

**A CHALLENGE TO BE ACCEPTED BY
EUROPEAN DEMOCRACIES:
THE OBSERVANCE OF HUMAN RIGHTS AND
THE EFFICIENCY OF THE FIGHT
AGAINST CRIMINALITY**

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1. The safeguard and promotion of pluralist democracy, to which the whole of Europe is now committed, are no longer safe from growing threats, such as increasingly violent crime that is very much present especially, but not exclusively, in the nascent democracies.

This not only causes formidable problems of law and order but also poses a constant threat to the proper functioning, and indeed the very survival, of democratic institutions. It is even suspected that important political and judicial decisions may have been directly influenced by criminal organisations. In any case, the weakness (be it genuine or presumed) of public institutions vis-à-vis crime gives rise to widespread disillusionment which, in turn, nurtures nostalgia for the "strong arm" of authoritarianism or dictatorship.

The widespread desire for more draconian penal policies, for stronger justice and harsher punishment at whatever cost, therefore comes as no surprise. "Aim at the head!" is an exhortation that can scarcely be regarded as a mere metaphor, particularly when heard echoing down the corridors of police training colleges.

There is at present considerable pressure in favour of unscrupulous recourse to capital punishment. The abolition of the death penalty

is being called into question by official declarations, in the very countries that made abolition a symbol of their return to democracy. Furthermore, politicians calling for the death penalty as a short-cut solution to new outbreaks of crime are not present only in certain countries – just think of the speech by the President of the United States on the day after the bombing in Atlanta.

2. Yet it is no coincidence that the rejection of the death penalty has become one of the cornerstones of European commitment to the safeguarding of human rights, with the result that accession to Protocol No 6 of the European Convention on Human Rights – which imposes a total ban on capital punishment in time of peace – is envisaged as one of the conditions for full participation in the new democratic Europe.

Allow me to borrow a famous phrase by Pascal to restate in a nutshell that this rejection – the irreversible manifestation of the finer aspects of mankind's conscience – is based on both the *raisons de la raison* (rationality) and on the (deeper) *raisons du coeur* (reasons of the heart). There is nothing I can add to this belief. Rather, we should ask ourselves whether our “no” – which is based on a consistent belief in the right to life (and more generally stated in the name of human rights as the foundation and aim of democracy) may not sometimes lack real credibility, particularly when it is not accompanied by a major effort to find alternative solutions to the challenge of serious crime. We remain speechless in front of sentiments of huge, angry crowds after the discovery of the pathetic remains of the victims of the “Marcinelle monster”.

Nor is it wrong to say that a hidden and distorted form of death sentence is passed and executed every day by savage, unscrupulous criminals, and more often than not on innocent victims. And we are asked, not without a hint of controversy, to explain our attitude as persons claim to speak and act in the name of human rights.

The theory of *Drittwirkung* has had the merit of preparing fertile ground for discussions showing acute sensitivity to this type of problem. At this point, however, we should consider the contributions made by the “living” system of the European organs which monitor respect for human rights, in terms of a real awareness of the attacks which those rights suffer from both crime and the abuses and superior power of public authorities.

3. This immediately brings us to the clause in Article 15 of the

European Convention on Human Rights which distinguishes between rights from which no derogation whatever may be made – in as far as they are secured by specific provisions of the Convention – and other rights and freedoms which are safeguarded but from which derogations may be made “to the extent strictly required by the exigencies of the situation”, not only in time of war but also “in time of ... other public emergency threatening the life of the nation”.

We might endeavour to wonder in greater depth about the reasons for the different attitudes taken by the various member states of the Council of Europe. For example, it transpires that Italy has never formally relied on this derogation, although it could – as far as terrorism and with the mafia are concerned – defend its emergency legislation from most of the criticism levelled against it. It is, however, more important to note the care taken by the European Court of Human Rights (since its first judgement in the *Lawless* case) to ensure that the formal and material conditions required for the application of Article 15 are met, so that this very delicate tool continues to be a weapon that is used only in extreme circumstances.

Quite apart from any recourse to Article 15 – a derogation clause which is both general and exceptional – the question of serious crime has already been raised before the European Court, which has thus been led to examine in greater detail both the concept and the scope of certain rights and freedoms safeguarded by the Convention.

