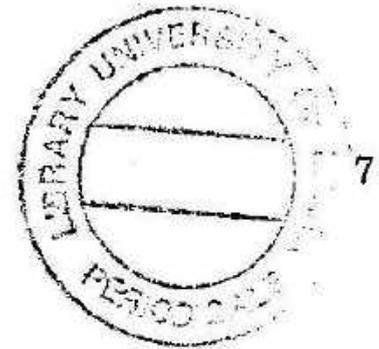


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EDITORIAL

DEMOCRACY BESIEGED

CIRO SBAILÒ

Despite the clashes in Genoa, the anti-globalisation movement and democratic governments should work together to preserve the world from a conflict between 'McWorld' and *Jihad*. They have very similar targets, foremost among which is their common aim of defending human rights and protecting poor countries from the increasing power of corporations. Outside of a close relationship between democratic governments and the anti-globalisation movement, there is no way to achieve global equity and a global governance of resource flows. While the anti-globalisation movement is more nimble and popular than democratic governments, democratic governments are more authoritative and powerful than the anti-globalisation movement. This 'Holy Alliance' has become even more necessary after September 11.

The violent clashes that took place in Genoa during the Summit of the Group of Eight (19th-20th July, 2001) highlight the difficulties standing in the way of effective dialogue between democratic governments and the anti-globalisation movement.¹

¹ The three-day summit took place under siege conditions. As 20,000 security forces struggled to seal off the port area of Genoa, some demonstrators managed to get into the fenced-off 'red zone' where the leaders were meeting. Dozens of demonstrators and police were injured. On July 22 a 23 year-old man was shot by a 'carabiniere' (Italian paramilitary troops) while he was joining in a mob attack on a vehicle in which the troops were sitting: the first time someone has died in demonstrations against globalisation since the movement surfaced in Seattle in 1999. Italian President Carlo Azeglio Ciampi said he was shocked by the demonstrator's death and urged protesters "to immediately cease this blind violence".

Things, however, are changing. Nowadays the movement has changed its tactics and is taking a more educational approach, abandoning street-protests for more “teach-ins” and “candlelight vigils”. The movement is displaying remarkable resilience. America’s pain will not silence its claims against the impact of global capitalism in the Second and Third world. However the movement is conscious of the danger that its clamour against capitalism could sound like a justification for terrorist attacks against the symbols of western civilization, and it has been compelled to isolate and expose its violent clusters.

At the same time, it has become apparent that democratic countries must defeat terrorism not only in a military fashion but also socially and culturally. This could be achieved by spreading the benefits of the globalisation throughout the whole world. Despite the violent clashes in Seattle, Göteborg and Genoa, democratic governments should not miss out on the opportunity to form a new “Holy Alliance” together with the anti-globalisation movement in order to defend human rights and construct worldwide democratic institutions. Democratic governments and the anti-globalisation movement have common targets and interests. In particular, they both want to ensure effective human rights protection at a time when the anarchic power of international corporations is on the increase.

British Prime Minister Tony Blair defended the police behaviour in Genoa: “*It is difficult to police things in situations where you do have a small minority who are prepared to come along and throw petrol bombs and use violence*”, he said. He argued also that the tragedy had detracted from important work of the summit: “*These issues like, global change or helping the poorest countries in the world – it is important we come here and discuss these questions*” (Ansa/Reuter). To have a global vision of the G8-Summit in Genoa, see.: “I popoli di seattle”, *Limes. Rivista italiana di geopolitica*, 3/2001 (espec.: Francesco Vitali, “Vita e morte dei gruppi antiglobalizzazione al tempo di Internet”, Elisa Marincola, “La galassia dei centri sociali”, Federico Fubini, “La battaglia degli OGM, nuova frontiera fra Europa e Usa?”, Silvia Trabalzini, “Monsanto, la padrona dei semi gm”); “L’Italia dopo Genova”, *Limes. Special Issue*, sept. 2001 (espec.: Antonio Sema, “Limoni e sangue: a che servivano gli scontri di Genova”, Luca Rastello, “Movimenti e distanze da Porto Alegre a Genova e, si spera, ritorno”; Francesco Martone, “Dopo Genova nulla è più come prima”); “Globalizzazione, violenza, democrazia”, *MicroMega*, 4/2001 (espec.: Giuseppe Caccia, “Il movimento e i suoi nemici”, Gianfranco Bettin / Luca Casarini / Massimo Cacciari, “Dopo Genova, mentre Manhattan brucia”).

Paradoxically, in Genoa, while the “*Seattle people*” were protesting against “*G8 and Corporations*”, the Eight Leaders approved a document entitled “*Beyond debt relief*”, which implemented a strategy intended to eradicate poverty in the poorest countries. The strategy of G8 is founded on “*three fundamental pillars*”:

- a) To open the markets of industrial countries to the exports of poor countries – liberalizing market access for their exports is the only way to allow poor countries to exploit the benefits of specialization and contribute to faster world economic growth.
- b) To facilitate Foreign Direct Investments (FDI) and technology transfers into Least Developed Countries (LDCs).
- c) To reduce the gap between poor and rich countries by increasing the mobilization and efficiency of resources channelled into the development of the social sector. A special role should be played by the World Bank to promote the creation of dedicated Trust Funds through donations by the more industrialised countries.

According to G8, increased trade will stimulate economic growth in the poorest countries. This can be achieved by eliminating all the remaining trading-barriers with these countries, and extending, across the borders, unrestricted duty free and quota free access for all products originating in LDCs. This emerges from the document itself:

“The challenge is how to encourage larger and better FDI flows to LDCs, where these flows can play a key role in promoting development and knowledge diffusion, enhancing access to scarce managerial skills and marketing channels and providing a much needed stable source of external financing. Recipient countries have a primary responsibility in enduring in their efforts to adopt policies for attracting long term private capital inflows and enabling knowledge diffusion. The international community should adequately support these efforts by contributing to improve the overall framework disciplining investment, promoting adequate market incentives and providing developmental aid for capacity building, advisory services and information sharing”.

Unfortunately the media at the time paid more attention to the demonstrations against G8 rather than to the contents of the summit.

In Genoa the anti-globalisation movement demonstrated against its most valuable allies in the world: democratic governments of developed countries. In fact, there is no way to achieve a global governance of resource flows and global fairness apart from initiating a close relationship between democratic governments and the anti-globalisation movement. They depend on each other to uphold the primacy of politics vis-à-vis global finance.

Globalisation compels us to continually update our political categories. We are accustomed to assuming a 'symmetrical' relationship between political decision-makers and the recipients of their decisions. In fact, this is the foundation of the modern nation-state. However, due to the digital revolution and processes of economic integration, this relationship is no longer so obvious. The nation-state is not able, as it was in the past, to guarantee basic levels of safety and social security. Nevertheless, people demand the same level of safety and social security. There are many examples of this. For instance, in the USA, the on-line vigilantes are succeeding in the fight against on-line fraud. The on-line vigilantes do not use any weapons or handcuffs. Their only weapon is the Internet. They discredit, libel and boycott people or firms that commit on-line fraud. This initiative is successful because, as the slogan goes, "*vigilante justice is better than no justice at all*". This slogan means: "*if the state cannot defend me, I'll find another institution that can do it*". In the Hobbesian way of thinking, that translates as: "*I need no longer respect the rule of the state*". After all, the Western world is the home of individualism and private enterprise. Thus, some months ago, the American people were encouraged to act like "*private attorney generals*". This is a manifestation of the deterritorialisation of law. In the recent past, this was justified by saying "*It's globalisation, it's progress*". Most American middle-class persons used to consider the decline of state as an inevitable price to pay for modernisation. The mentality and outlook have changed after September 11th. Everyone can understand that the anarchistic deregulation of both justice and safety can make western society extremely vulnerable and nowadays people request "*more state*" and "*more control*".

Who or what can answer this question? Can anything or anyone prevent a *corporation* from violating human rights (i.e., damaging the environment), if that corporation does not work within the borders of a democratic country? A country, especially a democratic country, cannot take away what it has not given or bestowed. If a firm does

not need the state to ensure its safety, it will not respect the rule of the government. A chaotic and unfair world is also the ideal environment for the development of terrorism. In short, democratic countries on their own cannot wage war on corporations to defend human rights and the rule of the law. They need the support of public opinion and the help of Non Governmental Organizations, such as Greenpeace or Amnesty International. NGOs and the anti-globalisation movement can transcend borders, informing and mobilising people against violations by corporations.

On the other hand, anti-globalisation movements also need national democratic governments to concretise their campaigns to help poor countries. For instance, the "debt" of the LDCs can only be addressed if the creditors (i.e. democratic developed countries) decide to pay up. Not all debtor countries are politically trustworthy. In some, human rights are systematically violated. In others, political corruption reigns. In the first case, debt relief would amount to financing despotism; in the second it would be a disincentive to achieving political reform.²

² "7. Debt relief – particularly the Enhanced Heavily Indebted Poor Countries (HIPC) Initiative – is a valuable contribution to the fight against poverty, but it is only one of the steps needed to stimulate faster growth in very poor countries. We are delighted twenty-three countries have qualified for an overall amount of debt relief of over \$53 billion, out of an initial stock of debt of \$74 billion. We must continue this progress. 8. In particular we look to countries affected by conflict to turn away from violence. When they do, we confirm that we will strengthen our efforts to help them take the measures needed to receive debt relief. We confirm that HIPC, in conjunction with reforms by the countries to ensure strong domestic policies and responsible lending by donors, is designed to lead to a lasting exit from unsustainable debt. 9. Beyond debt relief, we focussed our discussion on three mutually reinforcing elements: a) greater participation by developing countries in the global trading system, b) increased private investment, c) initiatives to promote health, education and food security. 10. Open trade and investment drive global growth and poverty reduction. That is why we have agreed today to support the launch of an ambitious new Round of global trade negotiations with a balanced agenda. 11. While opening markets through global negotiations provides the greatest economic benefit for developing countries, we fully endorse measures already taken to improve market access for the least developed countries (LDCs), such as Everything But Arms, Generalised Preferences and all other initiatives that address the same objectives. We confirm our pledge made at the UN LDC III Conference to work towards duty-free and quota-free access for all products originating in the least developed countries. We support efforts made by LDCs to enter the global

National governments, although strong in their popular vote, are not strong enough to be able to face such complex and often unpopular issues alone. Aid to the poorest countries involves several changes (and maybe restrictions) of the western way of life and standard of living. First of all, the free circulation of LCDs' goods and produce in our markets could result in losses to local firms and farmers. So, therefore, to be able to invest in poor areas, western governments have to reduce public spending affecting thereby the middle class. To achieve effective aid policies in favour of LCDs, governments need the support of anti-globalisation movements. Furthermore democratic governments also need "global" support: the recipients of political decisions are nowadays "global". So, NGOs and anti-globalisation movements can denounce attempts by corporations to condition or boycott the political sphere.

In a nutshell, human rights policies need a "Holy Alliance" between democratic Governments and the anti-globalisation movement. This alliance has become even more important after September 11th. It is futile to categorise the anti-globalisation protesters with the terrorists, accusing them of destabilising the world order. These protesters are the product of western civilization and their objections are not fundamentalist but liberal. Anti-globalisation claims focus not on world order but on world disorder. Activists are seeking new and improved ways of defending human rights in the globalisation era. We should recognize that the same deregulated disorder that benefits corporations is the very disorder in which terrorists act. The present aggressive neo-liberalist trend stifles all political regulation in the global sectors, all institutions of legal and political

trading system and to take advantage of opportunities for trade-based growth. 12. Increased market access must be coupled with the capacity to take advantage of it. Thus, to help developing countries benefit from open markets, we will better coordinate our trade related assistance to: a) provide bilateral assistance on technical standards, customs systems, legislation needed for World Trade Organisation (WTO) membership, the protection of intellectual property rights, and human resource development, b) support the work of the Integrated Framework for Trade-Related Technical Assistance encourage the international financial institutions to help remove obstacles to trade and investment, and establish the institutions and policies essential for trade to flourish, c) urge countries to mainstream trade expansion by including it in their poverty reduction strategies (*Final Official Notice of the G8 in Genoa, Jul. 21, 2001*)

oversight, all attempts at democratising globalisation and institutionalising economic justice. It insists on total freedom from government interference in the global economic sector. But should the national governments weaken, it will be extremely difficult to preserve safety as well as to defend human and civil rights.

What has become apparent to us after September 11 is that in the global era there is no "*clash of civilizations*", but a collision between modernity and its critics. Most Muslim people do not want to destroy western civilization at all. They are only terrified of modernity and its costs, just like the Seattle or Genoa demonstrators who protested against the costs of globalisation. Thus the no/global protesters could be the best allies of democratic governments in the fight against terrorism. After all, terrorism is the dark side of the "*global casino*", i.e. of absolute market freedom from political interference. Both governments and the no/global movement want a fairer and more ordered world, like Moslems who desire a more respectful and equitable worldwide order. Democratic governments must work to preserve western civilization from turning into a "*McWorld*". If that were to happen, a clash between "*McWorld*" and *Jihad* (like the title of one of Benjamin R. Barber's latest essays) would be inevitable. The only way to fight terrorism is by globalising both human rights and civic institutions, extending democracy to the global market. Cultural monism (i.e. the conviction that liberalization plus deregulation equals worldwide happiness) is the best partner of terrorism.

ARTICLES

IN PARTIBUS ANGLIAE: IMAGES OF THE 'COMMON LAW' IN ITALIAN LEGAL CULTURE

GUIDO ALPA

This paper analyses, mainly from a historical perspective, what are usually perceived as two non-convergent legal systems, namely the continental civil law system, and the Anglo-Saxon common law system. Throughout the article, the author pinpoints the numerous misconceptions that have been harboured for centuries by the legal scholars of either system, vis-à-vis the legal system prevailing on the other side of the Channel. Principal amongst such misconceptions is the idea that the common law and the civil law systems have travelled all along on parallel railroads which never met or intertwined – the notion of two legal systems each revolving in a world of its own, and not capable of being influenced by or of influencing the development of the other. The author dismantles these preconceived ideas by outlining various ways in which these two apparently isolated legal systems have in fact been in continuous contact. In particular, detailed reference is made to the enormous volume of legal works by British authors which have been translated on the continent throughout the centuries, and which have maintained their popularity among the legal scholars and intellectuals of mainland Europe ever since. The exchange between the two legal systems in question is also analysed in the context of specific fields of law, such as maritime law; commercial law; public law; and the law of contracts.

1. Foreword

A few years ago, A.W. Simpson published the findings of his accurate research on the history of common law, and dwelt upon the pre-eminent conviction, shared by many English scholars, that

*“English law is to be presented as capable of standing alone.”*¹ Research has vigorously rejected that conviction, so much so that nowadays it can be considered as a veritable prejudice. For his part, Basil Markesinis has taken it upon himself to understand the reasons that lay behind that prejudice, and has brought forward irrefutable evidence of the permeability of English notions and institutes into their continental counterparts.² In other words, when we speak of the British contribution (from now on I shall refer mainly to England) to the construction of Europe, and in particular to the British contribution to the European legal tradition, we cannot conceive of a process that had no contacts with continental Europe, and that matured its legal system in a region far removed from any influence whatsoever deriving from the Continent.³ An open-minded approach is therefore *de rigueur*, particularly when dealing with the concept of “legal” contribution. This is due to the fact that when we think of the contribution provided by English common law we tend to come with a preconceived idea of what it entails.

Some scholars have underlined the fact that it is not possible to give an unequivocal definition of common law, because the way the British themselves conceive of the common law is complex.⁴ Moreover, the notion of common law varies, depending on the historical periods under consideration, and therefore there exists a high degree of relativity. The perception of common law also varies depending on whether we consider it *per se*, or whether we compare it to its natural “counterpart”, the concept of civil law. The notion of common law

¹ Simpson, “Innovation in Nineteen Century Contract Law”, in *Legal Theory and Legal History* (London and Ronceverte, The Hambledon Press, 1987), at p. 171

² Markesinis, “Our Debt to Europe: Past, Present and Future”, in Markesinis (ed.) *The Clifford Chance Millennium Lectures. The Coming Together of the Common Law and the Civil Law*, (Oxford, Hart Publishing, 2000) at p. 37

³ Among the contributions see Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Berlin, Duncker & Humblot, 1993)

⁴ A collection of opinions is reflected in the essays collected by Galgano (ed.), *Atlante di diritto privato comparato* (Bologna, Zanichelli, 1992); Alpa (ed.), *Corso di sistemi giuridici comparati* (Torino, Giappichelli, 1996), at p. 121 ff.; Sacco and Gambaro, *Sistemi giuridici comparati* (Torino, Utet, 1996); Losano, *I grandi sistemi giuridici* (Roma-Bari, Laterza, 2000) at p. 257 ff.; Alpa, Bonell, Corapi, Moccia, Zeno-Zencovich, *Diritto privato comparato* (Roma-Bari, Laterza, 1999); Lupoi, *Sistemi giuridici comparati* (Napoli, ESI, 2001).

changes according to the cultural perspective in which it is placed. This is reflected in the different opinions on the main hallmarks of common law as expressed by modern English authors. Alan Watson, for instance, believes that the differences between civil law and common law reside neither in the Germanic customs absorbed by the latter, nor in the influx of canon law in the rules of equity, since both these sources have also exercised great influence in the formation of civil law on the continent. Nor does the difference lie in the varying degree of intake of Roman law principles recorded in the two worlds. According to Watson, what distinguishes these two legal systems from each other is historical tradition for common law, and the choice of Justinian's *Corpus juris* as an instrument for the organisation of the law for civil law.⁵ On the other hand, Tony Honoré has emphasised the temporal distances as a basis for the differences in the two systems.⁶ In this context, Christopher Dawson's warning,⁷ also shared by Paul Koschacker,⁸ is still valid: "*Europe is not a spontaneous fruit, a geographical and natural fact, but a product of history.*" Since legal organisation is an integral part of the history of a people, of a nation, of a State, it too is subject to the same law of history.⁹ Therefore, although there exist deep-seated misconception in this regard, a different reading of the documents and evidence available allows us to discard them.

