rights such as the right to vote without reactions by courts or by scholars.

3. Jurisprudential and legislative trends in other countries

Another reason why the distinction fails in becoming a general framework for immigrants discrimination cases is that it does not tell us anything about illegal immigrants treatment.

In immigration cases, the United States Supreme Court has developed a doctrine of full deference towards Congress.⁶ But in *Plyler vs. Doe* (1982), Justice Brennan, writing for the majority, said that the XIV Amendment, referring to “the person”, the due process of law and equal protection of the laws, is enforceable to the “shadow population of illegal immigrants ... (raising) the specter of a permanent caste”, whose sons have a right to public education, which, although not granted by the Constitution, “has a fundamental role in maintaining the fabric of our society”.⁷

Today, this clear call for the protection of illegal immigrants is threatened by a strong climate of intolerance towards immigrants and by the related tendency of legislatures in setting a privileged standard protection for citizens, and liberals recognise “that enforcement of the

⁴ In the decisions *Berrehab* of 21 June 1988 and *Moustaquim* of 18 February 1991, in Publications of the European Court of Human Rights, series A, Vol. 138, 14 - 16 and Vol. 193, pp. 18 - 20, respectively.

⁵ See B. Nascimbene, *Straniero (dir. internaz. pubbl.)*, in *Enciclopedia del diritto*, Milano 1990, 1151.

⁶ S. H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress and the Courts*, in *Hastings Constitutional Law Quarterly*, 1995 925 ss.

⁷ 457, U.S., 202.

border is a legitimate and significant public policy goal", perhaps thinking "that emphasis on border control might lessen concern about interior enforcement". But this strategy remains doubtful, as there is a growing consensus for measures to ensure that illegal aliens already in the U.S. receive neither jobs nor benefits.⁸

Meanwhile, the French *Conseil Constitutionnel* has stated that "Aucun principe, non plus qu'aucune règle de valeur constitutionnelle n'assure aux étrangers des droits de caractère général et absolu d'accès et de séjour sur le territoire national ...; les étrangers se trouvent placés dans une situation différente de celle des nationaux ... Toutefois si le législateur peut prendre à l'égard des étrangers des dispositions spécifiques, il lui appartient de respecter les libertés et droits fondamentaux de valeur constitutionnelle à tous ceux qui résident sur le territoire de la République".⁹

But the reforms of 1993 known as "Pasqua laws" have strongly questioned the *iure soli* standard of achieving citizenship, which was Revolution legacy, and the country seems now to know a kind of regressive circle. Immigrants are denied any legal status in order to legitimise their deportation.¹⁰

In Italy the approach is different, since there is more hypocrisy than elsewhere. The reform of the 1990 law, which has not yet passed through Parliament, tends to transform immigration policy and the questions of immigrants rights, into a question of public order by broadening the chances of deportation, and by giving judges the last word.¹¹ In this light it is not difficult to guess that "the tightening circle of membership" may prevail.

Last but not least, the European Union's Council Resolution of 20 June 1994 has stated that members of the Union will take into account the requests for entry in their country for working purposes only when the working offer of the State cannot be fulfilled by national or EU workers,

⁸ T. A. Aleinikoff, *The Tightening Circle of Membership*, in *Hastings Constitutional Quarterly*, 1995, 918.

⁹ Decision of 13 August 1993. R. Pinto, *Le Conseil constitutionnel et la Cour Suprême des Etats Unis confrontés au droit international. Entrées et séjour des étrangers*, in *Journal du droit international*, 1994, 310 ss., has noticed a similar approach of the two Courts in immigration cases.

¹⁰ S. Nair, *France, la crise de l'intégration*, in *Le Monde*, 23 april 1996, 16.

¹¹ See the critical note of M. Cuniberti, *Politica dell'immigrazione, condizione dello straniero e garanzie costituzionali: a proposito del recente decreto legge sull'immigrazione*, in *Diritto Pubblico*, n. 1, 1996.

or by other countries' workers who reside permanently and legally in that State.

According to this rule, whoever is outside must be kept outside, so that whoever is inside can be privileged for employment. Is it a rational standard and can it face the immigration waves? Surely, it is not an encouraging solution to the efforts in finding at the Community level solutions not foreseeable at the national level, where the traditional state powers over the entry regulations still remain very strong. These efforts had been justified on the basis that the EC Treaty creates specific rights that go beyond what national law can achieve, in that their scope of application *ratione territorii* extends to the entire geographical area of the twelve Member States. These rights, it was noticed, "fill in precisely the gaps left in the economic field by national law and the general international human rights instruments".¹²

'Citizen' and 'person' are, everywhere, problematic concepts, whose definition and interpretation must be considered a difficult achievement, not a dogmatic or a sure premise for the recognition of rights. This remains true, even when the immigration dilemmas and the political struggle between integration and segregation, or exclusion, become more difficult to handle. It remains true for the courts, who may be called to arbitrate these dilemmas, and it remains true for constitutional scholars and for diverging political theories.

4. Ethics and constitutional law facing the challenge of immigration

"It has always been easier, it always will be easier, to think of someone as a non-citizen than to decide that he is a non-person".¹³ Those who are convinced that the concept of citizenship has always been the best way for tightening the circle of membership of a certain State community will surely agree with Alexander Bickel.

In the American tradition, the origin of these ideas, the meaning of citizenship has been very different from the one which prevailed in continental Europe. Bickel's criticism on the "artificial" characterisation of citizenship confirms these differences, as, in Europe, the concept and status of citizen have been built on artificial basis, in order to engage a battle against the dominant idea that nature, or metaphysical entities,

¹² C. Tomuschat, The Legal Status of Non-Citizen of the EU. General Introduction, in *European Review of Public Law*, 1995, 544.

¹³ A. Bickel, *The Morality of Consent*, New Haven and London 1975, 53.

assigned a destiny to everybody, so that different social roles and status could not be discussed.

A different stand is taken by some European thinker who suggests a return to Francisco Vitoria's constructions about the *ius societatis et communicationis*, the *ius peregrinandi* in our *provincias et illic degendi*, and about the *ius migrandi*. According to these thinkers, taking human rights seriously means to "have the courage to break all connection with citizenship, that is to say, the last status privilege remained in modern law".¹⁴

I do not agree with this idea of citizenship, and I think that the real question lies in the fact that, today, political cultures and legislative trends favouring citizens and discriminating immigrants look at citizenship as if it were a naturally driven concept, whereas, we have seen it before, in Europe this concept grew up against the idea of social roles assigned by nature or metaphysical entities.