It could be said that the entire system of the Convention provides a basis and substance for this need for clarification, if it is true that “freedom and the rule of law” are not to be considered solely as limitations on the action of state bodies but more generally as the underlying principles of a generally applicable operational model. More surprising is the scarcity of references in European case-law to Article 17 of the Convention, the role of which appears remarkable in that it forbids any interpretation of human rights likely to encourage the misuse of these rights in order to destroy them. Indeed, engaging in activities and committing acts “aimed at the destruction of any of the rights and freedoms set forth ... in the Convention” are typical deeds of organised crime. However, the caution and misgivings expressed about this clause – which has been accused of having served during the “cold war” as a means of ideological persecution – are perhaps justifiable.

4. Whatever the case, the Court has not side-stepped the essential problems and has even gone so far as to examine possible restrictions

on the very rights which Article 15, paragraph 2, includes in the list of rights from which no derogation may be made.

As regards the prohibition on torture and inhuman and degrading treatment, a very recent judgement (the *Ribitsch* case) underlines very clearly that Article 3 of the Convention “prohibits in absolute terms” the practices in question “irrespective of the victim’s conduct”; moreover, the said decision refers to a previous decision in which it was stated that “the requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals”.

As regards the right to life, the Court has taken account of the fact that Article 2 of the Convention does not exclude the possibility that the deliberate use of lethal force may be justified in cases where it is “absolutely necessary” to prevent certain kinds of crime. However, in a case concerning the use of such force by soldiers against persons suspected of the case of preparing a terrorist attack (*McCann and others*), the Court stressed that it was its duty to “carefully scrutinise ... not only whether the force used ... was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force”. In this particular case the Court held that there had been a violation of the Convention.

On the other hand, the Court has not yet had the opportunity to deal directly with the scope of Article 1 of Protocol No. 6 which forbids recourse to the death penalty in times of peace. This article was relied upon in an indirect and inconclusive manner in the reasons given for the *Soering* judgement, by means of which the Court prevented the extradition of a person sentenced to death because there was not sufficient guarantee that he would not be subjected to “inhuman” treatment prior to execution. This judgement, which was “historical” (at that time), is also a clear indication of the restrictions imposed by a very special situation.

5. There are, with good reason, more direct and frequent reminders of the requirements of crime prevention in the European Court’s decisions relating to Articles 8, 10 and 11 of the Convention. National security, as well as public safety, crime prevention and the authority of the judiciary, are mentioned among the public interests that may justify state measures as “necessary in a democratic society”,

although they restrict either the right to private life, home and correspondence or the right to freedom of expression, association or peaceful assembly.

In the case of rights which, according to the definition given in the Convention, are not limited by such general clauses, similar trends have developed (at least to a certain extent), for example in particular the right to liberty and security of the person (Article 5) and the right to a fair hearing and the characteristics and conduct of such a hearing (Article 6). As regards these rights, it is evident that the question of possible restrictions arises most directly and most frequently in relation to the requirements of fighting crime, since their field of application largely coincides with the fields of action of the police and judicial authorities.

Furthermore, it would be fair to say that the clarification referred to earlier has been achieved more in terms of adjusting the internal dynamics of these rights than by laying down external restrictions. The Court was thus led to "re-write", so to speak, the interpretation of the rights in question, in the sense that the conclusions drawn about their scope in "normal" situations are no longer necessarily the same where serious crime is concerned.

6. It is impossible here to go into all the aspects of this case-law (which has been illustrated and fully examined in a quite recent article by Mr de Salvia in *Bulletin des droits de l'homme*, 1996, no. 5).