If we try to view the situation from the other side of the Channel, we are not faced with an entirely different landscape. As Arturo Carlo Jemolo would have said, the 'lawyer's glasses' may change, but not the substance of the matter. Indeed the continental jurist has also been raised in the same conviction and tends to believe, almost by a "natural" reflex, that common law has been afflicted by an impermeable otherness, which has guaranteed, at the same time,

⁵ Watson, *Roman Law & Comparative Law* (Athens and London, The University of Georgia Press, 1991), at p.139 ff.

⁶ Honoré, *About Law* (London, 1999)

⁷ Dawson, *The Making of Europe. An Introduction to European Unity* (1935)

⁸ Koschacker, *L'Europa e il diritto romano* (Firenze, Sansoni, 1970), at p. 8

⁹ Two Italian eminent scholars share the same views: a teacher of jurisprudence, Tarello, *Storia della cultura giuridica* (Bologna, Mulino, 1998) and a teacher of Roman Law, Orestano, *Introduzione allo studio storico del diritto romano* (Bologna, Mulino, 1978).

its identity and purity. This too, however, is a misconception, shared by many continental jurists. This misconception, which has been challenged by Simpson and Markesinis, has therefore the appearance of a two-faced Janus. Continental jurists as well tend to think that the English system, like Victorian England, is devoted to a "splendid isolation". But the history of continental legal history itself – and Italian history in particular – belies this prejudice, parallel to the previous one.

It is not easy to eradicate prejudices. We have to be armed with historical awareness in order to take stock, of the contribution that the legal culture, institutions, and practices from across the Channel have registered in the individual legal systems. It is even more difficult to imagine the process in the context of the dynamics that govern the construction of E.C. law. I shall try to follow the model proposed by Prof. Markesinis. My report will, therefore, be divided into two segments, one dedicated to the past, the other to the present and the future.

The historical perspective makes us particularly cautious, since we are moving in a linguistic and conceptual environment which is burdened with stereotypes, myths and simplifications which have become stratified through the centuries. When the Continental Jurist thinks (or used to think) of the English legal system, by "natural" implication, he ends up (or used to end up) alluding to the common law as a body of rules created by the Courts, almost as if the relations between private individuals, which come under the sphere of the civilian, were oblivious to the other sources of law such as statutes, rules and regulations and other precepts imposed by an authority different from a Judge. We, therefore, think of a law born of actual, empirical, casual reality, from time to time shaped by the Courts or by the practices and customs of commercial relations. Case law and *lex mercatoria* are, therefore, the first services which come to mind, whereas it is only in recent years that other sources of law have been considered as worthy of notice (particularly since the United Kingdom became a member-state of the European Union). This too is a stereotype, or an actual prejudice which historical analysis takes upon itself to rebut. Similarly, we tend to conceive of the English model as being in a minority position when compared to the other models taken into consideration by Continental legislators and jurists in general, who appear to be more attracted by models which are more akin to their own, such as the French and German ones. This

is another misconception which history undertakes to rebut, or at least to weaken.

2. **In partibus Angliae. The common law as a receptacle of “just law” and England as “the country of liberties”**

Going back to the roots of the matter, the “quest for justice” seems to be the most notable feature – and therefore the greatest contribution – that the common law could give to the Continental experience. However, the comparison between common law and civil law, which used to be identified with Roman law, has always been problematic. Sir John Fortescue, educated at Exeter College, Oxford; called to the Bar at Lincoln’s Inn, who became Chief Justice in 1442, and subsequently Chancellor to Henry VI, shortly before the end of the latter’s reign in 1461, demonstrated a good knowledge of Roman law, but discarded the latter in favour of municipal law. Roman law as imported by Lanfranc, a professor from Pavia, who came to England following William the Conqueror, and then cultivated by Vacarius at Oxford, was an essential component of the English jurist’s culture. Fortescue, for political reasons and for personal conviction, is bent on discrediting it, because he considers it “imperial” law, and therefore a threat to the King’s law. In other words Roman law does not only entail a cultural import, but may have been considered as a threat to the King’s political independence. To extol the virtues of English law, Fortescue identifies the fundamental difference between common law and civil law in the *evidence of the rights claimed in proceedings*. Chapter XXIII of *De Laudibus Legum Angliae*, published in 1470, is clear in this respect. In common law, the evidence is brought before the jury, in civil law through witnesses before the judge. If the witnesses cannot be found, if the titles are not produced, the rights are unenforceable and *therefore, justice cannot be obtained*. It seems a trivial observation, a simple note of a procedural nature. Instead it strikes at the heart of the civil law system. In that same world, which claimed to be founded on three moral principles (*honeste vivere, alterum non laedere, suum cuique tribuere*), no substance is given to the precept according to which: “*justice gives to everyone their due*”¹⁰.

¹⁰ *De Laudibus Legis Angliae*, ch.xxiii, at p. 78

The dividing line is traced even more clearly by Arthur Duck, LL.D., for many years a Professor of Roman law at Oxford. In his work *De Usi et Autoritate Juris Civilis Romanorum, per Dominia Principis Christianorum*, published in London in 1678, he underscores neatly the differences which could be found between the Continental countries and England, as regards the influence of Roman law. In England, the common law judge is barred from applying it, and the prohibition, which implies the application of municipal law, is presented as a political victory of the Barons, who were fearful of losing internal power, and at the same time of losing their independence from the Church of Rome. The application of the rules of law, therefore, becomes an issue of entitlement of the sources: only the King, Parliament and the Judges of the Realm are entitled to establish rules. Nevertheless, the influence of Roman law cannot be discarded so easily. Duck warns us that the full picture is far more complex, because the prohibition related only to *judicia secundum merum jus anglicum* (*op.cit.* p.325); it did not apply to the formation of jurists, who had great knowledge of civil law (such as Bracton, Glanvill, Lovell, Mansell); nor to the rules applicable to the "Supreme Chancery," in which, among others, Thomas Beckett had particularly distinguished himself; nor to the "*jus Admirallus*", that is the law practiced by the Admiralty Court, where in addition to Roman law, the constitutions (Consolato del Mare) of the towns of Rome, Pisa, Genoa, Messina, Marseilles and Barcelona were applied¹¹.

For many centuries, Roman law, with its principles, pervades English culture. The studies of the History of English Law are very well versed on the subject, and always have pleasant surprises in store for Continental jurists. Alberico Gentili, Regius Professor, dedicates the three books of his *De Jure Belli*, published in Hannover in 1612, to Robert Devereaux, Earl of Essex. In a passage from his third book, which is complemented by Roman quotations, by quotations from medieval legal literature, and from Latin literature which, together with Greek literature, make up the background of any jurist and of any cultured person, Gentili raises the question of the observance of pacts by the Regal Authority.¹² The principle *pacta*

¹¹ *De Usu & Autoritate* (sic), *op.cit.*, at p. 343

¹² *De Jure Belli*, *op.cit.*, at p. 616

sunt servanda applies to Monarchs as well – he believes – and therefore the law common to everybody (he refers to the civil law, but the same applies to the common law) cannot be derogated from merely because one of the parties has a particular status. This is a teaching that expresses great courage and a deep sense of liberties: the relationship among parties, when it is founded on the basis of equality, cannot but produce equality of conditions. Different is the case of a privilege, that is the concession by the King of a right which one did not possess. A privilege may be revoked by the King but a pact may never be violated. It is for this reason (the example is fitting) that when the King of France wishes to break the covenants signed with the Genoese, he maintains that he had not signed *covenants*, but granted *privileges*. The qualification is all-important, because privileges could be freely revoked. This, however subject to the precept according to which such revocations, could not be arbitrarily exercised, but had to be grounded on *iusta causa*¹³.

This osmosis between Roman law and local law continues for many centuries in England, and contributes to fuel, in the Continent, the idea of an English system with peculiar traits, different from the more uniform ones which can be traced in the Continental systems; of a complex of rules, principles, concepts which, not having its foundation in Justinian's *Corpus Juris*, appears splintered, flexible, changeable, intricate, totally unintelligible to the layman and not very clear to the jurists themselves. These stereotypes are passed down through the ages and, as we shall see, are still deep-rooted in 19th century Continental Europe. Yet they do not stifle the curiosity of Continental jurists towards the common law, or, rather, towards the English system considered in all its facets and components, which nowadays, utilising the accepted categories, we can refer to in terms of constitutional law, administrative law, criminal law and "private" law.

3. The translations of the nineteenth century and the circulation of liberal ideas

Already during the first decades of the nineteenth century there appear, in Italian literature, studies and reviews that take English

¹³ *De Iure Belli*, op.cit., at p. 626

thinking and contributions to European legal culture into account. The era of translations – a period which extends from the beginning of the nineteenth century to the beginning of the twentieth – offers a delightful landscape for those interested in understanding how cultural models are circulated; how the image of foreign legal systems is constructed; how the techniques for the solution of problems which are by and large common to all the experiences of Western Europe are proposed¹⁴. Those who believe that England's geographical distance and natural isolation may have prevented, or at least limited, the contacts between our two worlds, will be surprised.

Of the thousands of translations of foreign legal works prepared by lawyers and professors in the different Italian States, and subsequently in unified Italy (political unification dates back to 1861, legal unification to 1865), the prize goes to the clear, lively geometrical books of our French cousins and to the weighty, thought out, architectonic tomes of esteemed German colleagues. But the translations of English books are also significant. Translations are a reliable gauge of the tastes, of the exigencies, of the curiosities of the readers. At that time, there existed a selected, restricted, homogeneous readership. In the nineteenth century a very modest percentage of Italians could read and write fluently and had the requisites to exercise active voting rights. Apart from *rentiers*, the higher social classes were engaged in the liberal professions, and therefore consisted of lawyers, doctors, engineers, University Professors, industrialists, bankers, high-ranking merchants – all these subjects made up a homogeneous cultural *milieu*, fairly uniform also from a political point of view, most of them professing liberal ideas, but also with a strong Catholic background. The works coming from England besides being formative readings, were also useful for professional practice.

However, let us proceed in an orderly manner. The researches of legal historians provide us with interesting data in this respect. It appears, in fact, that over the entire nineteenth century, translations of French books number more than a thousand; those of German books are slightly less than half that number, and that those of

¹⁴ Alpa, *La cultura delle regole. Storia del diritto civile italiano* (Roma-Bari, Laterza, 2000)

English books are 160: a fifth of the former and a third of the latter. I believe this to be an extraordinary result, bearing in mind that French was the language spoken by the cultured classes, in some regions even prevailing over Italian; and moreover taking into account the fact that the distance between the two systems, by structure, by institutions and in vocabulary was considered astronomical.

The places of more frequent publishing also represent clues not to be ignored. They correspond to the great capital cities: in decreasing order, by number of publications, we find Turin, for more than a third, Milan, for one fifth, Florence, Naples and Rome for the remaining part. The years of publication also provide an interesting clue. In Turin, translations from English are prevalent in the period prior to national unification, i.e. in the years during which the Savoy State aims to assume the leadership of the peninsula. These are the golden years of the Count of Cavour (1851 – 1855) a great admirer of British political institutions (besides British farming techniques). There is a second flourishing of translations towards the latter part of the century, when Turin provides a now united Italy with its free, open and combative spirit, sensitive to class struggles and to the social effects of the industrialisation of the country. In Naples, instead, translations cover the years that precede Garibaldi's venture, sustained by Piedmont and by British capital. In Milan – until 1859 an Austrian province – they appear only in the years following the unification of Italy and in Florence, in the years of consolidation of the new powers (1871 – 1875).

What could English literature offer the lawyer, the judge, the notary, the university professor, the *litterato*? Prior to political union, and then up to the end of the nineteenth century, the boundaries of law, as a science and discipline, were quite blurred, and therefore we can also include in our list, books of a political and philosophical content, which certainly prevail over books of a strictly legal content. The matters dealt with regard the organisation of power, the distribution of property, the placing of individuals in their social contexts. The British contribution to the construction of the foundational values of Italian culture is varied and vast. Public law is intermingled with political philosophy and with universal values, and hence proceeds at full speed towards economics and sociology; criminal law goes alongside psychology and anthropology. At the beginning of the nineteenth century, the books on the idea of the republic and on morals by David Hume and John Locke, those on

aphorisms by John Harrington, on social organisation by John Brown, on civil society by Richard Price and Adam Ferguson, are published.

Translations, obviously, do not exhaust the cultural horizons of jurists. Locke's thinking had been introduced in France with the translations of 1724, and was also known through the works of Rousseau, especially the "Social Contract", which had been disseminated in Italy by Cesare Beccaria and Pietro Verri at the end of the eighteenth century. Thomas More's *Utopia* is translated in Milan in 1821; Francis Bacon's *Universal Law* in Turin in 1824; James Mill's *Political Economy* in Naples in 1826. Again Bacon, this time alongside André Marie (nick-named Aîné) Dupin, in Naples in 1831. In those same years, Dupin had edited a very popular manual for law students and young lawyers, which was to become an instrument for the bridging of ideas with foreign cultures.¹⁵ In the Neapolitan edition of Bacon, the translator inserted the *Aphorisms* and excerpts of *De Dignitate et Augmentis Scientiarum*. The principles of political economy by William Nassau Senior, derived from his lectures at Oxford University, are rendered in Italian by the translator of James Mill in Lugano, in 1836.

James Mill, alongside Jean Sismondi, is one of the authors who are most representative of the political unrest which flares up in Milan in 1848. Borroni and Scotti's "Tipografia Patriottica" (Patriotic Press), with headquarters in Lugano, publishes his work on reality as opposed to utopia. Lugano was home to the refugees from Lombardy, under Austrian domination at the time, who professed ideas of liberty, universal suffrage, struggle against tyranny. At the end of the century it would be a haven to anarchist exiles. As regards Richard Phillips, our interest lies in his work on *Jury* (Florence, 1849); as regards Lord Henry Peter Brougham, his *Political Philosophy* (Florence, 1850); and lastly, by John Stuart Mill, the *Principles of Political Economy* (Turin, 1851). The publisher who secured the right to print the book, Pomba (who will subsequently adopt the acronym U.T.E. and thus the current UTET), inaugurates a series of books that is still renowned nowadays for its prestige. In the same year, he publishes the translation of Adam Smith's *Inquiry*,

¹⁵ About Dupin's contribution to the creation of the Italian legal culture see Alpa, *La cultura delle regole*, cit.(n.14)

already translated into Italian in Naples, in 1790. A few years later, in the same collection, Bentham's manual of political economy (1854), the principles of Malthus, and the works of James Mill, Scrope, Ricardo, Wately and Dupont-White appear. These represent a healthy injection of utilitarianism and individualism, which serve a dual purpose: to reinforce individual rights against an obtuse and tyrannical authority, and to limit the interference of the community in personal choices. The incipient capitalism (subsequently developing at the end of the century in its expression of brutal exploitation of the workforce) needed this nourishment. Even this aspect denotes the natural traits of common law which, as Bertrand Russell teaches, materialises in the dialectical relationship between "Authority and the individual"¹⁶.

Neither is there lack of interest, for the history of The British Constitution by Henry Hallam (Turin, 1854). Whilst in the Neapolitan State, the studies on the interpretation of the law, and in particular the works of Bacon, are highly appreciated, Bacon's "Aphorisms" are greatly successful everywhere and are published again in Urbino, in 1855. Sir William Blackstone is admired for his works on the penal code, translated in Milan, in 1813.

Only private law, Roman in its roots, French in its codified structure, and then German in its conceptual framework, shows a terrain which is ploughed, but with very strict boundaries, apparently impervious to the influence of common law. Yet it is not rash to believe that the views of Blackstone on common law, even though not frequently quoted in Italian literature of the nineteenth century, were known to Italian jurists. In Paris, in fact, the translation of his *Commentaries* appears in 1822, in its fifteenth edition. In 1776, four years before the author's death, a French version had already been published in Brussels, made on the fourth English edition. This was followed by another version in 1801. The reasons for this cultural exchange are explained in great detail by Counsellor Compré: the development of trade between France and Britain, cultural, scientific and industrial exchanges; family relations and friendships; and contractual relations, in addition to successions, are a powerful incentive to bring the two worlds closer together.

¹⁶ Russell, *Autorità e individuo* (Milano, Longanesi), 1962

Notwithstanding all this, what is mostly underlined are the divergences rather than the convergences; the French system (interchangeable at the time with that of the pre-Unification Italian States) and the English system seem to rotate around distant orbits, as if they were planets never bound to meet, but which only occasionally come face to face.

4. Blackstone's systematic operation

In France, custom is replaced by codes, whereas in England we have general and local customs, the rules of Roman law and canon law, acts of Parliament and of the Monarch and lastly the decisions emanated by judges from time immemorial, gathered in voluminous collections in which legal writers and magistrates put forward their respective opinions. There, against the backdrop of this mass of legislative material, difficult to decipher for the common lawyer, and even more so for the civilian, stands Blackstone's work, remarkable, says the translator, because in his clarity Blackstone illustrates the history of the laws of his country, their evolution and their criticism. While appreciating Blackstone's effort in the systematic reconstruction of the subject matter, the translator and the commentator (Christian), are not too indulgent with the object of the work. They preserve their respect for English public law, for that unwritten Constitution which traces its roots way back to medieval times, and makes it probably the best Constitution among those existing at the time. This can be easily understood, since in 1822 there were very few liberal constitutions which had managed to survive the anti-Napoleonic reaction. By contrast, the continental commentators reserve lesser praises for the pages on "private law", indeed they believe that the latter is certainly not worthy of the same consideration.

It is difficult to ascertain whether the scant interest shown by translators towards private law as reconstructed by Blackstone is due to the conviction that the common law regarding relations between individuals is something different from continental private law, which therefore there was no point in discussing, or due to the acknowledgment that its evolution had led to the stratification of a medieval and mercantile law as categorised different from the continental ones. Yet Blackstone's systematic order follows closely

that of Justinian's *Institutions*.¹⁷ The roots of Blackstone's thinking, the richness of values which it incorporates, and the profound culture which emanates from his pages emerge from his work according to an order not only quite familiar to continental jurists, but even structural to their culture. In the syllabuses laid down by Napoleon for the students of the Lyceums and Universities of the Kingdom of Italy (1806), Roman law and its sources, were in fact a compulsory subject, and the *Code Civil* was commented with references to Roman law¹⁸.