Are we witnessing the end of the artificial conception of citizenship? Do the restriction's policies reflect a widely accepted notion of citizenship as a naturally driven status? If it were so, today's difficult balances between fundamental rights recognised to everybody as persons and citizens rights would be teared away. Such a conclusion would take us into a deep regression in the relationships not only between citizens and aliens, but also between citizens themselves. Once started, one cannot stop the tendency towards the tightening circles of membership, especially with objections founded on the universal notion of the human person.

This is why I think that the focus of our attention must be kept on the concept of citizenship. In this way, we can hope to deal with the great challenges of immigration. By leaving aside the concept of citizenship, as if it were a privileged status built against a more general idea of equality between men, we miss the central point and we encourage the trends towards social regression in our communities.

The diverging cultures and theories opposing these trends have the task is to build a well balanced conditioned, we can't forget it, by national borders. Here different ethical traditions and constitutional cultures have plenty of work to do.

The mutual relationship between citizens rights and duties could be one of the main aspects of this work. This relationship was at the core of the original idea of citizenship, but in some countries, or in some of them

¹⁴ L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, Milano 1995, 54.

more than in others, it gradually lost its ultimate sense of a reasonable standard for living together. But it is sometimes recognised that the present challenges to citizenship can succeed more easily where that relationship has lost its sense, while they can be resisted where citizens do not see themselves as mere passive perceptrs of public subventions or services.¹⁵

In the Italian constitutional experience, the chapter of duties has been gradually removed with the slow decline of the state-centered ideology, to whom it was associated in the collective perception, and even by constitutional scholars, at least if we consider the very little attention given to the matter.

In conclusion I would like to refer to art. 2 of the Italian Constitution, which recognises and grants fundamental rights of man, but seeks also the fulfilment of duties of political, economic and social solidarity which cannot be derogated. But in what sense can we speak of a mutual relationship between rights and duties according to the text?

The Italian Constitution does not provide an automatic reciprocity between single rights and duties, as the nineteenth century version put it. Fundamental rights of man cannot be “violated” by any public or private power; solidarity duties cannot be “derogated” by citizens, in the sense that the laws providing those duties (and only laws can provide them according to the Constitutional Court) have to be respected by them.

I think that an idea of reciprocity between rights, especially social rights (e.g. education, health) and solidarity duties is a necessary condition for the growth, or the establishment, of a responsible human coexistence. Solidarity cannot be truly cultivated without individual responsibility, and these two values are part of “the full development of the human person” that is the ultimate constitutional goal. I think that a conceptual development of this kind is necessary if we want to find a suitable approach to immigration challenges.

My views have centered on the Italian Constitution, not only because of my origins, but also because, for historical and cultural reasons, the Italian case is the best example of a wide contrast between the spirit of the Constitution and the effective lack of reciprocity between rights and duties.

Nevertheless, there are similar problems elsewhere, and sometimes approaches may be similar too. According to an English judge, “Whether

¹⁵ V. E. Parsi, *Democrazia e mercato. Elementi di analisi del sistema internazionale*, Milano 1995, 55.

we are dealing with aliens or not, the language of rights is not adequate to describe the legal balance which a civilised state should achieve between autonomous human beings and the state itself. People only have rights because they possess free will and are rational creatures; and so are to be treated as ends not means. This is at the very basis of any decent moral philosophy. But for the very same reason they have duties, towards each other and to the community where they live: duties to act responsibly, to respect the rights of others ... In the end, our legal treatment of aliens is a function of our moral perception of the balance the law should achieve between an individual's interests of others".¹⁶

Following this inspiration, attention would be firstly given to citizenship, in order not to reduce it into a naturalistic concept and to meet, in this way, regressive tendencies towards a primitive egoism and a legally enforced privileged status. It would be driven towards citizenship because integration of immigrants can be understood only if citizenship is founded on the idea of a minimal reciprocity between rights and duties.

After the decline of state-centered ideologies in continental Europe, States are more and more perceived reasons as uncertain organisations of living together. If this is so, a naturally driven concept of citizenship would acquire the sense of a non-principled defense of a status. This is the challenge we have to face together, in order to prepare for a difficult but plausible future.

Cesare Pinelli is Professor of Public Law at the University of Macerata. His numerous publications include *Judicial Protection of Human Rights and the Limits of a Judge-made System (1996)* and *Costituzione e principio di esclusivita: I percorsi scientifici (1990)*.

¹⁶ The Hon. Mr. Justice Laws, *The European Convention on Human Rights and Non-EU Aliens*, in *European Review of Public Law*, 1995, 571-572.

CONFERENCE ANNOUNCEMENTS

The Mediterranean Centre for Human Rights will be holding an international conference on **Migration and Human Rights in the Mediterranean** on 16th to 18th May 1997 at the Aula Magna of the Foundation for International Studies. Themes to be discussed will include current problems of migration, particularly migration resulting from conflict and south-south migration. In a round table discussion, official representatives of international organisations will speak about their commitment in the field of human rights, and more specifically, on migration.

A workshop on **Media, Human Rights and Migration** will take place on Sunday 18th May 1997. This workshop is being organised by the *Reseau Euro-Maghrebin de Formation dans les metiers de la Communication* (REMFOC). Participants will include a group of journalists working in the field.

This conference will be preceded by a meeting for UNESCO National Commissions of the Euro-Mediterranean Area on the initiative of the Malta National Commission for UNESCO and with the support of UNESCO. The aim of this meeting is to exchange ideas and promote inter-regional cooperation in the various domains of interest to UNESCO, especially in matters regarding culture for peace. Special attention will be paid to human rights in the service of peace, especially in their application to Mediterranean problems.

All correspondence regarding these activities should be sent to Ms Lucienne Curmi, Coordinator, Human Rights International Conference, Human Rights Programme, Institute of International Affairs, Foundation for International Studies, St. Paul Street, Valletta VLT 07, Malta.

Tel. 356.231875, 234121/2 Fax. 356.230551

The Peace and Conflict Studies Programme of the Institute of International Affairs is organising and hosting the 3rd annual meeting of the International Association of Peacekeeping Training Centres (IAPTC)

on **The Role of Regional and Sub-Regional Organisations in International Peacekeeping** on 25th and 26th April 1997 at the Aula Magna of the Foundation for International Studies. The theme of the meeting has been chosen by the IAPTC on the premise that the changing context of peacekeeping operations must be catered for at training level. Training centres should therefore be part of the general debate on the development of international peacekeeping, with its new emphasis on regional organisations. The meeting shall be divided into two workshops:

Workshop 1: Regional Organisations in Peacekeeping

This workshop will identify and summarise for UN consideration the responsibilities, functions and capabilities which a regional/sub-regional organisation, training, deployment and support of a regional peacekeeping mission.