The number and the quality of the dissenting opinions appended to each judgement bear witness to the importance of the issues raised and also to the intensity of the passions and tensions that they almost inevitably arouse. These strong feelings, moreover, are those that our societies experience whenever crime prevention is held up as the declared aim of legislation restricting certain rights and freedoms which are firmly rooted in (at least part of) our civic conscience. I have already mentioned Italian legislation, in particular the emergency legislation introduced after the murders of Giovanni Falcone and Paolo Borsellino, which affects *inter alia* the law of criminal evidence and the special régime for prisoners who continue to be active members of certain criminal organisations. Nor can we forget that English legislation has substantially altered the rules governing the accused's right to silence, affecting one of the legal practices most representative of a certain human rights approach to criminal procedure. There is also the recent French "anti-terrorist"

legislation concerning foreigners illegally present on the territory, which was referred for review to the Constitutional Council which criticised certain aspects, including the right conferred on the police to carry out searches at night outside the normal hours.

It is also these same strong feelings which – once brought under control by underlying tolerance on both sides – have probably been one of the key factors in the survival of democracy in Europe during the darkest years of its history.

7. The European Court, which rules on actual violations of human rights and fundamental freedoms, systematically refuses to judge domestic laws as such. It has, however, sent out fairly clear signals to the law-makers and, more generally, to the state institutions involved in implementing crime prevention measures. With reference only to signals of a general kind, I would say that the Court both provides **encouragement** and delivers **warnings**.

It obviously, and above all, delivers **warnings** with regard to the inadmissibility of measures which fail to meet the conditions of necessity and proportionality, as well as the warning that certain limits should never be exceeded with regard to the very concept of each right.

There is a large number of “condemnations” to choose from, and they are all the more interesting in that they are usually preceded by statements accepting in advance that such and such a rule may be subject to extension, derogation or a less rigid interpretation when confronted with certain forms of crime. There have been such decisions on the confidentiality of prisoners’ correspondence (the cases of *Campbell* and *Messina* judgements), on time-limits for police custody (the case of *Brogan et al*) or for detention on remand (the case of *Tomasi*), conditions for the legitimacy of custodial measures (the case of *Guzzardi* and *Ciulla*), on limitations on the right to question witnesses for the prosecution (the case of *Lüdi* and *Saïdi*) etc. The last-mentioned aspect is particularly significant because it is linked to the question of the use of information supplied by undercover officers and informers from criminal organisations (forms of aid which are as important as they are difficult to control).

8. In short, states are not given a free hand in the name of crime prevention. Nevertheless, how can we forget the **encouragement** – also deriving from this case-law – given to a penal policy which takes care not to confuse respect for the rights of the individual

with the abstract and naive peddling of cheap illusions, exposing the least privileged members of society to the worst forms of criminality.

I would first like to draw attention to the essential value of a warning not to ride roughshod over the witness and the victim considering only the rights of the accused. In a case concerning drug trafficking, the recent *Doorson* judgement held that it may be justified to preserve the anonymity of a witness in certain situations, precisely because "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify", where "their life, liberty or security of person may be at stake". Is this a significant step towards the "statement of the rights of victims" (and "of witnesses") which ought to appear in the texts alongside the statement of the rights of the accused?

Secondly, the Court, without claiming that the accused should actively co-operate with the prosecuting and judicial authorities (cf. the recent *Yagci and Sargin* judgement) and while asserting that the state is responsible for ensuring that its courts are organised and proceedings conducted in such a way as to avoid delays that might infringe the accused's right to proceedings and detention of reasonable length, has also ruled that an accused person cannot complain of delays caused by the obstacles raised by his defence (see the *Vendittelli* judgement). Is this not a way of underlining that there is a world of difference between abuse and misuse of a right (in the instant case, a right of the defence) and the honest exercise of that same right, particularly as such abuses prevent the fulfilment of a requirement (the reasonable length of court proceedings), which exists to serve both the essential interest of the community and another fundamental right of the individual?

Similarly, certain precautionary measures taken by states accord fully with the European Court's case-law where the Court acknowledges, for example, that there are greater risks of an accused person absconding if he has links with a criminal organisation and that this must be taken into account in deciding whether to keep him in custody (the case of *Van der Tang*).

Finally, the Court has not hesitated on occasion to declare that certain measures are not in themselves open to criticism, although the means of applying them and the field of application may be debatable. A recent example is provided by the *Welch* judgement. Although the Court held that there had been a violation of Article 7 of the Convention with regard to a confiscation ordered on the basis

of a retrospective law, it stressed that its finding “concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking”.