One of the reasons behind the lack of interest in English common law, at the beginning of the nineteenth century, may be attributed to the image of their own law which English legal writers themselves projected overseas. A review published in Naples at the beginning of the century (*Il Giurista. Giornale di legislazione e giurisprudenza – The Jurist. Journal of Legislation and Jurisprudence*) contains several precious essays which document the construction of the idea of common law which was rooted in Italy. An article by Rathery, published in issue N. 25 of the 4th September, 1836 deals with the “*study of law and the advocate's profession in England*.” It contains a comprehensive and concise outline of the history of English law, from the Middle Ages to the beginning of the nineteenth century, an analysis of the legal profession, including the role of the Inns of Court; and a concise description of the methods of teaching of the law. The picture is drawn in grim and sarcastic terms. The foreword to the article is significant, in that the author immediately warns the readers from making blunders or harbouring false expectations. He sets off from a drastic assumption: “*Let us say it out loud: the French can be rightly proud when they compare the magnificent monument of their codes with the intricate labyrinth of English laws. Except as regards certain issues on the subject of criminal procedure, we have nothing to envy our neighbours in this respect*”. Following

¹⁷ The discussion is open: see Kennedy, “The Structure of Blackstone's Commentaries”, in Hutchinson (ed.), *Critical Legal Studies* (Totowa, N.J., Rowman & Littlefield Publ. Inc.), 1989, at p. 139 ff. and (from an opposite viewpoint) Watson, *Roman Law & Comparative Law*, cit. (n.5), at p.166 ff.; and also Boorstin, *The Mysterious Science of Law, An Essay on Blackstone's Commentaries* (Chicago and London, 1941-1996).

¹⁸ Alpa, *La cultura delle regole*, cit. (n.14)

this, he recalls Hale's assumption that the source of common law "is as difficult to trace as that of the Nile." He contrasts statute law with common law, and regrets that a "science of the law" has never developed in England. However, not every aspect of the common law is to be depreciated. What can be saved is due to: "*the spirit of practical wisdom that the English nation possesses so pre-eminently, corrects the flaws of a literal interpretation of the law, and sometimes the sublime intent of its judges makes up for the inadequacies of the law*".

Even the English judicial system falls under the commentators' axe. An article published anonymously in issue n. 29 of the 18th February, 1837 on "*judicial centralization in England*", criticizes the number of cases pending before the Courts of Westminster, and lists the frustrated attempts to introduce a legislative reform of the system. The "*Insolvency Court*", set up in 1813 in the 53rd year of the reign of George III is also subjected to criticism in another anonymous article published in the same year. On the other hand, the rules on *defamation* and the organization of the penal colonies meet with great favour, as can be seen from the articles published on several occasions in the Neapolitan review in 1836 and 1838. In other words, what is appreciated in British culture is what is akin to the continental mentality. I believe that this is one of the many reasons why Jeremy Bentham is greeted with such favour among the continental jurists, and in Italy in particular.

5. Bentham and the codification of law

A curious destiny was Bentham's, – to be criticized at home and appreciated on the continent. So much so, that his works are dissected, published in parts and extracts. His work on civil and criminal legislation is translated into Italian from the French text edited by Etienne Dumont, from Geneva, on the basis of the manuscripts entrusted to him by the author. Naples is the first Italian town to bestow this honour upon him. The year is 1818. Again in Naples, two years later, his works on parliament and on political sophisms are published from the French edition, and in Forlì in 1830 his writings on codes are published. Other editions are printed elsewhere in Italy, such as in Venice in 1836. Bentham's volume on the theory of judicial evidence is printed in Bergamo, in 1824 and 1837, and in Brussels, in Italian, in 1842 and 1843.

Bentham's opinion on codes was of particular interest for Italian

jurists, particularly to those who lived and worked in the States in which the option of codification had not yet been effected. The discussion centred on whether it was preferable to align with the codifications of the Kingdom of the Two Sicilies, of the Duchy of Parma, and of the Sardinian-Piedmontese Kingdom, or if it was more appropriate to maintain the traditional sources, which were applied. In the Grand Duchy of Tuscany, the sources brought by tradition were in force. I believe this was the reason which led the Grand-ducal Press in Florence to print Bentham's pages on the compilation of codes. In Florence, in those years, a treatise on civil law was written by a brilliant and acute legal writer, Enrico Forti, who was an admirer of conceptually systemized law, but opposed to codification. Those were the years in which the debate between Savigny and Thibaut on codification was closely followed in Italy and its echoes were not yet subdued. It was an ancient debate, which in Italian culture was rooted in Enlightenment thinking. Ludovico Antonio Muratori, in describing the failings of case law, had already brought to light how the resolution of disputes by recourse to the opinions of legal writers, to methodological fashions (the *mos italicus* was prevailing at the time), to the contradictions of precedents, led to uncertainty on the application of legal rules and scant reliance on the part of the public on the work of lawyers and judges. But was it possible to renounce to tradition and change direction? Had the Italian States which had opted for codification simply imitated the *Code Napoléon*, or were they convinced of the political reasons underlying codification?

Bentham's thinking as set out in *Law and Legislation* is crystal clear: the law must be made known to all those who have the power to preserve and apply it; for the part which relates to them to those who must obey it. For Bentham the order of exposition is the *natural* order, (it does not coincide with that of Domat since it has nothing of the superhuman). The natural order is the practical order as imposed by utility. In addition to the rules to be followed for the drafting of a penal code, Bentham also dictates the rules for civil codification, thereby arranging in sequence, things, places, times, services, obligations, rights, contracts, persons capable of acquiring, and so forth. The conclusions of his work are touching; because in their clarity they condense the dictates of a legal positivism that was well before its time, and precisely for this reason they are avant-garde and genial: the composition of a "corpus juris" must be

characterized by *purity*. Laws must be cleansed of any extraneous element, to be fully able to express the *intention of the legislator*. "*Leges non decet esse disputantes sed iubentes*", was Bacon's saying, and Bentham adds: *et docentes*.

This is a courageous and innovative approach (for an Englishman), similar to that of Beccaria. Bentham does not appreciate the *Codex Fredericianus* prepared by Coccejus because it exalts uncertainty and the triumph of legal scholars, but weakens the resolution of disputes. One cannot transform the intention of the legislator into the intention of others – he cautions -, one cannot think of a natural law which remains obscure, one cannot put veils over the intention of the *positive legislator*. We must not do as the Romans did for the sole sake of copying them; "*la grande utilité d'un corps de droit c'est de faire oublier le débats des jurisconsultes et les mauvaises lois des temps antérieurs*". Clarity and brevity must be the features of the law. The law must not lend itself to differing and conflicting interpretations; its clarity depends on logic and grammar. Brevity is essential so as not to lose sight of the purpose of the law, as is the case (says Bentham) with English statutes. Bentham's recommendations go well beyond a political evaluation of the procedures for the creation of rules. He also deals with enviable competence, with drafting, offering suggestions that even nowadays maintain their effectiveness. In Bentham's convincing reasoning, there is the pattern of a complete and precise legislative programme. Legislators must use terms with which the people are familiar; technical terms must be defined; definitions must be written using common expressions; and these expressions must always be used with the same meaning.

It is sad to realize that these words of warning have been thrown to the wind. Only Eugen Huber, the Swiss legislator, tried to put them into practice. But in the other systems the growing complexity of legal science and technique have rendered them useless. Only now that we are faced with the harmonisation of the rules of private law in the EU context, do we realise that uniform terminology and definitions are the only means to give actual binding force and greater certainty to regulations.

Bentham the empiricist, the practical man, the astute politician fought against the concept of law as a science. Not, I believe, due to a particular aversion to robes, or to knowledge *per se*, but for fear of the perversions of the purposes of the law which may come from professors who comment on laws, from compilers of glossaries who

obscure their meaning, from petty litigators who fill them with useless quibbles. It was an ideal model – perhaps unattainable in practice – but it is precisely these models which the legislator needs, as does the legal scholar in general, to orient his work. The illusion that the legislator does not require a medium to reach the people is reflected in the irrepressible need for a technical exactitude which distances the language of the law from the commonly spoken language in such a way that the ordinary interpretation of the text is thereby frustrated.

6. John Stuart Mill and Herbert Spencer at the time of the industrialization of the country

John Stuart Mill too has a prominent place in any Italian lawyer's library.¹⁹ Interest in Mill grows after the unification of Italy. In Turin his works on political representation; on the interference of the State in the Church's properties and institutions; on liberties and on utilitarianism are widely circulated. The translations are edited by lawyers, a sign not only of an ongoing cultural (whether legal or otherwise) exchange, but also of the liveliness and versatility of the profession (the "corporation" as it would have been known at the time) which, together with that of doctors, constituted, for the entire century and beyond, the main framework of the country's ruling class. These works accompany those on economics, which helped build the Italian economic thinking of the time. It is not by chance that in 1905 it is Luigi Einaudi himself, the great economist, later to become Governor of the Bank of Italy and subsequently, after World War II, the first President of the Italian Republic, who translates Bagehot's work on the government's monetary policy and on the role of the Bank of England.²⁰ Bagehot's book has a sub-title that illustrates its contents. The work deals with the British monetary market, but the title is highly evocative for Italians, because it recalls the trade and entrepreneurship of the medieval merchants who used to have their places of business in "Lombard Street".

¹⁹ See Ripoli, *Itinerari della felicità. La filosofia giuspolitica di Jeremy Bentham, James Mill, John Stuart Mill* (Torino, Giappichelli, 2001).

²⁰ Bagehot, *Lombard Street* (Torino, Utet, 1905).

Industrialisation and trade make great strides forward in Italy, so there also arises the need for works of a practical nature. In this regard, reference is made to manuals on English maritime cases (by William A. Oliver, in Leghorn, 1872); on the theory and practice of banks by H. D. Macleod (in Turin, 1879); on Company law (Bruce, Bologna, 1896), as well as a collection of model letters of correspondence and sample contracts, such as those proposed by Hugh Darley (Naples, 1863), and manuals on copyright with the relative international agreements, such as the one by Hawkrige (Rome, 1884). In the same period, Herbert Spencer raises great interest: his sociological philosophy, very close to reality, his analysis of social needs, of household and ceremonial institutions constitute one of the pillars of the new concept of social sciences that sweeps the country, and therefore of the renewal, also from the point of view of methodology, of legal studies. Socialism advances, together with the affirmation of women's rights. Workers' rights and labour law are studied thanks to Th. W. Thorton's book (Florence, 1875).

7. British political liberties and hospitality

There are also translations of works on the Church of Rome and the Anglican Church. This too is a sign of the absence of prejudices, indeed of the quest for knowledge on the part of Italian scholars. Britain is thus considered as the home of liberty, of freedom of opinion and freedom of criticism. In fact, it is precisely through the works of British authors (including Gladstone) that the Italians – still living in an environment marked by Napoleonic influences – are anxious to discover, what is said and done across the Channel. After unification, Italians are keen to learn what Britain thinks of the Church and of the Papacy. These are the anxieties of a culture that wishes to preserve its secular features, which longs for the free circulation of ideas, which sees in comparative studies and in the contributions of foreign scholars the way towards maturity, not an escape from reality.

It is no coincidence that London is the place where many of the "Founding Fathers" of the Italian State sought refuge – those lawyers or doctors, "carbonari", free-masons and free thinkers who had fought against the obscurantism and tyranny of the post-Napoleonic monarchs, and had established the foundations of a new society, not

only from a political, but also from an economic and social point of view. Giuseppe Mazzini was amongst them. This movement was not new, as shown by the personal history of Alberico Gentili, who sought refuge with his brother in England, in order to escape from religious persecution, and here, after laying the foundations of international law, ahead of the more famous Grotius, he offered his services as Crown Counsel to Queen Elizabeth I. Alberico Gentili was remembered by Thomas Erskine Holland in his inaugural lecture at All Souls College on the 7th November, 1874, as recalled in the translation of the lecture made ten years later by Aurelio Saffi in Rome. Saffi too was a patriot, a follower of Mazzini, who graduated in Ferrara in 1841. Being based in the Church Dominions, his aspirations to civil liberties had been frustrated by the disappointing policy of Pius IX. He had actively participated in the Roman revolution of 1849, had become a member of the triumvirate of the Roman Republic and, after its collapse, had sought refuge in England where, having married a Scottish lady, he had lived for a time, teaching Italian literature at Oxford University.

The role of British political science and public law (equally appreciated were the works of criminal law and forensic medicine, on which I shall not dwell) is underlined also by the interest raised by the country's Constitution. This is witnessed, among others, by the volume by Thomas Erskine May on democracy in Europe, published in UTET's precious collection, in Turin, in 1884. The idea of Europe is already circulating at that time; it circulates also thanks to the historical studies on medieval Europe by Henry Hallam and William Smith (Florence, 1874). The British Government and Parliament are well-known through the works of Charles Knight (Milan, 1869), Henry Latchford (Milan, 1885, Naples, 1885), George Lewis Cornerwall (Turin 1886), Alpheus Todd (Turin, 1886). Even the text that carries the reform of the regulations of the House of Commons is translated (May and Reynärt, Turin, 1888).

The dialogue is very close between intellectuals on both sides of the Channel. Count Andrea Finocchietti, a Senator of the Realm, translates the work on Giambattista Vico by Robert Flint, Professor at Edinburgh University (Florence, 1888). The major Italian scholar of public law at the end of the century, Vittorio Emanuele Orlando, edits the translation of the work by Francis Montague on the limits to individual freedom (Turin, 1890).

8. Pollock, Maine and Holmes's contribution

At the end of the nineteenth century an eclectic fervour characterises Italian legal culture. The French model: descriptive, linear and tied to the interpretation of the *Code Civil* no longer satisfies the Italian legal scholars' needs. Alongside the enormous dogmatic construction of the Pandectists, which pervades in full pomp the treatises and training manuals of students and lawyers, there are studies by those who believe that law is a social science, and that it therefore cannot exclude economics, sociology and anthropology. Two opposing concepts of the law square up face to face: one is based on the geometric purity of the system, the other on the practical function of the rules and their social effects. Hence the interest in the method for the study of law.²¹ The two schools of thought confront each other but manage to set up a debating relationship.

One of the most important reviews of the time, the "Archivio giuridico – The legal archive", published in Pisa under the editorship of a master of Roman law and a supporter of the Pandectist school in Italy, does not hesitate to publish texts inspired by the opposite school of thought. In the collection of 1886, the "Archivio giuridico" carries a long article by Frederick Pollock on the "methods of jurisprudence" (*jurisprudentia, Rechtswissenschaft*). This is the inaugural lecture given at the University Conference in London on the 31st October, 1882. Again the translation is edited by a lawyer, Salvatore Sacerdote. Pollock expresses a modern concept of the law, which should be considered as a *science* and as an *art*. The legal scholar's is a multiform art:

"as a consultant he is called upon to form a concept on the legal effects of the facts placed before him; as a lawyer, to present in the most effective and persuasive manner the points in the case which are more favourable to the interests of his client; as a writer, to express in adequate and sufficient words the intentions of the parties who consult him".

²¹ Alpa, *La cultura delle regole*, *op. cit.* (n.14)

But precisely because it is a science and an art, the terms and concepts which the lawyer uses are technical and practical terms. "*English lawyers – observes Pollock – for a variety of reasons anxiously avoid verbal definitions*". But there is more. In the lecture, he explains the salient features of the English model, which differs from the continental method. It is immediately clear that the comparison between the English method and the continental one must be placed in historical perspective. As the geometric and ideal study of Pandects was prevailing at the time, Pollock emphasizes the differences rather than bringing to light the similarities. It is not only the terminology which strikes the observer of the two worlds: "*there is a radical difference of concept and development.*" This difference lies in a basic legal concept, that is, the concept of "*just and unjust*". We almost seem to hear the echo of Fortescue's words, which we referred to at the beginning of this article. To understand the differences, Pollock appeals to history and logic. History teaches us that whilst the aspiration to ideal laws is one thing, quite another is the analysis of positive law. "*Ethical Jurisprudence*", however necessary, crosses into metaphysics, into *Naturrecht*, which is totally alien to the British mentality. The British concept of law concerns: "*something to be achieved, or to be approached as closely as possible in a current State for the modern citizens by the effective promulgation of legislation.*" Rules are formed through the decisions of the courts and through the principles and practices of Chancery. But what most brings out the spirit of English law is legal practice. This, according to Pollock, is the reason why Bentham and Austin's model was unsuccessful. At the same time, he heartily promotes the study of comparative law, because both the knowledge of Roman law, and the knowledge of civil law, are useful for the lawyer's formation. He is convinced that comparative studies and critique will improve the standard of English lawyers, who should behave like "*prudent travellers*", who never follow all the winding bends of the roads, nor do they cut across unknown ground, in order to avoid being confronted with impassable precipices.

The appeal to history and anthropology is the impressive and intriguing message of Henry Sumner Maine. *Ancient Law* is a successful book in Italy as well, because it shows how rules of law are not the creation of an ideal mind, but rather are rooted in the culture of a people, in tradition; in the behavioural models spontaneously observed. The American Oliver Wendell Holmes also

earns the public's favour. His *Common Law*, as with Bentham, is translated wholly, then fragmented and published in extracts, in chapters, by topics. Again in "*Archivio giuridico*", in 1889, the chapter on the "*primitive forms of responsibilities*" is published, translated by the lawyer Francesco Lambertenghi. This is an accurate reconstruction of the rules of civil liability, which sets out from Moses's law, to pass on to Greek law, to Roman law, to Germanic and Anglo-Saxon law, finally ending with English common law.