Workshop 2: United Nations Military Observer (UNMO)

The UNMO workshop will review and validate the key elements of UNMO training proposed by the United Nations (UN) Department of Peacekeeping Operations (DPKO). These elements are: UNMO (1) selection criteria (2) predeployment education and training programme, and (3) in-theatre training programme outline.

All correspondence regarding the above should be sent to Ms Christine Coleiro, coordinator, IAPTC 3rd Annual Meeting, Peace and Conflict Studies Programme, Institute of International Affairs, Foundation for International Studies, St. Paul Street, Valletta VLT 07, Malta.

Tel. 356.231875, 234121/2 Fax. 356.230551

ABSTRACTS

LES DROITS DE L'HOMME: UN NOUVEL ENJEU POUR LE MONDE ARABE

ABDELWAHAB BIAD

This Paper examines political attitudes and reactions in the Arab World towards United Nations Covenants on Human Rights. The paper discusses problems and obstacles that have been met on implementing such Covenants in the Arab Countries. There is strong criticism by most of Arab and Muslim states against so-called Universal Human Rights. It was asserted that such rights as Equality of Women and Freedom of Religion conflict with Islamic Law. It was argued that the Islamic Legal Heritage, the Sharia, contains enough rules to protect fundamental freedoms of Muslims and there is no need for additional rights. Problems of the compatibility of Islam with civil and political rights was often raised.

The paper points out that there are diverse national positions among Arab countries towards these issues opposing "conservatives" as Saudi Arabia and other Gulf States and "liberals" as Egypt, Syria and Maghreb states. During more recent years, Human Rights and democratisation became a central issue within Arab societies. Emergence of Civil Society is followed by stronger revendication for democratic freedoms as freedom of Press and free Elections. Today, most of Arab regimes try to resist to internal and foreign pressures for Human Rights through counter policies that consist in implementing limited reforms as creation of national (official) institutions for Human Rights.

The paper focuses on concepts of "Compatibility", "Islamic Particularism" and "Universality versus Cultural Relativism".

تفحص هذه الدراسة المواقف السياسية و ردة فعل الوطن العربي تجاه معاهدات الامم المتحدة حول حقوق الانسان. وتناقش الدراسة المشاكل والعوائق في تنفيذ مثل هذه المعاهدات في الدول العربية. هذا وثمة انتقاد شديد من قبل معظم الدول العربية والدول المسلمة ضد ما يسمى بالحقوق الانسانية العمومية وقيل أن حقوق مثل حقوق مساواة النساء وحرية الديانة تعارض الشريعة الاسلامية وأن التراث القانوني الاسلامي المتمثل في الشريعة الاسلامية يشمل قواعد تتعلق بحماية الحريات الاساسية للمسلمين ولذا فلا حاجة الى حقوق اضافية. وتطرح مرارا مشاكل انسجام الاسلام مع الحقوق المدنية والسياسية.

وتشير الدراسة الى المواقف القومية العربية المختلفة تجاه هذه القضايا والتي تتراوح بين "الدول المحافظة" كالمملكة العربية السعودية ودول اخرى في الخليج العربي و"الدول التحررية" كمصر و سوريا والدول المغربية. وأصبحت حقوق الانسان والعملية الديمقراطية قضية مركزية في المجتمعات العربية، وتعقب ظهور المجتمع المدني مطالبة أقوى من أجل الحريات الديمقراطية كحرية الصحافة والانتخابات الحرة. وتحاول معظم النظم العربية أن تقاوم الضغوط الداخلية والاجنبية الداعية الى حقوق الانسان وذلك عن طريق سياسات مضادة التي تهدف الى تنفيذ اصلاحات محدودة كانشاء مؤسسات وطنية رسمية لحقوق الانسان.

وتركز هذه الدراسة على مبادئ "الانسجام" و"الخاصية الاسلامية"
و"العمومية ازاء النسبية الثقافية".

THE CONSTITUTIONAL FUNCTION OF HUMAN RIGHTS

AUGUSTO BARBERA

There are three tendencies converging to create a "cultural revolution" of constitutional and international law.

a) The diffusion of international charters on human rights has threatened the traditional evolution of international law, as a law just concerning states. The need to recognise citizens and peoples as entities of international law is becoming more widespread.

International interference which protects human rights insists on reconsidering traditional characteristics of state sovereignty, as well as the basis of the international community system of sovereign states. The problem is defining the powers of a supranational authority qualified to ensure respect for human rights, even by force (a power which until now has only been admissible to states). How should this planetary authority be organised to represent all peoples and individuals?

b) The difference between international and national laws is diminishing as international system rules are automatically introduced into the state systems through national Constitutions. It is not the state that occasionally agrees to self-limit its own sovereignty, for example through the treaties, but it is the state that "bends" to international law, accepting that its fundamental rules may become state laws.

c) Some Constitutions, for example those of Italy, Bonn and Spain, contain references to "natural laws". While recognising and protecting individual's freedom, this assumes a constant adjustment of the international system to the evolution of the conscience of international opinion.

These three tendencies are overcoming the state monopoly of law making and introducing human rights in the national laws of states. But could these tendencies develop further in the current international

situation? There are countries which make an effort to reconcile their state law with the construction of an international order, while there are others which want to maintain traditional and anti-storic prerogatives of national sovereignty. This inevitably encourages an authoritarian culture, stopping evolution of international law towards a recognition of peoples' law, wherever they may live.

ثمة ثلاثة اتجاهات التي تتلاقى لخلق " ثورة ثقافية " فى القانون الدستوري والدولي. أولا: انتشار المواثيق الدولية حول حقوق الانسان قد هدد التطور التقليدي للقانون الدولي كقانون يخص دولا فقط. والحاجة الى الاعتراف بالمواطنين والشعوب ككائنات القانون الدولي قد اصبحت أكثر رواجاً. هذا والتدخل الدولي الذي يحمي حقوق الانسان يصر على اعادة النظر في الميزات التقليدية لسيادة الدولة وكذلك أساس نظام المجموعة الدولية المتكونة من دول ذات سيادة. والمشكلة تتمحور في تحديد القدرات لسلطة تفوق المستوى الوطني المؤهلة لضمان احترام حقوق الانسان، حتى بالقوة (تلك القدرة التي سمحت للدول فقط حتى الان). كيف يمكن تنظيم هذه السلطة العالمية حتى تمثل كافة الشعوب والافراد؟

ثانياً، أخذ الفرق بين القوانين الدولية والوطنية ينخفض مع ادخال قواعد النظام الدولي بشكل تلقائي في أنظمة الدولة عبر الدساتير الوطنية. ليس الدولة التي توافق بين الحين والآخر على تحديد سيادتها عن طريق الاتفاقات على سبيل المثال، ولكن "تنحني" الدولة أمام القانون الدولي مع الاعتراف بأن قواعد هذا القانون قد تصبح قوانين الدولة.