9. As a result, there are fixed points of reference which lose none of their relevance from one case to the next. In short, it could be said that these points of reference make it possible to draw the line between a punitive system that knows no limits and a penal policy that has the necessary weapons at its disposal but is nevertheless unwilling to renounce the principles of legality and respect for human rights.

It is not the aim of this paper to discuss in detail the consequences of this distinction, in terms of penal and penitentiary policies, police action, etc. Instead I will limit myself to a few general remarks.

First of all, I would say that a precondition for the effectiveness of such a penal policy is the awareness of the considerable diversity and complexity of the phenomena in the category of “serious crime”. Any one-sided approach would lead us astray from our goal, including – among other things – pandering to the popular view which perceives only the most visible (and therefore not necessarily the worst) aspects and often demands measures which would deal only with the tip of the iceberg.

Similarly, one cannot ignore the relationship between problems of “serious” crime and of “petty” crime – a relationship which is sometimes expressed in terms of organisation and frequently in terms of the attraction the former holds for the latter; the existence of this relationship is in any event perceived as unquestionable by the public, by whom petty crime is directly experienced through the threatening and intrusive presence of a person or group interfering with the normal conduct of daily life. Any alternative to imprisoning a number of persons living on the fringes of society is welcome, provided it does not result in outright impunity.

10. Another general factor that must be taken into account is the exponential growth of the financial and technological resources which enable those involved in serious crime to dissimulate their criminal conduct and, more generally, to alter, manipulate and fabricate evidence. Sexual abuse and the traffic in children organised through the sophisticated structures of the “Internet” have provided the latest shocking example.

This fact should have substantial consequences at several levels, beginning with the methods covering the definition of offences. The Strasbourg Convention on laundering, search, seizure and confiscation of the proceeds from crime seems to advocate courage, whereas a more coherent attitude on the part of European states is required in a different area, that is with regard to making the mere fact of belonging or providing support to a criminal organisation a crime. This, of course, is conditional on respect for the principles of legality and non-retroactivity; nor must the definition of a criminal offence go so far as to prohibit actions or omissions constituting the "normal exercise" of human rights (the *Engel* case).

The application of new penalties relating to activities and property, the rules on limitation, updating the rules governing banking secrecy, greater specialisation and better national and international co-ordination between investigators are but a few of the other aspects concerned. The success already achieved in pursuit of related objectives shows that these are the best lines of action to follow. I would, however, also add that an effort must be made regarding the "philosophy" on criminal evidence. Although it is necessary to restate the importance of a number of principles – beginning with the presumption of innocence – established over centuries to protect individuals against the worst effects of the inquisitorial approach, it is also important not to place "doctrinal" obstacles in the way of legitimate undertakings to combat the abuse of those principles, which is doubtless easier now than it used to be.

11. The effectiveness of punitive justice, beginning with the search for evidence of crimes and their perpetrators, is beyond all doubt a key factor in the fight against crime. Effectiveness also depends on citizens' active support for the justice system, support such as to break down the barriers of silence which often make it impossible to detect offenders and, above all, such as to disprove the widely held opinion that the countervailing powers constituted by crime are more reliable than state institutions.

In order to gain that support, judicial institutions themselves also need a high degree of credibility. I have already mentioned the reasonable length of proceedings, which is a key aspect of such credibility – its importance is undeniable both from the viewpoint of the rights of the defence (and above all of the innocent defendant) and from the viewpoint of justice for the community itself, which otherwise all too easily falls prey to the attractions of summary

justice. To this we should add the need for greater – and more transparent – endeavours to achieve real equality in the administration of justice, without which citizens will never co-operate with the judicial institutions in a consistent and sincere manner.

Is it not true that the credibility of domestic legal systems – and consequently the chances of obtaining the entire population's full, active cooperation in the prevention of crime – are largely measured by the courts' capacity to take action against the corruption of senior officials of the State, and even of those in its own midst? On a quite different level, the capacity of permanent organs of international criminal justice to enforce the fair but severe punishment of crimes against humanity is clearly an essential requirement, going beyond the steps taken, and also the controversies arising, from the Nuremberg trials to the courts set up by the UN to judge crimes committed in the former Yugoslav territories and in Rwanda. From a quite different viewpoint, it has already been observed that impunity is not the most appropriate solution to the problems of petty crime.