9. The Law of Commerce and of the Sea

Even commercial law and maritime law are marked by the important influence of the English experience. One of the founders of modern Commercial law, Cesare Vivante, in addition to German jurists such as Goldschmidt and French jurists such as Lyon-Caen and Renault, includes among the major references in his *Treatise on Commercial Law* published in 1893, also the work of John William Smith, *A compendium of mercantile law*, in the tenth edition, published in London in 1890. Thanks to the *lex mercatoria*, there emerges the legal figure of the merchant. The rules followed by merchants are transformed from subjective law to objective law, on the basis of the fiction that "*anyone should be held to be a merchant when instituting proceedings for a commercial affair.*"²² Vivante avails himself of Smith's opinion, in addition to those of authors from older times, such as Stracchia and Ansaldo, to document this important landmark in the world of law. It is, in fact, the quotation of Smith's opinion that consolidates his conviction, where he underlines that when *lex mercatoria* ceased to be a separate branch of the law applicable to a single class of persons, whoever made any transaction regulated by that same law was held to be a merchant *quoad* such transaction.²³

On the continent, this approach was codified, that is, it was transformed into an enforceable general rule. But also in the English experience the *lex mercatoria* – in relation to acts of trade – is made

²² Vivante, *Trattato di diritto commerciale* (Torino, Fratelli Bocca editori, 1902) 2nd ed., vol.I, at p.6

²³ Vivante, *op.loc.cit.*(n.22) at p.7

mandatory for all. Smith himself underlines how at the end of the nineteenth century mercantile customs were incorporated into the common law, and had become mandatory for all citizens, whether they be merchants or not.²⁴ However, this initial unity does not imply an identity of systems. Vivante highlights the different concepts of mercantile law in continental Europe and in England. In the continental systems, there is a tendency to build a system of commercial law separate from the general system of civil law, whilst in English law there are no general theories of commercial obligations, because these are subject to the principles of common law.

Learned and innovative, Vivante extends his analysis to the main models of comparative studies, including the English experience. Among the sources of his studies, he lists both the principles deriving from the common law and the institutes regulated by statute law. Again availing himself of Smith's work, he lists the laws of major interest to the scholar and the lawyer who practice commercial law. He therefore, reviews the Bankruptcy Act of 1883 and its subsequent amendments, translated into Italian by two of the major scholars of the time, Bensa (*Legge sui fallimenti*, Genoa, 1882) and Sacerdote (*Rassegna di diritto commerciale* – Commercial law Review, Vol II); the Bills of Exchange Act of 1882, translated again by Sacerdote (*Review*, Vol. I); the Sale of Goods Act of 1893, the Merchant Shipping Act of 1894; the legislation on commercial companies, the comments on the *Zeitschrift fuer das gesammte Handelsrecht*, of 1901, (Vol. L, p. 526.) and more. Included in the foreign literature taken into consideration for his Treatise on commercial law, precisely by virtue of the conceptual unity of commercial law and private law, absorbed in the common law, Vivante mentions the works of Anson (*Principles of the English law of contract and agency*, Oxford, 1888), of Pollock (*Principles of contract*, London, 1889), of Duncan (*The annual review of mercantile cases*, from 1886), in addition to works by foreign authors published in French, such as those by Colfavru (*Le droit commercial de la France et de l'Angleterre*, Paris, 1863) and by Lehr (*Elements de droit civil anglais*, Paris, 1885).

²⁴ Vivante, *op.loc.cit.*, at p. 11

The same considerations are made when analysing the institutes and terminology of maritime law, in which we find roots from Roman law, the framework of French law (*the Ordonnance de la marine* of 1681), the collection of usages, laws and instructions of the *Consolato del mare*, in which pre-eminent are the Genoese Targa (*Ponderazioni sopra la contrattazione marittima* – Ponderings over maritime dealings, 1682) and Casaregi (see the 1707 edition of the *Discursus legales de commercio*), and “evidence” of the English experience, such as *utmost despatch*, *despatch money*, *mortgage*, *detention*, etc.

10. Roman law and private law

The British contribution to the formation of the law and the circulation of ideas in Italy does not stop here. To return to the legal works closest to our subject, it may be surprising how in the nineteenth century, there already emerges the refinement and the reliability of the studies on Roman law conducted in Britain. Studies that are all the more remarkable precisely because they were so greatly appreciated in the home country of Roman law. At the beginning of the century, the book by Alexander Adam on Roman antiquities and civilisation is translated (Naples, 1820). The book is a great success, and is re-printed several times. At the end of the century, in their fervour over the dogmatic works on Pandects, even scholars who are most receptive to the German doctrine do not hesitate to lend their talent to the translation of an introduction to the study of Justinian's law by Henry John Roby (Florence, 1886). Two of the major scholars of civil law and Roman law, Pietro Cogliolo and Giovanni Pacchioni, are called upon to accomplish the task. Cogliolo again, writes the foreword to the translation of the book on the Twelve Tables by Frederick Goodwin, and the foreword to the translation of the book by James Muirhead on the history of Roman law (Milan, 1888). Italian advocates are interested in the law of property in England, translating the work by Joshua Williams, of Lincoln's Inn (Florence, 1873); they are interested in marriage and divorce, thanks to the writings of William Harris (Milan, 1885) and of Edward B. Taylor (Florence, 1889), and then the unification of the laws on Bills of Exchange, thanks to J. D. Wilson (Turin, 1888).

On the other hand, John Austin remains, unknown in Italy. His contribution has become appreciated only recently, (a few decades ago), when his intelligence, his modernity in conceiving the law and

the method for studying it become, so to speak, a "literary case". His exclusion is due to two main factors: the aversion with which his lectures were greeted in Britain; and the fact that their publication, by his wife, at the beginning of the 1860's occurred at a time in which legal scholars were distracted by other problems. In Italy it is the time of unified codification and of social unrest; in Britain, the practical concept of law is far removed from the speculations of jurisprudence, as Pollock was keen to point out.

The works of British scholars, read in the original language, or learned through translated versions and discussions in France and Germany, or translated into Italian, leave deep marks in the formation of Italy's legal culture for the whole of the nineteenth century, and move beyond the restricted circle of intellectually inquisitive persons, to enter manuals, treatises, and other miscellaneous works. We have already looked at Vivante's *Trattato*. But it is worthwhile to look at other examples. Pietro Cogliolo, in his "*Filosofia del Diritto Privato – Philosophy of Private Law*"²⁵ quotes amply from Mill, Darwin, Spencer and Maine. Of the English method, he praises the interpretation of facts, the legal institutions based on reality; the aversion to concepts formulated "*a priori*". In the British concept which he outlines, the law is a *social phenomenon*, which requires a flexible and changeable structure. Instead "*codes stand still, while life moves on,*"²⁶ almost as if he wanted to say that codes bridle reality, instead of supporting its evolution. He depicts the English system based on the precedents of court decisions as "*a sort of code under another form.*"

However, the interest in the English model is not only due to the longing for techniques and solutions to new or hitherto unknown problems. It is also determined by the awareness of many that codification, though appreciated, must not constitute an obstacle when comparing problems and their solutions, or alternative ways of producing laws. At the beginning of the twentieth century, Biagio Brugi recalls the controversy on codification; he recalls Meijer's observations²⁷ and underlines how codes have, first of all, a political

²⁵ Cogliolo, *Filosofia del diritto privato* (Firenze, Barbera, 1891), at p. 18

²⁶ Cogliolo, *Filosofia del diritto privato*, cit. (n.25), at p. 65

²⁷ Meijer, *De la codification en générale* (Amsterdam and London, 1830)

value (the Code Napoléon is the triumph of the French people, the Italian code is the symbol of the country's unity), and that it is wrong to consider codes as durable, necessarily perfect monuments. Codes cannot be completely systematic, because "*systematic unity is in the mind of the legal scholar*". He adds: "*if codes should become in future a repertoire of general principles surrounding each legal relation, it might be more worthwhile to leave them placed in a scientific manual*"²⁸.

Through the analysis, even though fragmentary and unsystematic, of the contacts between the two cultures, we perceive that in the ever increasing manner of approaching, of getting to know each other, studying in detail issues and problems throughout the nineteenth, and at the beginning of the twentieth century, the cruxes and nerve centres of the law flow through Italian books and the translations into Italian. These comprise: the definition of the law, its attitudes, its manifestations, its fictions, its imitations, its evolution, its progress and its withdrawal, the phases or sectors more sensitive to social issues and the phases of its indifference to all that is meta-legal.

To conclude on this point, almost all of the books translated from English deal with works relating to public law, not private law. It is clear that the rules of common law are viewed, by those who have the good fortune or the opportunity of getting to know them, as belonging to an "other" model, different, non-repeatable and non-transplantable. But it is also common opinion that "*England and France did not lay great stock on the philosophy of private law, but rather developed the doctrine of public law.*"²⁹ Ahrens – whose book is also very widely read in Italy – is a conservative who sometimes borders on the reactionary, as when he cautions his readers against the pages of Locke, Smith and Bentham, whom he considers too liberal and egalitarian. Even though acknowledging a debt of gratitude towards Bentham for having drawn attention to man's needs,³⁰ Ahrens puts forward a concept of the law which is not based on reality, but on *reason*, "*the divine light which enlightens every man*

²⁸ Brugi, *Introduzione enciclopedica alle scienze giuridiche* (Milano, 4th ed., 1907)

²⁹ Ahrens, *Corso di diritto naturale* (Milano, 1857), at p. 64

³⁰ Ahrens, *op.cit.*, (n.29), at p. 68

who is born into this world". Therefore, he is indulgent with the differences of nature and critical towards those who would abolish them too light-heartedly. As for the relationship between individuals, he opposes Bentham's theory³¹ according to which a contract should be complied with for utilitarian, and therefore moral, reasons. His reply to the question: "*which grounds has the principle "pacta sunt servanda?"*" is that it has legal content: the observance of the bond is the *condition* for pursuing the purpose which the parties have resolved to pursue.³²

On the subject of contracts Ahrens's social conscience urges him to affirm two modern principles that clash with Bentham's *laissez-faire* position and respond to exigencies of justice and reasonableness nowadays – *but only nowadays* – shared by legal writers. On the subject of monetary interest, criticizing Bentham's *laissez-faire* position as expressed in the latter's work, *Defence of usury* of 1787, Ahrens maintains that if natural law cannot deal with this subject, the State should attend to it instead. The State must intervene to fix a rate of interest in accordance with the teachings of economic science. As regards State intervention in the discipline of contracts, Ahrens believes that the State *must* intervene, "*establishing regulatory authorities to bring back within the limits of justice and reasonableness the demands that one party may make and which the other party may not be able to avoid.*"³³

11. The cosmopolitanism of the first post-war period

English law becomes the constant point of reference in the cosmopolitan climate that spreads over Europe after World War I. One of the essays which is still read nowadays on the subject of common law is attributable to one of the past masters of Italian civil law, namely, Giacomo Venezian. In 1918 his *Studies on obligations*³⁴ were published posthumously in Rome. Contained

³¹ Ahrens, *op.loc.cit.*, at p. 477

³² Ahrens, *op.loc.cit.*, at p. 478

³³ Ahrens, *op.loc.cit.*, at p. 488

³⁴ Now in Alpa and Bessone (eds.), *Causa e consideration* (1984, Cedam, Padova), at p. 27 ff.

therein is an elegant analysis of the concept of *causa*, the "heart", so to speak, of obligations and contracts. Venezian criticizes the concept of *causa* tied to the will of the individual, as put forward by the Pandectist school, and places it among the anthropological roots of any social aggregation. He avails himself of Spencer's studies; Spencer's criticism of Maine; and the works of Morgan and Mac Lennan, to demonstrate that it is the interest of the group that dominates the collective interest, and that it is the coordination of activities which renders the will of the individual worthy of protection. It is in the notion of *consideration*, as described in Pollock's masterpiece (*On Contract*), that Venezian finds the explanation of the reason for the binding nature of the promise. Thus we see how one of the classical institutions of the theory of obligations is emptied of the frills of German culture and filled with more plausible contents deriving from English culture.

This is not the only novelty of the landscape that opens up to our research. These are fruitful years, in which Italy looks to the English system as to a "corpus" of modern rules, which govern economic relations in a particularly effective way, or that offer instruments so far unknown to our experience. The task is taken on again by great scholars such as Ascarelli,³⁵ Sarfatti³⁶ and Grassetti.³⁷ Law reviews are once again the instruments for the circulation of ideas. Among the publications involved in the spreading of culture and techniques applied to the law, we find the *Rivista di diritto commerciale* – *Review of commercial law*, founded by Vivante at the beginning of the century, and, in particular, the *Annuario di diritto comparato* – *Yearbook of comparative law*, founded by Salvatore Galgano in 1925. Here we find not only bibliographical references and debates on individual aspects of English law, but also digests of case law, with the discussion of notable cases. P. H. Winfield

³⁵ Ascarelli, "Il diritto comparato e lo studio del diritto anglo-americano", *Annuario di diritto comparato*, 1930, at p. 493 ff.

³⁶ Sarfatti, *La nozione del torto nella dottrina e nella giurisprudenza inglese* (Milano, 1903); ID., "Il contratto nel diritto inglese", in *Rivista italiana per le scienze giuridiche*, 1912; ID., *Le obbligazioni nel diritto inglese* (Milano, 1924); ID., *Legislazione inglese sulle assicurazioni* (Roma, 1938)

³⁷ Grassetti, "Il trust nel diritto inglese", in *Rivista di diritto comparato*, 1936, 543

contributes regularly to the *Yearbook*, illustrating cases of conflict of laws, matrimonial law, law of contract and torts.

The case of *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* (L. R., 1926, A. C. 497) raises particular interest, as translated and commented by Mario Allara. It is one of the cases of *frustration* of the contract, determined by supervening circumstances outside the will of the parties which disrupt the economic transaction which the parties had set in place. The case is presented as similar to those, well known to the Italian experience, where the rule *pacta sunt servanda, rebus sic stantibus* is applied, drawn both from common law and from the German law of *Geschaefstgrundlage*. Allara observes that the rule of *implied condition* as applied to war cases already exists in English maritime law in the area of contracts of carriage. Not to impose upon the parties the performance of an obligation which though still possible, has become exceedingly onerous, responds to a requirement of fairness, but also to the need for a rational treatment of the interests at stake. Here we find the difference in perspectives between English and Italian law. The English judge relies upon the fiction, openly admitted, of an interpretation of the contract which has the effect of introducing in the text a clause which the parties had never thought of, thereby permitting an objective appraisal of the situation. The legal fiction of *implied condition* does not depend on the intention of the parties at the time of entering into the contract, nor on their opinions, but on the occurrence of circumstances which prove that the event which caused the frustration of the contract is incompatible with the subsequent performance of the obligation envisaged in the contract itself. The Italian commentators – still enmeshed in the Pandectist theory of the will of the parties, and unaware of Venezian's warning – think in terms of the subjective evaluations of the parties and take refuge in the will of the parties: "*it is a problem of wills, that is the parties wanted the contract in relation to a state of affairs, that subsequently ceases to be due to supervening unforeseen circumstances*"³⁸.

³⁸ Allara, *op. loc. cit.*, at p. 758. A complete discussion of these problems is offered by Bessone, *Adempimento e rischio contrattuale* (Milano, Giuffr , 1975).

History stands as witness to the success of the English perspective: objective, concrete, functional. With the end of the dogmatic approach, and having abandoned the patterns of the Pandectist theory, as centred on the will of the individual, even Italian judges, on the basis of more modern legal thinking, came to follow the reasoning of English judges and in the end it was accepted that supervening unforeseen circumstances entail the objective termination of the contract due to the modification of the economy of the deal. To contradict the idea that the English experience is solely founded on common law, the Yearbook, again thanks to Winfield, refers to the statutes that were enacted in the first decades of the century. Between 1914 and 1926 all the major statutes were amended, from those on farming to those on the electoral process, from the organisation of the civil service to family relations, to the Law of Property Act, and also to the reform of the Universities, on the basis of the recommendations by Lord Haldane and of the Tomlin Commission. Gradually, therefore, there emerges an understanding of common law which is ever more distant from stereotypes and closer to actual reality.

12. The renewal of the method of legal studies and Gorla's work

For political reasons, the English model is ignored by the Fascist reform which leads up to the civil code of 1942. The prevailing cultural model is still the French one, corrected with German concepts. However, the law of precedents, which constitutes one of the reasons for the richness of the English experience, continues to be appreciated.

In the second post-war period, the work that stands out for its absolute novelty of method, for the wealth of cases considered, and for talent, is that of Gino Gorla, at the time Professor of Institutions of Private law at Pavia University and of Comparative Private law at the University of Alexandria in Egypt. The work is entitled '*Contracts. Fundamental issues treated with reference to comparative law and case-studies.*'³⁹ As can be envisaged from the title and as

³⁹ Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistica* (Milano, Giuffrè, 1955)

the author himself points out in the foreword, the innovation of method is determined by the need for concreteness; for control of abstract methods; for emancipation from the theories of natural law. Comparison is used in order to explain the reasons for similarities and differences among legal systems; "*comparison is nothing but history*", it is a way to escape from abstractions and generalisation. For Gorla, comparison not only means an analysis of the French and German experiences, but above all analysis of the common law, of its contents and method. Cases are useful to reproduce the:

"mental process which brings judges and legislators (...) to formulate abstractions of rules and principles, to come back, in a continuous exchange or circle, to the issue of the actual case. We have to see how rules and principles (or rather the men who use them) adapt and change, faced with this problem, which is none other than that of justice, influenced by history."

The case method used is not a mere imitation of the English and US experiences: there it is used in comparative law only to gain knowledge of foreign legal systems, whilst here it is used to understand the Italian system as well, to ascertain the ancient roots of the institutions and the models of reasoning, to verify law in action, as it results from the manipulations of its interpreters. A method, therefore, that does not disregard the merits of systematic logic, but uses them alongside those of historical and comparative analysis. The cultural environment of the time is so hostile and biased against methods other than the analytical and formalistic ones, that Gorla feels the need to justify himself: order, arrangement, the logic of the thought process, and its discipline, are not neglected; but they are no longer considered as the *sole method* for the study and representation of the law. In this way, we avoid the risk of turning into a sort of "natural law" the generalisations and abstractions which define the law into general theory, almost as if the law were nothing but a general theory and the common law were not law at all. The consequence of the application of the formalistic method is the enfeeblement of scholarship, the concept of a law which is uprooted from its history and from reality, which leads to the chasm between theory and practice.