ثالثاً، تحتوي بعض الدساتير، مثل دساتير ايطاليا وبون واسبانيا، اشارات الى "القوانين الطبيعية". هذا وبغض النظر عن الاعتراف بحرية الفرد وحمايتها، تفترض هذه القوانين المطابقة المستمرة للنظام الدولي في تطور وعي الرأي الدولي.

وأخذت هذه الاتجاهات الثلاثة تهيمن على احتكار الدولة في عملية سن القوانين وبدأت تساهم في ادخال حقوق الانسان في القوانين الوطنية للدول. ولكن هل يمكن لهذه الاتجاهات أن تتطور أكثر في الاوضاع الدولية الراهنة؟ هذا وثمة بعض الدول التي تبذل جهودها من أجل التوفيق بين قانون الدولة وعملية انشاء نظام دولي، غير أنه هناك دول أخرى التي ترغب في التمسك بالميزات المضادة للتاريخ فيما يخص السيادة الوطنية. ويسفر هذا بالطبع عن ثقافة اخضاع الافراد لسلطة الدولة، الامر الذي يوقف تطور القانون الدولي نحو اعتراف بقانون الشعوب حيثما وجدوا.

PEACEKEEPING AND HUMAN RIGHTS: A CRUCIAL BUT UNEASY RELATIONSHIP

FRED TANNER

This study proposes to use the numerous peace operations in the greater Mediterranean region to look at the role of the human dimension in peacekeeping today. It will examine to what extent questions of human rights, democracy-building or humanitarian relief protection have entered

into primary or secondary mission objectives and how such multi-component operations affect the missions' overall performance. The study identifies and discusses the main challenges of such peace operations. They include the danger of spiralling linkages and conditionalities between human rights questions and other commitments under peace agreements; the lowering of the consent of the parties when implementation of human rights issues are at stake; and finally, the ambiguous relationship between judicial intervention and peace operations.

تقترح هذه الدراسة أن تستعمل شتى العمليات السلمية في منطقة البحر المتوسط الكبرى بغية النظر في دور البعد الانساني في عمليات حفظ السلام اليوم. كما تبحث الى أي مدى دخلت قضايا الحقوق الانسانية أو عملية بناء الديمقراطية أو حماية المساعدة الانسانية في الأهداف الرئيسية أو الثنوية للبعثة السلمية ، بل تأثير هذه العمليات المتعددة الجوانب على الفعالية الاجمالية للبعثة. كما تحدد الدراسة و تناقش التحديات الرئيسية التي تواجه مثل هذه العمليات السلمية والتي تشمل الارتباطات اللولبية والتكيفات بين قضايا تتعلق بحقوق الانسان والتزامات اخرى ضمن اتفاقات السلام، وتردد الاطراف عندما تقتضي الحالة تنفيذ قضايا تخص حقوق الانسان، وأخيرا، العلاقة الغامضة بين التدخل القضائي والعمليات السلمية.

HUMAN RIGHTS AND MEDITERRANEAN SECURITY

SALVO ANDÒ

The events which have taken place in the World, following the demise of communism, call for major reflections on the military strategies and fundamental principles which regulated relations between States during the Cold War. In a new World order which is no longer founded on a bipolar system, all States not just the super powers, are responsible for international security and the peaceful settlement of disputes. Today it is no longer a case of some countries giving security assurances and of other countries receiving such assurances; all countries have to collaborate to guarantee the security of all. In the first place all must recognise the fundamental role of the United Nations in this respect. The concept of security too has to change. Armaments are in effect no longer the deciding factor in guaranteeing peace; peace depends on a better organised and a wider application of social justice. It is also dependant on a gradual reduction of the North and South divide and on development and the ability to guarantee Human Rights.

These needs are particularly felt in the Mediterranean region where competition between the super powers during the Cold War was at its strongest. In the Mediterranean one can witness all the contradictions and conflicts which divide the World today. In this area three monotheistic religions - Judaism, Christianity, Islam - and three cultures - Western, Islamic, Orthodox face each other. It is in this region that well established democracies are contested by fundamentalist movements and by despotic regimes. Europe has very important vested interests as well as responsibilities in this region and should at all costs guarantee its security. The instrument to achieve this end can no longer be military dissuasion but that of economic and cultured co-operation as suggested by the Barcelona conference. Extending the frontiers of democracy towards the South is no less important to European security than the extension of such frontiers towards the East.

Closing up Europe's borders to Southern Mediterranean countries through rigid immigration laws creates more problems than it solves; it creates especially dangerous divisions in European public opinion which only serves the cause of the xenophobic right wing movements which constantly search for new ideological enemies.

ان الأحداث التى شاهدها العالم بعد انهيار الشيوعية تتطلب وقفة تأمل جذرية حول الاستراتيجيات العسكرية والمبادئ الأساسية التى أقيمت عليها العلاقات بين الدول خلال سنوات الحرب الباردة. وفي نظام دولي جديد لم يعد يعتمد على قطبين رئيسيين، أصبح يتحتم على جميع الدول أن تكون مسؤولة عن الأمن الدولي، وليس القوى الكبرى فقط التى تتدخل، بقوتها العسكرية، لمنع أطراف أخرى من اللجوء الى استخدام القوة لتسوية النزاعات. كما أنه يجب ألا تكون هناك دول "منتجة" للأمن ودول أخرى "مستهلكة" له، ولكنه على كافة الدول أن تتعاون بغية ضمان أمن الجميع في ضوء الاعتراف بالدور الأساسي لمنظمة الأمم المتحدة. وفي هذا العالم "الجديد"، يتعين على فكرة الأمن أن تتغير كذلك. وفي الواقع، لم تعد الأسلحة المصدر الحاسم لضمان السلام. ذلك أن السلام يعتمد قبل كل شئ على عدالة اجتماعية واسعة النطاق ومخططة بطرق أفضل، بل يعتمد على انخفاض تدريجي للفرق بين الدول الشمالية المتقدمة و القادرة على ضمان حقوق الانسان، والدول الجنوبية.