Finally, at the risk of appearing repetitive, we must always remember the most elementary requirement of equality between persons on trial, the need for effective legal counsel, and, in general, legal aid, to represent those who are in need both financially and socially. Indeed, it is in the name of such "effectiveness" that the European Court has delivered many of its judgements against respondent governments.

12. A modern democracy is under an obligation not only to discard the barbaric rituals of the death penalty and other inhuman forms of punishment, but also – to ensure an effective and credible system of punitive justice, which is still an essential part of any strategy to combat crime.

We must, however, be increasingly conscious that such action, however essential, can only be a kind of sticking plaster that cannot deal with the underlying causes of disease, of which serious crime is one of the most alarming manifestations. We know the long-standing dualism "prevention-suppression", but the complexity of modern life confers new dimensions on this dualism, if only from the standpoint of organising controls over certain activities (notably the production and sale of arms or drugs).

Moreover, awareness of the purely subsidiary nature of criminal justice – ie the awareness that punitive measures to tackle crime

are only partial, belated and insufficient solutions – helps us to concentrate on other possible solutions further “upstream”. This seminar has the merit of giving a special place to the discussion of these aspects, and jurists can only listen and try to learn. They will see for themselves, however, that the question of human rights is more firmly rooted than ever at the heart of these same problems “of context”, in the form of the right to a family life, to education and to work and so forth, that is, in the form of rights which are no less essential than those that have been discussed in greater detail in this report. It must, however, be acknowledged that it is less easy to safeguard such rights through democratic forms alone, because they require the highest degree of positive action by public institutions and society as a whole so as to gather and distribute the material and spiritual resources needed to exercise them, while at the same time giving rise to some of the most acute forms of tension and interaction between the members of a national community and between one population and another.

Hence the importance, not only of ethical principles and policies concerning the family, youth, spatial planning, full employment, social welfare and so on, but also and even more, of new problems and new prospects – for example – involving immigration and the right to asylum, especially when a large part of the population is convinced – rightly or wrongly – that certain phenomena have been aggravated by a massive influx of new ethnic groups into their territory. An understandable demand for law and order and security is easily and dangerously interwoven with racism, although this may in itself, by way of reaction, bring about an unexpected return to pride in a nation’s long-established traditions of welcoming the world’s poor and persecuted. The recent events in France this summer – though far from being exceptional in Western Europe – were good illustrations of this phenomenon.

13. The effectiveness, credibility and subsidiary nature of criminal law are all factors essential to the success of everything our societies do to combat serious crime without infringing human rights. These are goals that can only be achieved if they receive the support of the moral forces in society, i.e. the force of formed and informed individual and collective conscience, so that we are capable of not giving up or losing our way under the often violent impact of first impressions. This is why a discussion on the role and responsibility of the media is so important.

Education and the media – in particular the latter – are always tempted to try the case before it goes to court; they become hawkers of partial and sometimes distorted images of crime, police inquiries and criminal proceedings. However, both are also indispensable sources of support for, and democratic control of, justice administered in the name of a free people. It is also their duty to ensure that the collective memory does not lose that sense of the message embodied in the various human rights texts that has inspired clandestine resistance to dictatorship.

A “united” Europe, at least in the (by no means definitively established) sense of a shared commitment to pluralist democracy, is the result obtained above all by virtue of “hoping against hope”. Thanks to the commitment of countless individuals, often paid for in bloodshed, and thanks to the long and bitter patience of peoples capable of resisting without self-annihilation, of struggling in silence most of the time, and also capable of overturning, by the force of conscience, oligarchies and tyrannies established in their countries. The long-hidden banner of human rights has been a source of strength and courage for these individuals and peoples. This is why legal experts and institutions which have made the protection and promotion of these rights one of the main aims of their discussions and their work, now bear a heavy responsibility. This banner must not become a mere decorative flag whose splendour pales and finally disappears when touched by the problems and tribulations of daily life.

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