From the point of view of teaching, the work is also *extra ordinem* for another reason: it manages to convey to the student a fundamental

key to interpretation, that is, that the rules we have to deal with are not an "*unfailing datum*"; it gives the student "*the meaning of the problem and of its varied historical development, rather than the solution.*" And thus the structure of the book reveals a masterpiece: the development of contractual obligations in civil law sets out from Roman law, moves through the intermediate law; arrives at Domat and Pothier, at canon law, at Grotius and the theorization of the principle of consent; it deals with the obligations of giving, with transfers *cum onere*, with *causa praeterita*, with promises, with *nudum pactum*, with just cause, with form; the criticism of the concept of "*causa*" as a socio-economic function of a contract is also rigorous and persuasive. In conjunction with the evolution of the doctrines and cases of *civil law*, Gorla illustrates the evolution of common law, especially with regard to *consideration*.

The material collected in the first volume would be sufficient to unsettle the theory of obligations and contract as taught up to then in Universities. But the second volume, which deals with the case-law, is even more surprising: this volume deals with donation as a formal contract in relation to other contracts, with sufficient "*causa*"; promise and sale for a "*causa praeterita*"; gratuitous obligations; and the intent to create legal relations with reference to judgements of both civil law and common law systems. The work ends with a comparison of the styles of decisions. It is impressive to note how Gorla's work went beyond the national boundaries, and those who follow methods similar to his, such as Basil Markesinis, do not fail to remember him in their works.

13. Models of legislation

We have talked a great deal about legal theory and method in these pages. It is now worthwhile to give some examples of the legislative models which Italian scholars have taken into consideration as models for the reform of our national law.

It is only in the 1970's that there arises the first debate on consumer protection in Italy. Legal scholars looked into the more advanced experiences of the United States, first of all, but also to those of France, Germany, and certainly Britain. On the subject of standard contracts, the Unfair Contract Terms Act of 1977 is considered as the model to be followed for legislation to bring back reasonableness and fairness in consumer contracts. With mass

production and contracting, the traditional tenets of the law of contract can no longer be deemed satisfactory. We are no longer concerned with guaranteeing freedom of contract, but rather to redress the balance in the *"inequality of bargaining power"*. Atiyah's pages are a veritable guide to understanding that it is legitimate to restrict the freedom of the stronger contracting party – the enterprise – and equitable to ensure the protection of the weaker party. Lord Denning's dictum, pronounced in 1957 – *"we do not allow printed terms to be made a trap for the unwary"* – becomes a warning for all legislators and for the judges who are forced to apply ancient rules. Again Lord Denning, in 1973, signals a break with the past: *"When a clause is reasonable, and is reasonably applied, it should be given effect according to its terms. I know that the judges hitherto have never confided openly to the test of reasonableness. But it has been the driving force behind many decisions"*.

In an environment which is now well-versed in the study of comparative law, anything of significance that happens in Britain, certainly does not go by unnoticed. The words of Hugh Collins are therefore to be pondered upon with great attention:

*"... under the influence of the EC harmonisation programme, UK contract law will eventually be pushed towards a fundamental division between consumer contracts and business contracts, with radically different regimes applicable to both... the assimilation of social values embodied in the European directive will lead the common law of contract, which Kahn-Freund once described as 'designed for a nation of shopkeepers', to succumb to a more communitarian ideal which balances the interests of consumers against those of shopkeepers"*⁴⁰.

However, the influence of comparative study has not been so decisive as to persuade Parliament to anticipate the EC's intervention. The reform of consumer contracts reaches Italy not from London, Paris or Bonn, but from Brussels. The civil code is amended only in 1996, following the implementation of EC Directive n.13 of 1993.

⁴⁰ Collins, "Good Faith in European Contract Law", in *O.J.L.S.*, 1994, at p. 229

Again, to remain within the subject matters ascribed to private law, I would not wish to leave out the interest raised by the Crowther Report, of 1974, on consumer credit. And, to move on to an entirely different subject, the Warnock Report on artificial insemination, a topic which still divides Italian legal scholars – for its religious and political implications. Biotechnology, whose legal aspects are so delicate, represents one of the most controversial aspects of private law; and the English experience in this respect is one of the models to which the more sensitive scholars, such as Stefano Rodotà, do not fail to give adequate attention.⁴¹

14. The indirect influence of English law on EC law and thereby on Italian law

After glossing over two centuries of legal history in a few pages, we have finally reached the present. And the present is a feast of studies on common law, relentlessly investigated in every sector. A whole book would not be enough to list the manuals, the treatises, the monographs, the essays which Italian scholars have devoted, and continue to devote to English legal culture. Every “school” of comparative law proudly presents its standard bearers as well-versed in English law. In spite of the fact that English is the most widely spoken foreign language in Italy, translations, still abound. Not only are the classics, such as the treatise by Maitland on equity, or by Wade on administrative law, translated, but also essays by Hart and Twining and Meiers; Lord Wedderburn’s manual on employment law, the historical analyses by Peter Stein and Alan Watson; and the translation of Roy Goode’s volume on commercial law in the new millennium is under way.

Beyond this tangible indication of the debt of our legal culture to the British contribution, we should bear in mind another occurrence which is taking shape in terms of the “Europeanisation” of the law. Here the English influence is not direct, but indirect, because it is filtered through the texts of the European Regulations and Directives. A brief reference in this regard should suffice. The use of the expression “reasonable”, which is not to be found in any of the

⁴¹ Rodotà (ed.), *Questioni di bioetica*, (Roma-Bari, Laterza, 1993)

provisions of the codes or special statutes, is gradually penetrating into our terminology, and also into our legislation. We already find an example in art. 1783, c.2, n. 3 of the civil code, on the liability of hoteliers for personal property brought into a hotel. Here the text derives from the Paris Convention, 17.12.1962, ratified by statute 10.6.1978, n. 316, and enacted on 12.8.1979. It is well-known that international conventions tend to condense the various contributions from the legal models taken into account, and that the British representatives are always held in high esteem for their authoritativeness. Again, art. 5 of D.P.R. 24.5.1988, N. 224, on the definition of defective products, derives from EC Directive n. 85/374, in which the British contribution, as everyone knows, was decisive. I could quote other examples, such as the rules of guarantees in the sale of goods, or the drafting techniques now widely used in the legal profession in Italy.

15. The process of convergence between Common law and Civil law

The cultural exchanges, the loans, emphasize convergences, rather than differences. Lord Bringham underlined this fact very persuasively during a recent meeting between Italian Judges and Law Lords. To quote his words: *"we are right to continue to worry away at the unnecessary divergences which continue to divide us. But the things which unite us are greater than the things which divide us"*.

The law is also pervaded with myths. We have been reminded of this fact in recent months by Christian Atias and Paolo Grossi. We must find the courage to get rid of them forever. The myth, for instance, that the common law consists only of a body of precedents with no relevant legislation, or, conversely, that the civil law consists only of statutes, with no importance attributed to the creative interpretations of the courts; or the myth according to which statutes are interpreted only according to the literal meaning of words, and, finally, the myth that sees in the law the image of a nation, and therefore appeals to history to justify divergences and oppose convergences. History cannot be denied, but the future can be built in a collaborative manner. Convergence is registered not only in written rules, but also in their interpretation. It is for this reason that Basil Markesinis speaks about the "Europeanisation" of the

English *common law*, especially thanks to the decisions of the Court of Justice in Luxembourg. The same can be said for Italian law, as for the other systems of the Member States.

It is for this reason that the efforts of those, such as the Commission coordinated by Ole Lando and Hugh Beale on the subject of contracts and the Commission coordinated by Christian von Bar on the other sources of obligations, promote harmonisation as a bridge for the unification of private law.⁴² The era of stockades is over. We must remember that freedom of movement of individuals, of goods, of services and capital was *preceded*, not *followed* by the free circulation of ideas and models in the legal world. The teachings of history and the consideration of current political, economic and social needs, lead us to believe that the movement that proceeds at great speed towards the convergence of systems and cultures is by now irreversible, and has become one of the factors that make Europe stronger and ennoble its mission in the new Millennium.

⁴² Hartkamp, Hesselink, Hondius, Joustra, du Perron (eds.), *Towards a European Civil Code* (The Hague, London, Boston, Kluwer International, 2nd ed., 1998); Alpa e Luccico (eds.), *Il codice civile europeo* (Milano, Giuffrè, 2001). But see also the EC Communication n. 398/2001.

HUMANITARIAN INTERVENTION, NEUTRALITY AND INTERNATIONAL DEMOCRACY IN THE WORLD AFTER THE COLD WAR¹

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Neutrality is a concept that cannot be isolated from the notion of state sovereignty and its development after the Cold War. Over the years, the notion of state sovereignty has changed and so have international relations. Consequently, the notion of war has also changed. The international community is set on guaranteeing peace through any possible means. Nonetheless, there has also been an escalation of violence within states, which does not amount to a war between states. Moreover, there has also been a dangerous escalation of terrorist attacks that are symbolical in the sense that they do not reflect overt differences in political ideology between states or peoples. This sort of strife cannot be said to be war, but it can be termed a "private war". Hence one can speak of a "new war", which does not involve war between states or aimed at liberating states. This new reality will have to be addressed through international co-operation and hence a new international legal order has to be created: a legal order based on universally recognised rights, at the basis of which lies human dignity.

1. In Malta, the debate between those in favour and those against the entry of Malta into the EU is developing with great liveliness. The arguments in favour and against membership, particularly in the political field, are many but the fundamental argument is that dealing with neutrality. Those in favour of neutrality hold that

¹ Speech delivered for the course leading to the attainment of the Master's Degree on "Human Rights and Democratisation", University of Malta, during the academic year 2001/2002

neutrality has a value which is still real and actual, and this not only because it deals with an obligation sanctioned by the Constitution, but also because it protects Malta in the post-Cold War world. This is a world which while it is no longer dominated by two superpowers is nevertheless not peaceful. This was also clearly shown by the spectacular acts of terrorism against the US on the 11th September, 2001, in which the number of lives lost is comparable to those incurred in a war. It is also held, following this line of argument, that a small island such as Malta, which lies at the centre of the Mediterranean, in a sea which is at the heart of some of the world's harshest religious, ethnic and military conflicts, may be better protected by a choice of impartiality and hence from the fact of not forming part of a great power such as the EU, and consequently, of military alliances which membership in the EU would involve. Alignment with the Northern-Mediterranean countries could open Malta to any type of reaction from the Southern-Mediterranean countries: this is what is being held by those who favour the neutrality of Malta.

Undoubtedly, at the basis of this debate on neutrality, there are also long-standing internal political questions. Consequently, Maltese politics continues to be divided by a fine – yet strong – line: on the one hand there are those in favour of Europe and of Atlantic politics and on the other hand there are those in favour of a preferential relationship with the Southern-Mediterranean countries. However, beyond the problems, particularly internal problems, which imply that Maltese neutrality is a unique case in the varied world of neutral and non-aligned states, it's also important to ask whether neutrality has a future in a world of interdependence and integration, considered the constant erosion to which the powers which are at the basis of national sovereignty are being subjected. In other words, it is important to consider nowadays the real parameters within which the States may decide autonomously their own foreign policy. It is not a legal matter but a political one to understand whether the national legal order has become a mere subsystem of the international legal order. Particularly, the problem is that of establishing whether the national legal order has a subsidiary role with regard to the international legal system. In today's reality, it is difficult to admit that there could exist a foreign policy of the States which is, in fact, autonomous, unconditioned by great international events and by the decisions which regulate the international market and hence the

internal market of the States. These are those events on which war and peace depend.

Through this conditioning, exercised by an international community which tends to identify itself in some values and interests, it is the essence of sovereignty which is questioned. Sovereignty has consisted, over the centuries, in the fact that no State recognised an authority which was above it, nor a superior judge which could decide above the interests and obligations of the State. If this is the case, nowadays, States increasingly appear to be artificial and anachronistic formations replaced by international organisations which take decisions which may have a bearing on the future of the large and little states and hence on the future of the peoples. Besides, at the bottom of the conflicts there are always divisions and contrasts which express an increasingly tumultuous vindication of cultural identities. It is evident that the end of the bipolar world cannot give rise to a world of uniform thought. Peoples refuse to accept a cultural and economic model which has to be necessarily the same throughout the world.

The future of neutrality, therefore, cannot be read separately from that of the Nation-State and in the first place the idea of sovereignty. For centuries, the right to decide war and peace and of assuming the position of aloofness in armed conflict or with regard to military alliance in times of peace has been the most important aspect of the foreign power which sovereign States could exercise. It has certainly been a matter of an ever-decreasing power which was being limited by the rules of law: even war was limited by the *ius in bello*.

Between sovereignty and law there has always been an undying conflict: a conflict which has been resolved more easily with reference to the matter of internal sovereignty once that rule of law constituted the basis of the modern State, but with more difficulty with reference to external sovereignty which till the First World War used to seem absolute and uncontrollable.

This notwithstanding, *ius in bello* and the Conventions to protect States which decided not to take any part in war, not even when it was of a general character were being laid down. They invoked the status of neutrality which was guaranteed to them by the two Hague Conventions of 1899 and 1907. There's a precise relationship between *bellum iustum*, which is characterised by the conflict between two *iusti hostes* and neutrality. Problems arise when war is intrinsically unjust, that is, "illicit" independently of the way it is conducted.

This occurs when it involves the violation of a right – which is not only moral – and its perpetrators are criminals who would be tried. The fact that there were rules adopted to moderate the violence of war – especially the damage to civilians – presupposed that war constituted a “right” of the State, in the field of an international legal order based on the “balance of power” between the States and hence on the possibility of modifying it through the use of force. It also presupposed that the only actors in the international arena were the States which had absolute power to decide peace or war and hence no authority above the States could question these choices nor judge the States as such and the person governing such States for the decision of making war (war did not give rise to criminal sanction but to sanctions of another kind); that the modalities of war consented to distinguish between civil and military populations in term of human cost which every war inevitably brings about. Moreover, it also presupposed that war was the only factor of change in the relationship between the States and hence that it had a constituent value, with reference to the new international legal order, which every war inevitably brings about. Another belief was that the peace between the States was based on a balance of power. And hence war intended to modify this balance. No moral judgment could be expressed on the acceptability of such equilibrium, whether just or unjust, because the moral dimension was not suited to the relationships between the States, holders of rights, but never of duties.

In the moment in which the Treaty of Westphalia recognised the absolute sovereignty as an essential characteristic of the Nation State, the rights of the States constitute the core of public international law. Since then, for three centuries, the natural antagonism between the States characterises the international scenario. International life is based on the principle of conflict between the States. The idea of co-operation and integration between the States is totally alien to this culture. No Authority may determine what the States may or may not do. Only on the morrow of the First World War the problem of condemning aggression through a juridical sanction arose by trying the Emperor of Germany, William II, for having caused war and hence for having committed an “international crime” which was not even codified as such by international law.

Almost few years after the end of World War II the high ranking political officials of the Third Reich and Japan were tried because

responsible of war. Moreover, in the post-war period, the principle of separateness and of the unquestionability of State behaviour faces for the first time a solemn derecognition through the creation of the UN, promoted by the States which had won the War, but also by some defeated States: an international organisation which imposed sanctions on those States which violated peace. The duty to maintain peaceful relations between the States becomes a legal obligation only when the UN is formed. In the Charter of the United Nations, in fact, the monopoly of power is in the hands of the UN. It is not a formal warrant of peace, but it is a warrant which is based on the coercive capabilities of the UN to act against the States violating international law. The UN, therefore, differently from the League of Nations, is not a "disarmed prophet", but a real arbiter of the international conflicts. War, in this context, is not a right of States but it is a crime against international law. This principle, has been held firm on paper even in these years but the situation of the Cold War did not allow the UN to adopt coercive measures against the will of the two superpowers which developed a diplomatic system which was absolutely autonomous with regard to that of the United Nations. Peace depended not on the respect of the rules on paper but on the equilibrium of power. USSR and the USA are aware of the fact that a war between the two of them would have been a nuclear war and hence it would have caused a nuclear holocaust. However, it is especially on the plane of international policy that the "right to war" as the prerogative of sovereign states finds an unsurpassable limit with the beginning of the cold war and the consequent division of the world in two blocs (each of which capable of using nuclear weapons against the other in the cases of conflict). War became impossible because there could not be victors and defeated, since they had equal destructive capacity in case of a nuclear war. The appearance of the nuclear weapon (with "weapons of a first shot" with resolute effect) not only changed the concept of war, in such a way that global war becomes impossible but also changed the relationship between law and war, since rules of war aimed at avoiding the onslaught of the destruction caused by war inflicted on or incurred by the civilian population became totally ineffectual. Nuclear war is necessarily a total war.

The appearance of the nuclear weapon changes the juridical scenario of war. States are no longer equal because not all the States the nuclear weapon. Carl Schmitt's classical war can no longer be

fought. In classical war, the players have the same juridical position. Classical war is a duel between sovereign States which wage war to alter the international order. These States are *iusti hostes*, they deserve equal consideration, and normally between them there does not exist a disproportion of military force. In this context, neutrality has a value. If, on the other hand, the players do not have the same juridical and moral consideration, if one of them is considered a criminal, war is no longer a duel between equals. In this sense, neutrality becomes an inadmissible equidistance between those who sustain the supremacy of international law and those who, on the other hand, want to violate international law.

Neutrality, therefore, already stripped of any value as a principle by an international security system entirely governed by the UN (also with reference to countries which do not form part of such organisation, considering that its fundamental principles are being recognised by the international community as general international law), is also rendered totally useless with the advent of the nuclear weapon, since nuclear war cannot be contained beforehand within given parameters, within limited regions of the world since its devastating effects are wide-reaching. Hence neutrality constitutes only an impossible act of disassociation from the international society, a sort of refusal on the part of one State to socialise with the other States.