ان هذه المتطلبات ملحوظة جدا في منطقة البحر الابيض المتوسط حيث تنافس القوتين العظميين اثناء سنوات الحرب الباردة كان شرسا جدا. وتركز في حوض البحر الأبيض المتوسط، بل تُفرض وجودها بطريقة محنقة، معظم التناقضات والنزاعات التى تجتاح العالم اليوم. كما تتواجد في

هذا الاقليم ثلاث ديانات موحدة، أي اليهودية والمسيحية والاسلام بالاضافة الى ثلاث ثقافات، الغربية والاسلامية والاورثوذكسية. وفي هذه المنطقة بالذات تدور مواجهة ديمقراطيات معينة استتبت فيها الأمن، وإن تتحداها الاقليات الاصولية المسلمة، كما تدور فيها مواجهة أنظمة طغيان وحشية لم تشهد الانسانية مثالا لها قط. ولأوروبا، في هذا الاقليم، مسؤولياتها ومصالحها الغارقة في القدم وعليها أن تضمن أمن هذا الاقليم بكافة الوسائل. والأدوات لبلوغ هذا الهدف لا يمكن أن تبقى متمثلة في الردع العسكري ولكن عليها أن تتركز على التعاون الاقتصادي والثقافي، وذلك طبقا لاقتراح مؤتمر برشيلونه.

ان قضية توسيع حدود الديمقراطية نحو الجنوب ليست أقل أهمية للأمن الاوروبي من توسيعها نحو الشرق.

وفكرة اغلاق القارة الأوروبية أمام بقية دول البحر الأبيض المتوسط، عبر القفل العسكري لمداخل أوروبا أو بواسطة سنّ القوانين الصارمة ضد الهجرة، لن تؤدي الى حل المشاكل، بل تخلق المزيد منها، كما تخلق حتما انقسامات خطيرة في الرأي العام الأوروبي وأزمات ضميرية. وكل ذلك يخدم قضية "حق" كره الأجانب، تلك الظاهرة التي تبحث جاهدة، وبعد انهيار الشيوعية، عن أعداء أيديولوجيين جدد لها.

CITTADINANZA E TUTELA DELLA PERSONA

PROFILI DI DIRITTO COSTITUZIONALE E DI DIRITTO CIVILE

GUIDO ALPA

In today's world citizenship means more than an individual merely belonging to a state. Citizens now have powers as individuals and members of society. However, these legal rights and natural rules are not always acknowledged in constitutions which sometimes give only general indications of how a person can be protected. This level of protection varies. Such constitutional guarantees, in addition to ordinary laws and jurisprudence, bring out the various dimensions of a person. In the most recent constitutions, individual's rights are outlined in specific detail and not left as general indications to be interpreted according to the evolution of social conscience. Alpa examines various constitutions to highlight how they each acknowledge the individual's rights and the influence these acknowledgements have on countries' civil laws.

Civil Codes usually divide law subjects into physical persons (men and women) and institutions (legal entities). The identity of the physical person has been the subject of constant discussion particularly with regards to when life begins and ends legally and biologically. The distinction between legal capacity and capacity to take action, capacity and personality and capacity and legitimacy are still being discussed. All these issues are highly relevant when compiling a catalogue of individual's indispensable rights. The Italian Civil Code dedicates its first regulations to the physical person and his fundamental aspects, but it does not clearly define the concept of the person. However, Article 1 of the Civil Code establishes that the legal position is acquired at birth, has a general span and is constitutional (considering that the Italian "Albertino Statute", the Constitution that was in force in Italy when the Civil Code came into being, was in substance more restrictive). Today the range of this article is even wider as it is considered in an internal community and international context with regards to the person and his fundamental freedom. One needs to go beyond certain formal and legal distinctions between legal capacity and capacity to take action. These concepts should take into consideration social and economic contexts which have been extensively modified over the past 50 years. At the centre of the legal universe the individual is not seen as a point of reference in mainly patrimonial legal

terms. The individual is subjected to a wide variety of interests that take care of him and these interests should be protected.

Ultimately, the general rights of a person cannot be viewed as a closed and definite series of state positions. People's rights are unitarian revolving around the need to give a person the ability to achieve in line with constitutions. Various models of statal legislations show that a person has the right to be given protection by the social community, which must take into consideration the essential needs of humans. The human being is such if put in the condition to express his personality. This is a sacrosanct right which cannot be violated by any law.

فى أيامنا هذه لمبدأ " الجنسية " معنى أوسع من فرد ينتمى الى دولة ما. وللمواطنين الان سلطات كأفراد وأعضاء فى مجتمع. غير أن هذه الحقوق القانونية والقوانين الطبيعية ليست معترف بها فى الدساتير التى ، فى بعض الاحيان ، لا توفر سوى دلالات عامة حول حماية الانسان. ومستوى الحماية متنوع ومثل هذه الضمانات الدستورية ، بالاضافة الى القوانين العادية، تبرز الابعاد المتفاوتة للفرد. وفى الدساتير الحديثة العهد يتم ابراز حقوق الفرد بدقة معينة بعيدا عن الدلالات العامة التى تفسر طبقا لتطور الضمير الاجتماعي. ويشرح السيد ألبا الدساتير المختلفة لابراز مدى اعترافها بحقوق الفرد وتأثير هذه الاعترافات على القوانين المدنية للبلدان.

وعادة تقسم القوانين المدنية المواضيع القانونية الى أفراد طبيعية (رجال ونساء) والى مؤسسات (كائنات قانونية). هذا و كانت هوية الفرد الطبيعى موضع نقاش مستمر وخاصة فيما يتعلق النقاش حول متى تبدأ

وتنتهي الحياة قانونيا وببيولوجيا. والفرق بين القدرة القانونية والقدرة على اتخاذ الاجراءات، بل الفرق بين القدرة والشخصية والقدرة والمشروعية لا تزال مطروحة للحوار حتى الان. فهذه قضايا ذات أهمية كبرى لا بد من أخذها بعين الاعتبار كلما يتم اعداد قائمة حقوق الفرد التي لا يستغنى عنها. ويخصص القانون المدني الايطالي اللوائح الاولى للشخصية الطبيعية وجوانبه الاساسية مع أنه لا يحدد بوضوح مبدأ الفرد. غير أن البند الاول للقانون المدني يحدد الوضع القانوني نتيجة للولادة وله امتداد عام وهو وضع دستوري (مع الأخذ بعين الاعتبار أن "قانون ألبيرتينو البرلماني"، أي الدستور الساري المفعول بايطاليا عندما دخل القانون المدني حيز التنفيذ، كان في الواقع أكثر تقييدا). أما اليوم فمدى البند هذا هو أوسع إذ انه مأخوذ بعين الاعتبار ضمن مجموعة داخلية وفي إطار دولي فيما يخص الفرد وحرية الاساسية. ويجب تخطي بعض الفروق الرسمية والقانونية بين القدرة القانونية والقدرة لاتخاذ الاجراءات. وعلى هذه المبادئ أن تأخذ بعين الاعتبار الظروف الاجتماعية والاقتصادية التي شهدت تغيرا كبيرا خلال السنوات الخمسين الماضية. وفي مركز الكون القانوني لا ينظر الى الفرد كنقطة اشارة بمعنى ميراثي قانوني بحت. فيخضع الفرد الى عدد متفاوت من المصالح التي تعني به وعلى هذه المصالح أن تكون محمية.