2. Considering what has been said so far, after World War II, there has been a real revolution in international relations which has revolutionised the principles of international law which for centuries had regulated the relationship between the States, a new international legal order has been established. The States victors of war wanted to warrant peace through the implementation of international law. The creation of the UN, as has been said before, had to render war impossible. Every conflict between the States, had to find a legal solution beyond the use of force. The system of alliance on which the foreign policy of the great powers was based was simplified. Hence a duopoly is formed: there are only two great alliances rooted in a strong ideology. War which changed the *status quo* in the relations between states in the nuclear age, for what has been discussed so far, becomes directly impossible, and the balance between the two blocs is established on the basis of the equal destructive abilities possessed by each of them. The conflict became

permanent and ideological. However, the world is less violent: global war appeared extirpated from the perspective of politics. The two superpowers, not wanting involvement in direct combat, left the other States, which are their allies or which are subjected to them, the task to duel, and hence to maintain alive the ideological conflict. New regulatory principles of war, of an atypical war which did not belong to the categories of international law were established. The real aim of conflict during the Cold War is the maintenance of the balance of powers of the blocs. The consent necessary to render stable the *status quo* depended on the general agreement between USA and USSR and not on the activity of some arbiter above the parties who applied a new international law, but on the direct relation between the two great powers, which from time to time was changed without the necessity of involving any mediators. Hence, this agreement prevailed on the rules. In theory, the world is always in balance between war and peace, and lives in a situation of not peace and not war but the dissuasion exercised by a balanced destructive power expressed by the two superpowers was enough to warrant peace. The unilateral destabilisation of a regime in any part of the world was feared more for the repercussion which it would have on the rest of the world rather than the instability which it would produce in the region where the conflict is centred. In other words, the internal problems of any State assumed, in this context, immediate global relevance. Any fact which generated local instability could represent a threat to the interests of one of the superpowers, or to one of the great powers allied to either superpower. The effects of a situation of instability are global, because they inevitably effect global duopoly. Since there cannot be a different balance of power in respect of that fixed at the end of the second world war, there is the need to guarantee the *status quo* not only in the relations between the two superpowers, but also within the spheres of influence which to each of one make reference.

In a system of relations between States regulated by a very few rules and no authority, the supreme element at the basis of international order was the balance of powers between the blocs. Even intervention by the United Nations in the local crisis which would have altered that balance, risked creating a new global conflict. In the world of the Cold War, the equality between the States is inevitably on paper; the allied States of the Superpowers enjoyed a sovereignty which more or less limited, especially in Eastern Europe,

where the role of guide of the USSR is not questioned by the satellite states. Cold War tends to reinforce the sovereignty of the States with regard of the international community because it renders impossible the unilateral modification of the international equilibriums or the external military aggression. Small and medium powers are protected, not from the UN Charter, but from the fact of appertaining to a system of alliances which revolves around the USSR or the USA. No superpower may interfere in the internal affairs of the State which belongs to the opposite bloc. Undoubtedly, this situation, reduces the level of political participation and the warrant of rights particularly in the States which are not governed by democratic regimes.

The world was divided in two systems of political and military obedience, which excluded any reciprocal intervention. The eventual conflicts and the same problems created in the rush to weapons were not mediated by third party authorities, but directly by the superpowers, called to guarantee order, each to its sphere of influence.

The states which refused the "Law of the Cold War" had no alternative than to choose non-alignment both on the political and military planes. This choice, perhaps, was a utopic choice because it pursuits a world without superpowers and without arsenals. But it was a choice which was characterised by the illusion to guarantee the cultural plurality. At the basis of this choice, there was the idea of a world which did not have to be founded on the balance of powers. The limit of this policy was that the non-aligned States had no ability to defend themselves from themselves, nor give rise to a third bloc which was militarily self-sufficient.

In post-cold war era, however, the world is free from rigid ideological blocs, build around the supreme role exercised by superpowers which are capable of imposing a "convenient balance" on the global plane, and hence *de facto* suspending the rules and the mechanisms of guaranteeing the peace prescribed by the United Nations.

It is a world which is no longer characterised by a dialectical balance established by any interaction and conflict between the two countries guiding the international community. Hence, it is a world which is inevitably more disordered and which is characterised by the appearance on the world scene of medium powers which once they are freed from the protection of the superpowers of reference,

they intend to assume the role of leaders in their regions. The instability of the world of the post-Cold War era does not depend on ideological contrast, but on the contrast of social or political models which contend for the supremacy, according to the fascinating thesis of Huntington, which deals with the inevitable conflict of civilisations. It depends, therefore, on the rupture of a balance lasting forty years.

The end of communism has produced a change in the regional balances: it has allowed the formation of new alliances between the States, since there were no more ideological ties which conditioned the alliances. More importantly, however, the end of communism has led to the disintegration of multi-ethnic states which were unitary simply because of the dictatorial regimes which ruled them.

Hence, the nature of war changes: the "new war" of these last years will not be a general war, a war of high intensity, formally declared; it will be a local war, of low intensity. On the local level, it can however become permanent, in the absence of a global authority capable of regulating conflicts and of imposing external control. More importantly, it can also become permanent because inevitably it is the expression of undying and deeply-rooted differences which divide the people living on the same territory. Therefore, every cultural or ethnic minority, wants to be identified as a national community, that of becoming a State. Such minority wants to have international recognition as if it were a State. This tendency becomes the greatest factor of instability in the Post-Cold War World. Once the ideological ties have been eroded, the cultural tradition, religion, ethnic divisions become decisive elements which inevitably lead to conflict.

The supremacy of the United States in this context on the plane of economic and military force is not limited by the other powers. The US is in fact a superpower with no competitors. This does not mean however that the end of communism has created a world, in which a superpower may "impose" peace over all people, a world of a unified thought, open to accept the social and economic model which has emerged as the winner from the East-West conflict.

The new world order, therefore, is an order which tends to be unipolarised with regard to political and military power. However, this world order, on the economic and cultural level, is inevitably heavy in conflict and divisions. In the past, it was possible to establish the balance of power on the military plane; nowadays, it is not possible to establish a balance on the level of cultural and ethnic

divisions, if not through a real diffusion of culture of legality and tolerance on the international level.

War, since the antagonism between East and West decreased, is banished from international relations. Not only on the level of principles, but also on the plane of concrete capacity expressed by the stronger nations to avoid any State to use force to take justice in its own hands. Therefore, war is no longer an affair of the States; the use of force, is no longer a right belonging to the states. Rather, it becomes a measure of policy which is resorted to go against the State or substatal entities which violate international law within or outside their borders. Therefore, it is an order normally guaranteed by the powers recognised to the UN to govern the peace but which also the States can impose even by substituting the UN, in case of necessity. It is clear that war between the States becomes impossible and not all the forms of use of force have to necessarily involve the typical characteristics of war either because not all conflicts involve the States, or because of the ways in which war is carried out or for the objectives of war. This does not mean that the "new wars", the wars which in form cannot be defined as real wars, do not pursue the same end, which is military aggression. Let's think of forms of terrorism which for the organisation they can count on, for the political cover they can avail themselves of on the international level, for the ability they have to hit any target (the attacks which occurred in USA in September, which for symbolic character and for the echo they had in the whole world, had been defined as the beginning of the first war of the twenty-first century) produce the same effects of war. The objective of war is that of arriving to the annihilation of the enemy or at least of unilaterally achieving advantages for the victor. Now, if it is undeniable that the wars which happened after 1989 – for the reasons which will be hereunder discussed in full – are not real wars in form, it is also undeniable that the number of human lives lost is the same as that of any normal "war". The logic of war is that of inflicting to the enemy the most serious damage possible, superior to those necessary to achieve the objective for which war is being perpetrated.

The new wars do not tend to modify the international balances, because they are wars which are being carried out within the States, which do not question the balance of power which could interest the community of the States but the rights, the conditions of life of the communities between which war is being fought and

also of other communities which are anyway involved in the conflict.

In a world which has become less stabile and less ordered, it is important that the warrant of international peace is not trusted to one international power. The world does not need a superpower which is the international sentinel of peace. What is needed is a collective security structure. Such structure should be based on a network of states and organisations which are held together by a strong common will. Europe, in this context, may play an important role, because it does not have an imperialist tradition, and hence, it has no long-standing enemies.

The process of European integration, therefore, is not only a warranty of peace in Europe but it also a warranty of peace in the world. Europe, even when it will be absolutely united on the political front, certainly it will not be interested in founding its own imperial presence in the world.

Europe is the continent which in the modern era has seen the perpetration of almost all the "great" wars on its territory. The fact that the European States, which have been the protagonists of so many wars, decide to create a single political institution changes the entire scenario of international relations. This does not only occur because European integration gives rise to a new great power which intends to be side by side with the United States not to be antagonistic to them but because such position reduces the historical contrasts which caused so many wars. In the modern age, the harshest European wars have all been the result of the antagonism between France and Germany.

With reference to these elements of great change in the international arena which have been mentioned, it would be important to ask whether neutrality has any more relevance, particularly on the part of a European state.

Today the world cannot be indifferent to military aggression such as that of Iraq against Kuwait, or to civil wars such as those fought in the territories of ex Yugoslavia, in Somalia or in Rwanda or terrorist attacks also of the great magnitude which have happened in the United States on the 11th September, 2001. This events have produced a number of victims not inferior to that produced by a war, as has already been stated. It is clear that no country may declare that it is not interested in taking part in the crusade against the "lords of war" because the "new conflict" with which we are

faced today is not a conflict between different States which decide to resolve conflict through the recourse to arms. It is a conflict between entities, sometimes even illegal which operate on a substatial or supranational level and which are moved by the will to impose a nihilist culture and hence which pursues destruction for its own sake and death for its own sake. And hence no State which is well ordered, organised on the basis of principles and mechanisms which give life to a constitutional system may be equidistant between the conservation of civilisation and its destruction.

3. Recently, many scholars and politicians have explained the reasons leading to the decline in the nation-State (particularly after the Cold War). They have also analysed the consequences which this decline has had on the international security system.

The advent of multinational companies, the creation of a global market capable of conditioning the same political decisions and to avail themselves of the new means of communication has created a new culture of peace. Peace increasingly appears to be the essential condition for development and progress. This is, at least, the underlying idea in the nations which have a sound democratic tradition. For centuries, war has been considered as the natural condition in the relationships between the states in a system of international relations governed by the principle of anarchy. Nowadays, this idea is about to be definitively defeated.

The meaning of the word peace does not merely denote the absence of war. Peace is not an occasional condition, a truce between two wars, but it is the normal condition in the relations between states, taking into consideration that war is no longer a right but it is a crime against international law. For centuries, peoples, once a war was over, they used to prepare themselves for another. Therefore, war appeared to be a lawful solution to resolve the many controversies which divided the States. After the Second World War, there has been the development of a new concept of peace. The world leaders have at last affirmed that peace is the cornerstone of the whole system of international peace. Without peace, there cannot be social justice. With the creation of the UN, these ideas are no longer mere philosophical affirmations but they become principles which lie at the core of a great international organisation as the UN. The absolute state sovereignty is no longer an absolute value, but it is limited by the duty of the States to foster friendly relations between them. In

this context, the States do not have only rights but also duties. Above the States, there are principles and authorities, which the States cannot refuse to recognise. The international balance should be based on the monopoly of force which is recognised only to the UN. The only important element in this collective security system is the idea that justice is the real warranty of international peace. An system of international relations based on an unjust division of the power of wealth, inevitably leaves to conflict between the peoples, and hence it leads to a situation of international anarchy.

Having considered what has been said so far, great cultural progress, therefore, has occurred in these last years. Peace was a negative condition, that is a suspension of conflict. It represented therefore the exception to the rule of the conflict between sovereign states. No one today affirms today that States must be able to impose its pretences. There emerged in the post-War period a new definition of peace, understood as a necessary condition to guarantee a well-ordered international system. The right to peace has been recognised as an undeniable right of people, at least in theory. This idea of peace, as a natural condition and a duty incumbent on the State in the relations between them, recalls a concept of the system of international relationships which revolves around the value of justice. The concept of peace as a necessary condition to guarantee an equitable distribution of resources and political power between the states and the respect of the peoples and the individual within the States replaces peace understood as an incidental pause in conflict. The warranty of peace depends therefore on the warranty of individual and collective rights. If the world does no longer have political and ideological divisions, all the peoples would be able to accept that the UN use force against the perpetrators of violations against human rights. In this scenario, the concept of neutrality appears to be devoid of any value. If the world, needs to warrant the rights to guarantee peace, it cannot be neutral in the conflict between those who fight for the respect of rights and those who deny these rights. Consequently, neutrality appears to be anti-social behaviour. Neutral States would therefore reveal an attitude of self-exclusion from an effort to improve the complex situations in the world. Neutrality, in other words, would constitute the triumph of egoism over solidarity.

The foreign sovereignty of States is not free to pursue any aim. It finds an insurmountable obstacle in the use of legitimate force

against the States which violate international law. Hence, these states do not violate merely the rights of other States but also of the peoples and the individuals. In this context, apart from the States as subjects of international law, there emerge the individuals and the peoples (which are subject to real juridical protection on the international plane.) But above all, the primary aim of international relations changes. It is not only the solution of the States and the controversies which exist between them, but also the warrant of justice in the relationships between the people and the safeguard of the rights of the individuals. Therefore, peoples and individuals are not merely objects of power of the sovereign State as its subjects, but also members of the international community.

The juridical equality between the States, which was the basis of absolutely foreign sovereignty, or almost, to which all States laid claim, becomes secondary when compared to the aim of equality between the peoples and of the individuals, which are the subjects of the same international protection, irrespective of the State in which they live.

Peace which is left in the hands of the States as an option according to their wills becomes a right of the individuals and of the peoples, since it would be a precondition for economic and social development, and also for the democratic and political institutions to function in all freedom.

The policy of the States hence has an insurmountable limit which the maintenance of peaceful relations between the states and the respect of individual and collective fundamental rights. "Pacifism through the law" which was thought to render war less violent becomes a principle which brings order into the whole system of international relations. From this, on the other hand, it emerges that international law increasingly prevails on domestic jurisdiction in the field of human rights.

The international community, however, not only produces new principles to protect human rights, but it creates new authorities which have the role of controlling that the respect for human rights is guaranteed in all the parts of the world. On the international level, therefore, there is affirmed a constituent function of human rights. And it is the same function which the rights have had in the National States at the origins of constitutionalism.

Hence, a precise relationship between internal and international legality is asserted and also between fundamental rights and the

international order. Not only a foreign aggressive policy, but also an internal policy which denies the rights may create political instability on the international level, by creating tension between neighbouring countries, or within an entire region.

Having taken account of all this, neutrality cannot warrant peace any longer. The refusal to be involved in military alliances does not render the world more peaceful when the conflict deals with the respect of rights in any part of the world. The coalitions of States aimed at humanitarian or peacekeeping missions are not military alliances, but they are alliances aimed at improving the conditions of living in war-torn countries. Guaranteeing international security also through the use of force has could improve the conditions of life of a whole people. The essential question, however, is to consider the use of force as a means and not as an end. Through the use of force, in any case, the structures of the state have to be rebuilt. The warranty of rights, therefore, depends on the good functioning of the State, and from the activities of the Courts and of the police which have to be only at the service of the law. To impose peace with arms is useless, if in the territory on which this armed intervention occurs, the conditions for the peaceful cohabitation and economic and social development are not created.

With regard to these objectives, the choice of neutrality appears to be a choice of real politique which leaves things unchanged.

For this reason, in the world ruled by the right of peace of the peoples and of the duty of humanitarian intervention, the value of neutrality is an anti-historic value.

4. From what has been said, it emerges that the crisis of the nation-State constitutes an important factor for the affirmation of the values which belong to "pacifism through the law". The more recent history of pacifism is an account of events aimed at diffusing the culture of peace and of the setting up of normative instruments for its guarantee. The objective was that of juridically controlling the exercise of the foreign power of the States. To achieve such aim, there has been an attempt to create a model of the relationships between states which does not merely maintain the *status quo* by the balance of power, but to guarantee in reality the supremacy of international law and the supremacy, in the international sys, of the authorities *super partes* called to defend it. In other words, the object is to guarantee peace through law (Kelsen); but not any peace

and not any balance. Justice in international relations is the condition necessary to avoid conflict, to guarantee political stability.

If in the past, or in any case, during the years of the cold war, the balance of power and the military force which guaranteed it were the only means of dissuading a State which wanted to commit acts of aggression, in the years following 1989, since bipolar balance has become impossible and since there was no military multipolar balance in sight, the only way of guaranteeing peace was that of organising a network of institutions and political and military defence to guarantee it. Only such security system can avoid the resort to force to resolve conflict between the States.

A system of duties, codified through a multiplicity of international documents and managed by international organisation, especially regional organisation, which, directly or indirectly, operate within the system of the UN, limits the freedom of the States in a matter of exercise of the external power. The aim of these organisations is that of being recognised as actors in the international scenario.

They tend to control the international activities, promoted by the states. In the post-Cold War World, public opinion acquires the unprecedented role of main actor in the international scenario. The people, once freed from the threat of nuclear war, appear to wish to be involved in the decisions which effect the future of humanity. In this sense, the people seem less tolerant of political power. In this climate, the role of the NGO's acquires more strength. The people holds that international politics should be based on the principles of morality both collective and individual. National interest, that is, the interest peculiar to every single State, has appeared to be always less deserving of protection when there are the rights of the individuals and peoples at stake. This is not a totally new process. This has had a slowly matured over the second half of the XX century. These years have seen the approval of documents, international declarations which have banished war as a factor of regulation of international relations and defined the area of fundamental human rights into which the internal sovereignty of States does not enter. The international community lies on the principle— in a certain sense destructive to the international order on which the *ius publicum europaeum* is based – according to which international life cannot escape moral judgement and the States have not merely rights but also duties.

The problem, however, has been for years that of going in this

field, from one normative activity, that of merely prevision of the regulatory principles of the international relations and of the position of every individual before his own State and the international community, to an activity of guaranteeing rights in a concrete manner.

Since war is no longer an instrument through which influence is made on international relations – rather, it is a crime – there are other instruments through which peace and justice may be achieved; in the first place, the intervention of the International community in the affairs of the States to prevent and solve the conflicts.

The great problem which has been created with the end of the Cold War, in the times when international legality is no longer a myth but an achievable political aim, is that of determining who has to warrant order in the world as long as the UN do not have the material means to provide for the “security in the world” with its own means. Once the balance of power which had brought about world peace for years decreases, war is not considered the only factor capable of changing the international balance, it had been asked whether the world which was established after 1989, would be a unipolar or a bipolar world. Analysts have favoured both positions. However, one thing is certain: the post Cold War era will not be an anarchic world, in which States, even the small ones, would be able to make war again each other to regulate their external relations, and in which they can freely exercise their domestic jurisdiction without their being any subject to control and interventions on the part of the international community.

If the States have duties in the exercise of the internal and external sovereignty, and if the violations of these rights involve sanctions on the international level, the more difficult problem would be, of course, that of controlling the lawfulness of internal national policy.

If the duties have precise beneficiaries, the peoples and the individuals, and if they involve activities of control and intervention to prevent war and to guarantee rights, there is no doubt that such duty of control and interventions constitutes the precondition to guarantee lawfulness in the relations between the states and to guarantee the fundamental rights which are threatened within the States. It is only a public opinion, aware of its rights and which has access to the means of information and political participation necessary to mobilise itself can warrant an effective control on the lawfulness of the behaviour of public powers.

When confronted with the duty of interference, which could also involve the use of force, neutrality does not appear as a status because it can produce exemptions from obligations in the relations between one State and the international community. The neutral State has the same duties of all the other States: not only can it not make war (since it is excluded from the status of neutrality) but it also must participate in the functioning of a system of international security which is capable of guaranteeing lawfulness in the relations between the States and within the States, with reference to the human rights. A security system which, given the aims pursued, cannot not have a co-operative order), because all the states in the world of interdependence are together producers and consumers of security.

When considering the problems created by the cold war which has seen the States limiting their own destructive capability through the creation of the institutes and mechanisms which guarantee peace (the UN in the first place) and through gradually reducing their nuclear weapons, it is undoubtedly that the collapse of communism has radically changed the international scene and hence radically questioned the principles on which the ancient international legal order was based. The legal order of the cold war was a "legal order" of war, of a war which was not being fought, but based on the equal destructive capabilities of the superpowers and on the diverse military ability expressed by the single powers within the two systems of alliance. Political stability and peace were not based on the respect for international law but on the ability to dissuade exercised by weapons. In a few months, this scenario changed; in an unforeseeable manner, considering also the rapidity of the collapse of that regime which has no precedent in history, if compared to the centuries which had to pass for the collapse of the Roman empire and the decades during which the crisis of the British empire was concluded which eventually lead to its collapse.

5. It is impossible to understand the new international situation if we consider the collapse of communism is the only reason of the great disorder which today characterises the world. This collapse is surely more relevant but immediately following the collapse of communism, it was not possible to envisage that a dialogue between Russia and the US would have been started. A dialogue which with alternate matters goes ahead particularly in these last months. The terrorist challenge which integralist groups pose to the western world

and primarily to the United States has created a real axis between Moscow and Washington, which constitutes in all probability, the foundation of the new world order.

Some time after the collapse of the Berlin wall and of the historic meeting in Malta between Bush and Gorbachev towards the end of 1990 (in which the USSR and the USA reached an agreement, on the basis of which the United States would support the Perestroika and the USSR would support the international policy of the West, as long as it guaranteed with all possible means, the principles of lawfulness, which had to give order and transparency to international life), the invasion of Kuwait on the part of Saddam Hussein had to unequivocally indicate that the post-cold war world would be less ordered and foreseeable than the old world of two blocs.

Beyond all the political interpretations which had been given to the Gulf War, with particular reference to the severity of the American reaction, backed by the UN with an ambiguous formula which brought to mind that used by the UN in the time of the War of Korea (it had been held that that was a real announcement of the American design to substitute the bipolar order of the cold war with a new global unipolar order), there is no doubt that the new reality, after almost fifty years of immobility on the part of the UN, was constituted by the decision taken by the two superpowers to resort to reacting through the use of arms to an outrageous violation of the international lawfulness, which had occurred through the aggression carried out against a sovereign State. The USSR and USA agreed on the necessity of not accepting the completed fact, without asking themselves who would have benefited from a war fought in the name of the international Community, against Iraq. The principles have prevailed on the politics of power. The warning which from that initiative was issued to all the states – but particularly to the medium powers which were after, since the bipolar equilibrium was over, the leadership in their respective regions on the basis of the achieved military power – was that the end of the Cold War could not mean the return to a situation of international anarchy. The global disorder, which for almost fifty years had been prevented by a system of distinct obediences, guaranteed by the superiority of the military means which the superpowers had at their disposal and the agreement of Yalta – which sanctioned the unchangeability of the spheres of influence assigned to each of the two superpowers – had to be tackled from the start and creating an outrageous precedent.

Moreover, at least in form, the initiative of waging war against Saddam Hussein excluded the UN as regards the operative decisions which dealt with the temporality and the modality of the military strike. Once that in the UN there had been certified the violation of international law on the part of Iraq, the fact that all the UN could do was to give a political coverage to the military mission against Saddam Hussein could not be ignored. The UN was not capable of providing troops to its dependencies; it could only provide that the decisions taken by the Security Council be executed by a coalition of States.

Moreover, the initiative decided by the UN did not leave any margin of doubt on the type of illicit behaviour – it was undeniably a matter of aggression – committed by Iraq against Kuwait. Hence, it was not a matter of a previous authorisation, to give a lesson to Hussein. The Iraqi dictator, on the other hand, was responsible for the commission of grave humanitarian unpunished crimes which had been tolerated for a little too long: such as for example, the ethnic cleansing carried out against the Kurds. Operation Desert Storm was conceived as an operation of international policy, decided in terms of Chapter VII of the Statute of the United Nations: therefore it had a sanction character (in spite of the extraordinary mobilisation, both on the quality and the quantity of the means used) and it could not be confused with a normal act of war. It was not a matter of militarily defeating Iraq, or of destroying the regime of Saddam Hussein, notwithstanding the fact that his tenure of the Iraqi dictatorship was jeopardising the tranquillity of the whole region. Once the aggression was pushed back and the sovereignty of the State of Kuwait was restored, the operation of international policy had to stop: and so it was. The Gulf War at this point constituted an important precedent, in the field of humanitarian intervention, which had to be asserted on the part of the international Community to distinguish between a military operation which had a precise and limited sanctionary character and a war aimed at conquering or committing aggression with the finality of victory of one of the belligerent states and the defeat of another.

In spite of the fact that the troops engaged against Saddam Hussein answered to a whole chain of military commando with the US leading the states which collaborated in the mission, there is no doubt that the political control on the part of the UN has subsisted for the whole duration of the operations and has constituted, for

public international opinion, a guarantee of lawfulness not only of the military initiative, but of its concrete results on the political future of the region. Nobody was ready to accept the Gulf War as an American War.

The Gulf War, in the consideration of public international opinion, has been the resuscitation, as it were, of the UN which was no longer immobilised by the vetoes of the superpower, and also of the affirmation of the co-operation principle in a matter which meant the guarantee of international security.

The new international order definitely does not emerge – this was impossible – from a decision of a coalition of States to take arms against Saddam Hussein, the aggressor of a sovereign state. However, the fact that various States decided to mobilise to render operative an essential principle to safeguard international peace, and the principle according to which the situation in fact imposed militarily to decide the controversies between the States, renders the international Community as an principal actor of the international order. All the States, become, in this light, builders of security: the distinction which has characterised the security system of the cold war between the States producers of security and States which were only consumers of security. The emblematic fact is those States which surely cannot qualify as great powers participated in this operation of highly taxing international policing.

It is not devoid of meaning therefore the fact that in the face of the terrorist attack against the US, the answer of the whole international Community has not stopped at political solidarity expressed to the United States, but it has been translated in a mobilisation, even military, around the United States, perhaps without precedent – for the amplitude of the mobilisation itself. The fact that even the NATO has qualified the terrorist attack as an aggression to a Member States, the US, so much so as to resort to the “reaction clause” prescribed by the Treaty, indicates that in reality, there is the development of a collective security system, within which, the burdens carried by the States are obviously not equal but based on the common sentiment of security and of international lawfulness.

6. On the morrow of the end of the Cold War, after the intervention in the region of the Gulf, neutrality appears to be totally inconceivable with regards to an operation of international policing which involves,

for the coverage given by the UN, the international community in its entirety, and hence both the States which have directly participated in the "war" of the Gulf, and also those which, though not participating have anyway shared the philosophy of that operation and its character laying down a fundamental precedent in terms of the establishment of a new international order.

If war becomes illicit not only because prohibited by the principles and the mechanisms prescribed by the security system of the UN (which were also in force during the years of the Cold War, but which were "suspended" by the duopoly exercised by the superpowers on the international community and in the UN) but because against the States which undertake war there is the adoption of coercive sanctions (the international community takes up arms to restore the violated right), it is evident that neutrality does not have any practical reason to exist, because the war against Saddam Hussein is an operation of international police, not a real war. And even military alliance, when faced with the prohibition of war which is so heavily sanctioned, becomes something else, as it were, as regards the former alliances which had the aim of military aggression or the defence from aggression. Military alliances, if they become a useful instrument for restoring legality, they can surely involve neutral States. However, that is not all. With the disappearance of a global ideological and political conflict which divides the world in two blocs, even non-alignment loses its *raison d'être*.

Once, the equilibrium between States are not altered through war, those principles of international law which used to regulate the use of force to render war more human and which also foresaw the choice of aloofness and impartiality with regard to the conflict and to the belligerents considered *iusti hostes* collapse. (Neutrality would only be relevant in a normal war between States).

The facts which developed after the end of the Cold War however show that not only war has become juridically impossible, but also that it is no longer an event which involves the States and hence the whole nation. From this point of view, the aggression which Iraq inflicted on Kuwait was perhaps the only classical war of aggression of our times.

In this sense, the wars which took place in the 90's in the territories of ex-Yugoslavia have become the paradigm of a new type of war which does not see the States in conflict any more, or actual armies fighting against each other. The entire *ius in bello* developed in the

XX century which considers the international subjectivity of the States a decisive element so that it can fight a war regulated by the law, does not find possible application when faced with conflict which does not involve armies fighting each other but, armies fighting against civil populations whose only guilt is that of constituting a minority in the State which perpetrates ethnic cleansing or genocide. This new war is fought between substatal entities which cannot be recognised as subject of international law (since the participants in this new war have little or no say in international fora convened to restabilise local order and halt the most outrageous violations of human rights).

The new wars do not even involve "normal" conflicts aimed at the recognition of independence of one people or of a territory. In the ex-Yugoslavian matter, the principles of self-determination evoked to distinguish between the opposing fighting groups. The idea that the international community may intervene in favour of those who vindicate independence of a people against the State which is the oppressor against one or more ethnic minorities appears founded. In this case, the international community justly violates domestic jurisdiction. There has been a conflict on the ex-Yugoslavian territory not on the right of an ethnic minority which wanted to form for itself a State in the territory in which it has always lived, but on the right of a population to remain on that territory and to resist to the pretension of the State, in which it identifies the majority of the population – to evict the ethnic minorities from the territory and force them to move to another State.

Mary Kaldor has analysed in detail the elements of this "non-war" which is no longer a war between the States, not even wars of national liberation, that is wars fought by an entire people to obtain independence, but "private wars". Kaldor has identified the following characteristics of the "new wars":

a. The "new wars" – in this sense the Yugoslav experience was paradigmatic – are wars which are born from the disintegration of the State and not to subject a State to another. In Yugoslavia after 1989, there was not only the dissolution of the Federal State which Tito had laboriously put together, but there was also the dissolution of any republics of the federation which had very diverse ethnic basis. The push towards the disbanding of the States had been given by various forms of exasperated nationalism which through the disintegration of the State consented the survival of political

nomenclature which had been defeated after the financial ruin of the communist party as the sole party or the leading party.

b. The vacuum of power resulting from the end of the regime and the economic crisis which had become acute after the creation of this vacuum has not rendered impossible a peaceful democratic transition. There hasn't been a revolutionary groups which took over when the ruling class was defeated. Those regimes have collapsed as a result of an implosion which did not leave any alternate ruling classes but groups and adventurers who have tried to substitute the dictatorial regime with an anarchy through fierce privations not only of the economy but also of policy. The internal wars which broke out seemed to be more instrumental to render permanent a situation of chaos produced *in loco* by the end of the regime (and perhaps many members of government, businessmen and common crooks to avoid being brought to justice have abused of disorder) rather to stabilise a new political and social order which would take the place of the one which had collapsed.

Criminal activity, sometimes promoted by organised crime which would be based outside the country, has been protected by war and social chaos and has therefore financed these singular nationalistic wars. In this context, it is clear that the irregular troops, police forces and the private armies and mercenary groups who have sought to find their fortune in the great disorder which had been produced or sent abroad to stimulate new and more extended disorder were stronger as regards the number and means available with regard to the regular troops.

c. These private wars could not obviously respect the rules which on the international level discipline the resort to violence. It has frequently been a resort to genocide which had been perpetuated on a large scale and with unprecedented cruelty.

When faced with such situations, the first duty of the international Community had seemed not that to restabilise the political order, and hence restoring the normal forms of legality, but especially to protect the victims through a massive humanitarian initiative.

In the beginning, international military intervention, during the wars which were being fought in the internal States of ex-Yugoslavia, it had been conceived as humanitarian intervention, necessary to assist the populations which were struck the violence of war; to guarantee the arrival of provisions and medicinals and the necessary

humanitarian channels through which the civil population which were isolated as a result of war would be reached.

In this type of missions, it is essential to create a security framework in such a way that the provision of humanitarian aid became possible whilst protecting the safety of the rescuers. The characteristics of the conflicts which have been fought at the Balkans and the low level of political representation which the fighting factions had on the international level. These two factors have rendered very dangerous peace-keeping operations. The principle actors of the conflicts did not have the capability of managing the crisis on the political level. The traditional UN divisions (peace-keeping forces) engaged in the operations monitoring the crisis situations and in the organisation of humanitarian aids have frequently turned out to be insufficient to face the situations of a real war in which they find themselves involved. In fact, the peace-keeping forces were not equipped to guarantee humanitarian aid and resist eventual armed conflict, but to defend civil populations particularly when they are gathered in protected sites, whose security used to be guaranteed by the international authorities. To guarantee humanitarian aid, there needed to be a real army. The humanitarian operations, therefore, which originally appeared to be distinct in their functions from those of peace-keeping, being justified from the fact that there was fighting and that the possibility of negotiation or achieving a truce seemed remote have become gradually real and proper operations for peace enforcement. Hence, there has been a natural evolution of these operations in the course of work, in the manner that divisions sent only to assist the civil population in fact found themselves in the centre of the fighting and forced to defend themselves from the attacks which the fighting factions inflicted unrelentlessly on the troops which were placed in the conflict.

7. It has therefore been a matter of an inevitable evolution of humanitarian operations gradually becoming peace-keeping operations and hence aimed at putting into practice the decision of the Security Council of the United Nations. The latter, when faced with a very grave crisis, did not limit itself to carrying out a normative activity which distributed fault and reason between the parties to the conflict but has patronised and promoted the peace operations to arrive to a military solution of the conflict but to arrive anyway to the truce and hence to interrupt the spiral of violence which risked

to massacre whole populations and to the isolation of those factions which aimed to bring to the completion the operation of ethnic cleansing. of populations which were more or less consistent.

The most interesting aspect of the activity carried out by the United Nations in these emergencies through the decisions of the Security Council is constituted of the frequent resorting to the coercive measures provided in Chapter VII of the Charter of the United Nations. The Security Council has appeared to be adamant in many occasions of imposing peace and of avoiding humanitarian massacres. However, this has not always occurred. The Security Council has been, on occasion, accused of implementing a policy of two weights, two measures. The Security Council did not always use force to suppress the behaviour of the States which violated international law. The coercive measures were resorted to without requiring the collaboration of the States in which territory military conflict was unfolding. In the case of the new wars, in fact, the territorially sovereign State, is either indifferent as regards the violation of the rights, or is not capable of stopping the violence or it is the State itself which is violating the rights.

Hence, coercive measures had been resorted to normally move against the States as provided in the Statute to react to the violation of international law, to suppress any form of resort to force or to react to the commission of grave and wide humanitarian crimes from whoever they are committed. The objective of the UN Statute was that of warranting the *status quo* in the relationships between the States, and hence avoiding any facts carried out which could modify it. Through the practice of peace operations taken against whosoever threatened or upset (substantial entities or real criminal gangs) the political stability of the States and against those who deeply violated human rights, the repressive mechanism, willed by the Founding Fathers of San Francisco to guarantee the rights of the States, was being put to the service of human rights and to the rights of the peoples.

The philosophy which has justified this radical change in the prospective, with reference to the functioning of the system of security of the UN, cannot be understood if not through the new and wider boundaries of the concept of threat to peace defined by the same Security Council.

The threat to peace, traditionally singled out in international aggression, in aggression committed by one State against another,

in the world of interdependence and of the supremacy of international law is identified in any event, even within a State, which produces instability in a region or in any violence of the masses inflicted on fundamental rights. In fact, the consequence of violence in a world such as the present one, in which the freedom of movement of persons and capital acquires decisive significance, brings about chain reactions destined to have an effect on the social tranquillity of the people who are not necessarily bordering with those where violence is being committed. The concept of a threat to peace, therefore, has to be updated according to the new international scenario which is characterised by the emergence in the international arena of players different from the States.

Facing the social and political factors, which, in this light, threaten the peace employing even the authoritative mechanisms of solution of the controversy and sanctions which had been conceived to stop war between the States and to force them to negotiate peace, poses first and foremost the problem of adapting an international law born to discipline the actions of the States and hence organised on the basis of the foreseeability of facts capable of modifying the system of international relations, to a world which is more disorganised in which new protagonists which enjoy little international representativeness are mushrooming.

The new functions exercised by the UN in this field have given birth to a new practice but the legality of such practise is being highly doubted. It has been observed that the principle of effectiveness, therefore the capacity to impose peace where violence reigns, needs to be employed as the decisive criterion to establish the lawfulness of the decision of the UN Security Council. On the basis of this principle, the legitimacy of intervention, may be evaluated only *a posteriori*.