وفي نهاية المطاف، لا يمكن النظر الى الحقوق العامة للفرد كسلسلة مغلقة و محددة من مناصب الدولة، وحقوق الشعب وحدوية وتدور حول الحاجة الى اعطاء الفرد القدرة على أن يحقق نفسه طبقا للدساتير. وتدل العديد من النماذج لتشريع الدولة أن للفرد الحق أن يكون محميا من قبل المجموعة الاجتماعية والتي عليها أن تأخذ الحاجات الاساسية للناس بعين الاعتبار. والانسان يكون انسانا فعلا اذا تمكن من التعبير عن شخصيته وهذا حق مقدس لا يمكن لأي قانون أن ينتهكه.

THE RIGHT TO FREE INTERPRETATION UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

J. J. CREMONA

This study examines the right of an accused person to free interpretation in the context of the general right to a fair trial under Article 6 of the European Convention on Human Rights, which in essence reflects the underlying basic principle of the rule of law. This right is examined under three heads: (a) nature and scope of the right protected; (b) quality and extent of the interpretation and (c) interpretation costs, in each case taking into account the jurisprudence of the Strasbourg organs on the subject.

تبحث هذه الدراسة حق المتهم للتفسير الحر في اطار الحق العام لمحاكمة عادلة طبق للبند رقم ٦ من الميثاق الاوروبي حول حقوق الانسان والذي يعكس في جوهره المبدأ الاساسي المتعلق بحكم القانون . ويتم فحص هذا الحق من ثلاث أبواب: أولا، طبيعة وهدف الحق المحمي،

وثانيا نوعية و مدى التفسير، وثالثا، تكاليف التفسير مع الاخذ بعين الاعتبار في كل هذه الحالات فلسفة التشريع لهيئات ستراسبورغ حول هذا الموضوع.

I DIRITTI NATURALI IN DIRITTO COSTITUZIONALE

LUIGI COMPAGNA

The summer 1789 decision to place the approval of the Human Rights Declaration before the Constitution showed how France had preferred to create rather than restore the Constitution. This essay brings forward the main aspects of such a change, significance and implications, with particular attention to Sieyès.

In the American Revolution, natural laws had been developed into effective and acknowledged constitutional laws. In the French Revolution no constitutional dictation would have succeeded to transform natural laws, tenaciously envisaged and claimed to precede institutes, into positive laws. This is where major difficulties, in France rather than in America, of natural laws to become constitutionalism, emerge.

In the constituent constitutionalism of Sieyès the political texts are more pronounced than the legal ones. And finally, in the modern meaning from which the 1789 is inseparable, it is the laws prior to the formation of the state which legitimise and qualify the state.

عندما قررت فرنسا، في صيف ١٧٨٩، أن تضع الموافقة على اعلان حقوق الانسان أمام الدستور فكانت قد برهنت بذلك على أنها فضلت ان "تخلق" الدستور وليس "اعادته". ويبرز هذا الاجراء الجوانب الرئيسية وفحوى ومضامين مثل هذا التحول مع اهتمام خاص بـ "سييس".

وفي الثورة الامريكية تطورت قوانين طبيعية الى قوانين دستورية فعالة ومعتزف بها. أما في الثورة الفرنسية لم يكن من الممكن لاي اعلان دستوري أن ينجح في تحويل القوانين الطبيعية، تلك القوانين التي يزعم انها سبقت المؤسسات، الى قوانين ايجابية . وهنا بالذات، أي بفرنسا وليس بأمريكا، تظهر أهم الصعوبات في أن تصبح القوانين الطبيعية دستورية.

وفي الدستورية التأسيسية لـ " سبيس " تبرز النصوص السياسية بوضوح أكبر من النصوص القانونية. وفي الختام، وفي المعنى الحديث المتصل مباشرة بقرار عام ١٧٨٩، فالقوانين التي تسبق تأسيس الدولة هي التي تضيف الطابع الشرعي على الدولة بل وتحددها.

THE PRESUMPTION OF INNOCENCE: AN ESSAY ON THE JURISPRUDENCE ON THIS HUMAN RIGHT

GIUSEPPE MIFSUD BONNICI

A review of the judgements of the European Court of Human Rights up to the end of 1995 dealing with the Presumption of Innocence guaranteed in Article 6[2] of the Convention, with a sidelong look at certain aspects of the same problem within the Maltese Jurisdiction.

تستعرض هذه الدراسة القرارات الصادرة عن المحكمة الأوروبية لحقوق الإنسان حتى نهاية عام ١٩٩٥ والمتعلقة بافتراض البراءة المضمون في البند ٦(٢) للميثاق، مع نظرة هامشية الى بعض الجوانب لنفس المشكلة ضمن القضاء المالطي.

RIGHTS, COMPENSATION, AND THE MARKET IN MALTESE CASE LAW

E. P. DELIA

The paper 'Rights, Compensation, and the Market in Maltese Case Law' complements the expanding literature on the Law and Economies. It evaluates the contribution of Maltese case law to economic efficiency within the context of the Coase Theorem which relates property rights, liability and potential government intervention to optimal resource allocation in an economy. The paper examines the emerging positions of Maltese courts on the right to compensation by third parties for harm accidentally received, the linkages between negligence and liability, and employers' responsibility for harm to third parties caused by incompetent employees. Also assessed are court judgements on compensation following human rights violations, as well as the treatment of wrongful death claims.

The Paper concludes that the emerging stance of Maltese Courts in internalising external effects on third parties is conducive to economic efficiency. The guidelines emanating from court decisions lead to a reduction of transaction costs. However, further clarifications are deemed essential in the case of public officers or employers when negative effects on third parties arising out of their behaviour are compensated for from public funds.

تتم الدراسة "حقوق والتعويض والسوق في قانون الدعوى المالطي"
المنشورات المتعددة حول القانون والاقتصادات. وتقدر الدراسة مساهمة
قانون الدعوى المالطي في الكفاءة الاقتصادية ضمن اطار نظرية "كووايس"

التي ترى علاقة بين حقوق الملكية والمسؤولية القانونية و التدخل الحكومي
الكامن من جهة وتخصيص الامثل للموارد في اقتصاد ما من جهة أخرى.
وتفحص الدراسة ما بدأت تبرز في المحاكم المالطية من مواقف حول حق
التعويض من اطراف ثالثة مقابل ضرر عرضي والارتباط بين الاهمال
والمسؤولية القانونية ومسؤولية ارباب العمل عن الضرر لاطراف ثالثة ناتج
عن عدم كفاءة العمال. كما تناقش الدراسة قرارات المحاكم فيما يخص
التعويض نتيجة خرق حقوق الانسان وكذلك معالجة طلبات التركات الغير
قانونية.

وتستنتج الدراسة ان موقف المحاكم المالطية المتعلق بتبني التأثيرات
الخارجية على اطراف ثالثة تؤدي الى الكفاءة الاقتصادية. والدلائل الناتجة
عن قرارات المحكمة تسفر عن خفض في تكاليف الصفقات. غير انه لا بد
من الايضاحات الاضافية فيما يخص الموظفين في القطاع العام او ارباب
العمل في حالة ان التأثيرات السلبية على اطراف ثالثة والناتجة عن
نصرفاتهم يتم تعويضها من اموال عامة.

THE PROCEDURE OF ADOPTING THE DECISIONS OF THE HUMAN RIGHTS COMMITTEE RELATING TO COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

VOJIN DIMITRIJEVIC

This article sets out to analyse the various aspects of the procedural mechanism available under the optional Protocol to the International Covenant on Civil and Political Rights for the adoption of decisions of the Human Rights Committee.

Amongst others, the Protocol determines that the procedure should be in written form and that communications should be examined in closed sessions. Provision is made for special rapporteurs and the creation of working-groups. The work of the committee is central in this analysis, particularly vis-à-vis the voting methods adopted, or rather the introduction of consensus as a principle of decision making as opposed to reaching decisions via the voting mechanism. The political ramifications of the procedure itself are also taken into consideration and in conclusion the legally binding nature or otherwise of the committee's views are considered.

تحلل الدراسة الجوانب المختلفة لآلية الاجرائية المتوفرة ضمن
البروتوكول الاختياري للمعاهدة الدولية حول الحقوق المدنية والسياسية من
أجل اتخاذ القرارات من قبل لجنة حقوق الانسان.

وينص البروتوكول على أن الاجراءات يجب أن تكون خطية وأنه يجب
فحص البيانات في جلسات مغلقة كما ينص البروتوكول على الناطقين
المتخصصين وانشاء مجموعات عمل. هذا ولنشاط اللجنة مكانا مركزيا في
عملية التحليل وخاصة فيما يخص اساليب التصويت المتبينة أو ادخال

الاجماع كمبدأ في اتخاذ القرارات بدلا من الوصول الى القرارات بواسطة
الية التصويت. كما تؤخذ بعين الاعتبار كذلك التفرعات السياسية
للاجراءات نفسها. في الختام تفحص الدراسة الطبيعة القانونية أم غيرها
لاراء اللجنة.

HUMAN AND INSTITUTIONAL ASPECTS IN THE ADJUSTMENT-GROWTH PROGRAMS FOR MEDITERRANEAN DEVELOPING COUNTRIES

FRANCESCO FORTE

The strategy of adjustment and reforms for growth suggested here, while aiming to basic tenets in the area of sound money and sound public finance, should be generally more process and institutions conscious, and consequently appropriately disaggregated and selective, and more oriented to individuals' than the current recipes by the Harvard and Chicago economists.

The approach suggested here develops through six interrelated areas of issues and principles: in each human and ethical issues must be taken into account. Obviously, the first area of issues is that of monetary and fiscal policy. To obtain consensus to the monetary and fiscal discipline, appropriate aids should be given to the authorities of the considered country linking financial assistance by the international institutions - as the EU - with given performances in the money supply area and in the budgetary area. Thus sound money and finance shall be connected with growth.

A second key policy theme is that of infrastructures; as the 1994 Report the World Bank points out that infrastructures can deliver major benefits in economic growth, poverty alleviation and environmental sustainability, when they provide services that respond to effective demand and do so efficiently.

A third group of issues has to do with savings, particularly those of small savers. It must be recognised that uncertainty on property rights is

among the reasons of capital outflow by the rich together with the risk of being subject to new extraordinary taxes on wealth and the like. But uncertainty of property rights and fear of property taxes may also be very important in reducing the propensity to save of less affluent families. The development of insurance products and the promotion of fringe benefits to wage and salary earners in the form of insurances may help to increase the rate of saving. In the area of popular housing too one might develop institutions to promote savings by individuals which, together with a subsequent loan, may allow to acquire the property of the house. Taxation devices favouring savings may be important, particularly for the low and medium earners, to stimulate savings.

Human aspects must have a proper place in the choice of the policies of public expenditures containment. This program should, as far as possible, include new social benefits given or promoted by the international financial institutions which control the adjustment process as a counterpart of the sacrifices required. These social benefits may be a small thing from the point of view of their financial costs, but highly important from an ethical point of view.

This last point leads us to a fifth group of issues to be considered: those relating to the policies of business incentives and job creation. In order to reach positive results which may be obtained in the two crucial areas of privatisation and of international trade liberalisation, one should think about the financial and entrepreneurial forces to be mobilised. One should also keep in mind that regulations and deregulations are interconnected. Entrepreneurial private activities may be hindered by bureaucratic regulations and by excessive constraints in the labour relations, but sudden international trade liberalisation may cause perverse result: because opening the doors is no aid to firms sclerotised by excessive constraints in the above mentioned areas. This is particularly true as for small business, which may be the most important sector for exports and for job creation also in the Mediterranean developing countries.

It is naive to assume that the trade relations of now developed countries are a mere "spontaneous order" process. International cooperation and planning by groups of business firms of the developing and of the developed countries, interested in the new markets and investment opportunities should be pursued in this area.

A sixth point has to do with interregional cooperation. In the case of the Mediterranean countries, this cooperation may have a peculiar ethical-humanitarian value because it has to do with two groups of interrelated problems.

On the one hand, it seems important to coordinate the job creation and growth policies in the less developed areas of the Mediterranean part of

EU with those in the Mediterranean developing countries, because of the strong complementarity among these regions. On the other hand, there is the problem of migration flows from the less developed to the developed Mediterranean regions.

A close connection among the various components and among the various regions of the Mediterranean area is vital to obtain a well balanced strategy, capable of synergic effects. It is necessary to stress that the fiscal and monetary policy measures and institutional changes need a social policy "envelope" and a social policy consultative procedure to gain enough support for the prescriptions suggested.

ان استراتيجية التسوية والاصلاحات من أجل التنمية المقترحة فى هذه الدراسة ، والهادفة الى المبادئ الاساسية فيما يخص الاموال السليمة و التمويل العام السليم، يجب أن تعي العملية والمؤسسات بشكل عام، بل عليها أن تكون غير مجمعة و انتقائية و مركزة على الاشخاص أكثر مما ينصحون به اقتصاديو حارفارد وشيكاغو.

أما المعالجة المقترحة هنا فتنمو عبر ستة مجالات متجانسة من المبادئ وفى كل مجال من هذه المجالات يجب الاخذ بعين الاعتبار القضايا الانسانية والاخلاقية. ويدهي أن أول مجال من القضايا يخص السياسة النقدية والمالية. ووصولاً الى القبول العام فيما يتعلق بالامور النقدية والمالية يجب توفير المساعدات اللازمة لسلطات الدولة المعنية التى من شأنها ان تربط المساعدة المالية المقدمة من طرف مؤسسات دولية - كالاتحاد الاوروبي - باجراءات معينة فى مجال توفير المال والميزانية. ولذا فيصبح المال والتمويل السليمان مرتبطين بالنمو.

والموضوع الرئيسي الثاني المتعلق بخطة العمل يخص البنية التحتية و كما ورد بتقرير البنك العالمي لعام ١٩٩٤ فبإمكان البنية التحتية أن تجلب فوائد كبرى في مجال النمو الاقتصادي وتخفيض الفقر والاحتفاظ بالبيئة كلما وفرت خدمات تستجيب بشكل فعال للطلب الحقيقي.

هذا و تتعلق مجموعة ثالثة من القضايا بالادخار وخاصة بالمدخرين الصغار. و يجب أن نعترف بأن عدم اليقين حول حقوق الملكية هو من بين الاسباب وراء تدفق الرأسمال من طرف الاغنياء، الامر الذي قد يؤدي الى المزيد من الضرائب الخارقة للعادة على الثروة وما شابه ذلك. غير ان الشك حول حقوق الملكية والخوف من ضرائب الملكية قد يكون مهما جدا في خفض الميل الى الادخار من طرف أسر أقل ميسورة. أما تنمية المنتجات التأمينية وتشجيع الميزات الاضافية للاجراء في شكل تأمينات قد تسهم في زيادة نسبة الادخار. وفي مجال السكن الشعبي كذلك يمكن تطوير مؤسسات لتشجيع الادخار من طرف الاشخاص، الامر الذي قد يؤدي الى اقتناء البيت في حالة الحصول على قرض ما. هذا والترتيبات الضريبية المشجعة للادخار قد تكون مهمة و خاصة بالنسبة للعمال من الدخل المنخفض و المتوسط وذلك تنشيطا للادخار.

و على الجوانب الانسانية ان تحظى بمكانتها المناسبة في اختيار السياسات

الرامية الى احتواء النفقات العامة وعلى هذا البرنامج أن يتضمن بقدر الامكان فوائد اجتماعية جديدة مقدمة أو مشجعة من طرف المؤسسات المالية الدولية المسيطرة على عملية التسوية ضمن التضحيات الضرورية. وقد تكون هذه الفوائد الاجتماعية ضئيلة من وجهة نظر تكاليفها المالية غير أنها فوائد ذات أهمية كبرى من الناحية الاخلاقية.

وتمضي بنا هذه النقطة الاخيرة الى مجموعة خاصة من القضايا التي لا بد من معالجتها، أي القضايا المتعلقة بالحوافز التجارية وبخلق فرص العمل وللحصول على نتائج ايجابية في مجالي الخصخصة والتحرر التجاري الدولي، علينا أن نفكر في القوى المالية والقوى وراء انشاء المشاريع التي يجب تعبئتها، كما أنه علينا أن نعي أن اللوائح و ما ازيل من لوائح المرتبطة بعضها ببعض. هذا و قد يعوق النشاط الاستثماري الخاص بسبب الاحكام البيروقراطية و بسبب التقييدات المفرطة في مجال علاقات العمل غير أن التحرر التجاري الدولي المفاجئ قد يسفر عن نتيجة معاكسة، اذ أن فتح الابواب لا يفيد الشركات التي تعاني من التقييدات المفرطة في المجالات الانفة الذكر. وهذا هو واقع الاعمال التجارية الصغيرة التي قد تكون أهم مجال للتصدير ولخلق فرص العمل كذلك في دول البحر المتوسط التي في طريق النمو.

أنه من الساذج أن نفترض أن العلاقات التجارية للدول النامية هي عبارة عن عملية تلقائية ولا بد من التعاون الدولي والتخطيط من طرف مجموعات تجارية من الدول النامية والدول المتقدمة المهتمة بالأسواق الجديدة ويتعين الاهتمام بفرص الاستثمار في هذه المنطقة.

وتتعلق النقطة السادسة بالتعاون عبر الأقاليم. هذا وبالنسبة لدول البحر المتوسط قد يحظى هذا التعاون بقيمة أخلاقية - إنسانية إذ أنه يتعلق بمجموعتين من المشاكل المرتبطة بعضها ببعض. ومن ناحية، يبدو أنه من المهم تنسيق عملية خلق فرص العمل وسياسات النمو بين مناطق البحر المتوسط الأقل تنمية والتابعة للاتحاد الأوروبي وسائر دول البحر المتوسط التي في طريقها إلى النمو وذلك نظرا للتكامل القوي بين هذه المناطق. ومن ناحية أخرى، ثمة مشكلة تدفق المهاجرين من المناطق الأقل غوا إلى المناطق النامية في البحر المتوسط.

هذا والصلة الأقرب بين مختلف المكونات و بين مختلف مناطق البحر المتوسط له أهمية حيوية لضمان خطة استراتيجية متوازنة قادرة على تأثيرات متدائية. ولا بد من التأكيد على الحاجة إلى إطار السياسة الاجتماعية و إلى إجراء استشاري في أمور السياسة الاجتماعية بغية الحصول على قدر كاف من الدعم للوصفات المقترحة في هذه الدراسة.

IMMIGRANTS' RIGHTS AND THE RECENT ITALIAN CONSTITUTIONAL EXPERIENCE

CESARE PINELLI

The Author attempts to draw a picture of the legislative solutions and jurisprudential trends concerning the immigrants rights issue in Italy, and points out that constitutional interpretation and hard policy problems are the main factors which have to be considered on that regard. On the other hand, the essay takes account of other constitutional experiences, and of ethical dilemmas which generally appear to be at stake in the different interpretations of the concepts of 'person' and 'citizen'.

يحاول الكاتب سرد الحقائق حول الحلول التشريعية والاتجاهات القضائية المتعلقة بقضية حقوق المهاجرين في ايطاليا. وتشير الدراسة الى ان التفسير الدستوري ومشاكل السياسة الصارمة هي العوامل التي يجب أن تؤخذ بعين الاعتبار في هذا الصدد. ومن ناحية أخرى تشير الدراسة الى خبرات دستورية أخرى وإلى معضلات أخلاقية التي تظهر بشكل عام في التفسيرات المختلفة لمبدئي "الفرد" و"المواطن".

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Publication of the Faculty of Laws
University of Malta



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