The UN is legitimated if it manages to impose peace and the measures decided upon are held to be legitimate if they avoid definite massacres. On the other hand, in the face of fighters who are not capable of assuming serious international responsibility because they are not subjects of international law, the only thing which remains to be done is to stop violence with violence.

However in these cases, there is a delicate problem of international democracy, with regards to the decisions which regard such interventions, whilst also taking into consideration that not all the new wars, and the international crimes, as has already been said,

have had the same reaction from the international community. In this sense, it has also to be taken into consideration that military operations may influence the same political future of the territories on which there is intervention, given that only with difficulty can perfect equidistance on the part of who intervenes between the fighters, considered also that some of those parties accept the intervention and others oppose it, even by resorting to violence.

Humanitarian intervention, therefore, inevitably, has caused discussion and will cause discussion for long for the arbitrary actions to which it can give rise. Objectively, it is difficult to distinguish between legitimate intervention and abuse of power in numerous cases. It is therefore difficult to equally distribute reason and blame between the parties to the conflict. Guaranteeing peace in a territory is objectively different than defending the truce reached between the opposite factions. Intervening in an intrastate conflict and imposing peace militarily does not amount to much if then a social and institutional environment capable of accepting peaceful help imposed by the international community is not rebuilt and hence the most remote reasons for the conflict are not faced.

There are aims which are difficult to achieve in social contexts which would have been harshly tried by violence caused by war, and in which it is difficult to guarantee stable peace without bringing to justice the perpetrators of atrocities which would have been committed, in the only way possible, that is, by trying the people responsible for humanitarian crimes. Peace without justice, inevitably, will be sooner or later interrupted by a spiral of violence and revenge. From this point of view, the international community appears to be justly not appeased by reaching any type of peace which perhaps ignored the right of the families of the victims to see tried and condemned the persons responsible of great atrocities. Even if it is right that it is the same local populations to decide the type of process to bring peace would be able to guarantee a stable political equilibrium, nonetheless, the idea that there isn't really peace without justice seem to prevail on any form of realpolitik, both in the ambit of public international opinion and in the countries which have been the stage for recent humanitarian catastrophes.

One thing is sure. Whilst taking into consideration what has been said so far regarding humanitarian intervention and the peace-keeping operations, these not only were bound to bring the peace but also to build it where the conditions necessary for long-term

peace do not subsist, and is clear that in the world of the new wars and of the humanitarian interventions directly managed by the international community the borders of domestic jurisdiction are always becoming more restricted.

If the international community is capable of even setting in order the creation of Tribunals with the aim of judging crimes against humanity, trying the people responsible of such crimes, and hence not stopping before an abstract political responsibility of the State with regard to their commission, it is undoubted that we are faced with a new frontier in the field of fundamental rights. And the proof of this lies in the fact that the promotion of these tribunals through the control of what the States do in this field tends to move more to a supranational level.

When faced with this scenario which influences the international sovereignty – as has been said – of the States neutrality appears to be a real non-value because it is translated in a position of equidistance between the warranty of rights and their violation. And if the new wars have as their primary aim the rights, and therefore, the capacity of a State to know how to defend them, it is evident that every member of the international community cannot not feel directly involved in an action for the protection of rights, such as that which is being discussed.

Even the neutrals cannot not recognise that whilst States are an artificial creation, human rights are not, and that it is along the lines of effective protection of human rights that a project of political stability of the whole world is being drawn up, on which project the security of the traditionally neutral countries depends as well.

The fact that the content of the status of citizenship acquires universal character and it does not depend on the relationship which ties an individual to his own States, changes radically the perspective in which the neutral states could legitimately interpose themselves not only in cases of war between the states, but also when the international equilibrium founded on the respect of the status quo between the States and the unquestionability of their internal order seems unjust. If intervention is a duty, neutrality becomes the violation of the duty.

8. The points which have been discussed so far on the relationship between responsibility for human rights and political stability acquire a particular concreteness if applied to the European situation in a

phase of the integration process – which should be concluded in a few years time – in which the idea of bringing together a more united and a wider Europe seems to prevail. The political dimension of the integration process seems to prevail on the commercial one and this inevitably has consequences on the plane of a security policy and hence of the planetary balances which the emergence of a great economic and military power tries to define.

Europe has been the territory on which the greatest wars of the modern age have been fought. Besides, some European States had dictatorships which were capable of suppressing for long decades any form of guarantee of individual freedoms. In addition to this, Europe has been the centre of the conflict between West and East and hence the area which was most at risk in the world during the cold war and when there was the threat of nuclear war.

The idea of one Europe united around the same idea of democracy and citizenship, capable of expressing a “common juridical area” and to organise a model of security capable not only of providing to the need of security in the continent but of constituting an important factor in the establishment of a new world order represents a very concrete possibility for the first time in modern history.

The disappointing lesson of the Balkans where Europe had a marginal role, though it was a European war, has forced Europe to have a precise common identity even in the field of security whilst developing its own strategic capacity on the level of defence and peace-keeping operations. Europe has decided (summit of Helsinki) to project the conversion of its military forces traditionally static and defensive, in corps capable of effecting offensive mission (missions which up till now were only undertaken by the US). In this field, there is still a lot to be done: but the direction of the path undertaken up till now univocal. Hence, Europe seems intent on building its own strategic identity but at the time not refusing the military dimension of NATO and accepting the a co-operative relationship with the US which remains the leader-State on the on the international level on the plane of military force.

After the end of the second world war and the unstoppable Westfalian system of the sovereign States, the international power tends to concentrate on a small number of industrialised States (those of the G8). The political power, on the other hand, in an even smaller number of countries. In the economic but above all, the military field, the US totally outweighs the other States. But after the Cold war it

is unthinkable that US wants and may assume all the responsibility to fulfil the needs of the whole planet in terms of security. Every State must share in the responsibility of guaranteeing "international tranquillity" in proportion of its political power and its economic strength. Of course, no great State may have political weight on the international level if does not contribute proportionately its political power to the "global security", threatened from the modalities of the new wars. International law and the same international criminal justice are subjected to the need of global security.

Europe in particular seems to be aware of this necessity also considering the fact that the most serious crisis which in recent years have given rise to real humanitarian emergencies have exploded in the European territory or the Mediterranean Basin. This would mean that Europe, in the field of security cannot limit itself to play a unilateral Atlantic role. It must also participate in guaranteeing political stability on the Mediterranean and Continental level, on the basis of a precise strategic design, which needs adequate military resources. If the Mediterranean will continue to be one of the most unstable regions of the world, even the social tranquillity of most European States will inevitably run serious risks. No world order may guarantee political stability and social well-being if it does not have political flexibility which allows the necessary "regional adaptations". Europe has to head the constitution of a front of the Mediterranean countries (Italy Spain and France) to establish new co-operative relations of co-operation with the African and Middle-Eastern States with particular reference to Italy, a country which because of the fact that geographically it juts out into the Mediterranean. It is evident that this region will have further possibility of growing if on the Southern coast there will be the promotion of civil development based on collective services: railways, schools and hospitals. Changing the relations between Europe and Africa means creating a type of development based on the creation of "regional economies": it means thinking in terms of development in the terms of a Region State.

Europe also seems to be finally aware of this necessarily Mediterranean dimension of foreign policy and of the common security (CFSP). The process of integration has pacified Europe. Not only; it consents Europe to become a relevant factor of peace on the world level – in a position of equal partnership with the United States. In this sense, militarily Europe is, definitely, less credible

than the United States but politically more credible because it does not have any external enemies. Undoubtedly, European integration develops around a bond, which constituted a resource of the whole world: a structural bond to a policy of peace. Naturally, it does not depend only on Europe to find an acceptable balance with the US to organise a really multilateral system which together guarantee security and shared economic development.

It is true that with the end of the cold war, one of the elements of international situation, perhaps the principal element, which pushed Europe towards the United States, has vanished. But it is also true that the United States looks at Europe, not any more threatened by the USSR, with more detachment. American society, after the disappearance of the historical enemy, considers it unjustified to channel to Europe hefty military expenses which could be used to finance social services in the US. The United States which for years has asked the European partners to commit themselves more strongly on the national level, have started to reduce their military support to Europe. This notwithstanding, if we consider the perspective that Europe acquires a new strategic capacity, through which Europe would no longer be a military pygmy totally dependent on the United States, there is an openly hostile attitude on the American part because it is held that a significant European military role weakens NATO. Anyway, it can also be said that up till now, in American politics there have emerged, even after the end of communism, – and it is not a matter of a new fact in the American history – two schools of thought, one which favours isolation, and one which aims at control, at intervention in all the affairs which could produce political instability, because it is held that any instability may damage the supremacy of the United States and hence also the interests of the country. These two schools of thought have also influenced the relationship the United States has built with Europe particularly after the end of Communism. However, it is important to say that many misunderstandings in the relations between the United States and Europe are not attributable only to an imperial concept of the American power and hence to American diffidence, but to a certain reluctance of the European States, which are ready to pass on to the EU quotas of sovereignty in matters of foreign policy and of security, but not the principle of sovereignty for its own sake. Europe is not yet a single State.

Today, after America has been attacked in its core after the

September terrorist attacks, it cannot take care of the world, it cannot choose arbitrarily allies and enemies once the invulnerability of the American territory was destroyed. America is at war wherever there is one or more organisations which threaten Western civilisation. The US, which had given up till now solidarity to the others, need solidarity, particularly from Europe.

This new reality imposes on Europe new responsibilities and it cannot only vindicate "more equality" in the relations with the United States. Europe has to organise its own military force on the basis of an autonomously defined strategic idea in such a way to impose in fact a really co-operative management of the international security policies.

To this end, the merely decorative Summits and the declaration of good will are not enough; there has to be direct intervention in all the instances where a war has to be stopped or peace needs to be rebuilt.

This being a very ambitious plan, no European State, independently of the level of the interest it harbours in joining the European Union, can withdraw from participating hiding behind its anachronistic neutrality. The EU efforts to include in the European Union also the formerly-communist European States. It is a historic aim. The choice is not between neutrality and participation in the construction and protection of the European strategic design, but between the affirmation or the negation to achieve a foreign policy which has a precise European value.

The EU, with the tasks which it has undertaken after the Treaty of Amsterdam and the Summit of Helsinki can permit even the small and peripheral States – and no one of the European neutral States is a great power – to participate in the definition of a foreign policy which would not be possible to realise through the decision of the single European States. The Presidency of the Community is a position of great responsibility on the international level. It represents in the world a great power such as the EU. A small or medium European State, even if neutral, may occupy this position. It is enough if one considers the role which Luxembourg, which was discharging the duties of the European Presidency, during the Gulf War. Member States may utilise their turn of presidency by inserting specific problems in the agendas of the EU summits, transforming therefore national

problems in European problems. They can also utilise positions taken by Europe to solve internal difficulties, to justify with public opinion measures which are considered unpopular. Therefore it would be too great an error to refuse to participate in the elaboration of a strategic identity and a European military policy in the name of a neutrality which is devoid of any practical purpose.

SECURITY CULTURE AND THE CONSTRUCTION OF SECURITY PARTNERSHIPS: THE EUROPEAN UNION AND CHINA COMPARED

FULVIO ATTINÀ and ZHU GUICHANG

Important transformations are taking place in the security of states. Among these transformations, the formation of a new security culture at the single state and group-of-state level and the construction of a new generation of regional security arrangements are of great importance. The new security culture is based on the concepts of co-operative and comprehensive security. The new generation of regional arrangements is based on the substitution of military alliance alignments with security partnership agreements. In this paper, the focus is on the new security cultures of Europe and China and on the role of the European Union and China in the present state of the construction of the regional security systems of Europe and Asia.

1. Introduction

Over the past few years, the world has been changed into *a single geostrategic space* (Held and McGrew, 1999: 88) and is presently characterized by a process of military globalisation and a state of global pacification. Patterns of arms trade and expenditures, linkages among national defence industries, and the multilateral pattern of military intervention are some indicators of the growing military relations among all the states of the world in the present international system. This military globalisation frames a state of global pacification. In fact, the expectancy of war between the major powers sharply decreased after the collapse of the Soviet Union and the number of wars between minor powers has been decreasing for the past thirty years (Zangl and Zurn, 1999: 140).

Since 1945, the processes of disintegration and unification, not military aggression, have been responsible for ending particular

states. In past international systems, the security of the single state was grounded in the national military power and/or the formation of military pacts and alliances. But in the present world, the number of states in military alliances is decreasing and the formation of new alliances is less frequent.

All these changes suggest that important transformations are taking place in the security of states. Among these transformations, the substitution of military alliance alignments by regional security partnership agreements (Attinà, 2001) is one of the most important. In this paper, we focus on some conditions of this change. Our main concern is the role of the European Union and China in the present state of the building of the regional security systems of Europe and Asia. But, in a constructivist perspective to the analysis of regional security, we firstly account for the security cultures of Europe and China.

Security culture is made up of

“those enduring and widely-shared beliefs, traditions, attitudes, and symbols that inform the ways in which a state’s / society’s interests and values with respect to security, stability and peace are perceived, articulated and advanced by political actors and élites” (Krause 1999: 14).

Our assumption is that political leaders and people respond to the challenges changes in their security environment and adapt their security conceptions to different conditions of international relations. In addition, shifts in security culture frameworks bring about shifts in the selection of new security policies.

The current debate on regional security agreements is concerned with the relative importance of two factors in the promotion of security building: multilateral international institutions and the internal security culture of nation-states. We share in common with some analysts of security building the view that multilateral security institutions have an effect on the security culture of concerned states, because security culture is not static in nature. According to Adler (1998: 120), the relationship between multilateral institutions and security communities is based *“on agency, that is, the catalytic function of institutions to promote, induce, and socially construct community by means of community-building practices”*. He believes that multilateral institutions activate the practices and conditions for peaceful change. These conditions are:

- a. Cognitive and material structures.
- b. Transactions between states and societies, and
- c. Collective identity or 'we-feeling'.

2. European security culture

The security culture of European countries has been forged in the bipolar context of the nuclear deterrence strategy and the multilateral context of the Helsinki Process. Arms control negotiations aimed at coping with the risk of the nuclear arms race were as important as the progress made by West and East European countries in the context of the Conference on Security and Co-operation in Europe (CSCE, today OSCE).

In the 1960s, Western policy-makers focused on arms control to stabilise the East-West confrontation, halt the nuclear arms race and, above all, reduce the risk of war between the two superpowers and allied countries. The fact that this goal has been reached over time convinced the Western public concerned with security and defence that arms control can be used as "*management tool*" of conflict relations between antagonist countries. In the early 1960s, scientists, professionals and experts of the two blocs started to organise conferences, have regular meetings and create networks to debate arms control issues on a regular base. Over time, this *arms control community* – as Krause and Latham (1999) call it – acquired importance in the development of arms control and nuclear non-proliferation agreements. Its importance led to its replication in posterior negotiation processes. The *seminar diplomacy* practice of the Helsinki Process and the *expert networks* practice of the Euro-Mediterranean Partnership are the repetition in other contexts of the *arms control community* of the bipolar strategic dialogue context. Trans-national co-ordination of experts was soon considered an essential condition for carrying out the wide regional co-operation programme of the three functional baskets of the Helsinki Final Act. In CSCE/OSCE's idiom, a number of words – such as meeting of experts, seminar, workshop, conference, round table, forum – is used to name direct interaction between the experts (diplomats, practitioners, civil servants, academics and scientists) of the member countries. Adler (1998: 138-142) adopts the term "seminar diplomacy" because those meetings have taken the form of "*for a modeled after university seminars*". Like university seminars, they are "*socialization*

mechanisms that, based on interaction and dialogue, promotes the development of common meanings, innovative ideas, and cooperative solutions". Adler observes also that

"in addition to their results coming to the attention of the OSCE's policy-making units, delegates will later disseminate the ideas raised at the seminar in their respective political systems, thus spreading the seeds of shared understandings across national borders. This is why NGOs can and do play an important role in seminar diplomacy; they are an invaluable conduit of information from the OSCE seminar to civil societies, and from civil societies, through the seminars, to OSCE authorities and OSCE governments."

The members of the *arms control community* of the Cold War analysed the implications of important arms limitation concepts and arms control measures. Krause and Latham (1999: 30-32), for example, underline the importance of the invention of intrusive measures of 'verification' aimed at increasing the effectiveness of arms control agreements. Regarding the right of foreign powers and international bodies to control compliance with an arms agreement, it was acknowledged and agreed that arms control agreements and treaties between enemies are useless without appropriate measures to reduce uncertainty about the enemy's compliance with agreed norms. Acceptance of the verification clause, developed in the dialogues of the arms control community of the 1960s, eased the way to the adoption of the concept of confidence and security building measures. This concept was created by the Conference on Security and Co-operation in Europe and is considered by European military experts as the essential element of any project of regional security partnership. In the 1992 Vienna Document of the CSCE, confidence and security building measures were taken as a compulsory instrument of the European security system. Military information and personnel exchanges were designed to regulate by mutual consent various aspects of military power, such as size, technical composition and operational practices of national armed forces (Krause and Latham, 1999: 32-34).

The early conception of confidence and security building measures (CSBMs) was limited to voluntary notifications of military activities and other forms of voluntary *transparency*, such as invitation of

foreign observers to military manoeuvres and reciprocal visits of military personnel. The object of these measures is to avoid misperceptions and make military intentions explicit.

The consequences of the adoption of confidence and security building measures are not restricted to the achievement of narrow strategic aims, such as avoiding surprise attack and inadvertent escalation. Implementation of confidence measures causes the transformation of the security relations of the countries involved in the mechanism. In fact, the acceptance of CSBMs changed the security conception of policy-makers, defence specialists and people in Europe. Security was seen as the product of mutual confidence and the effect of dialogue and transparency. Co-operative and multilateral approaches were acknowledged as more efficacious methods to attain peace and security than national threats and unilateral approaches. The *"most important legacy of the East-West CSBM experience was a modification of the Western realpolitik tradition"* (Krause and Latham 1999: 33).

As the Soviet Union accepted Western ideas of arms control and security measures, European governments believe that other states can join regional projects of security system construction which are grounded on mechanisms of mutual and co-operative security. European security culture today assumes that the security culture of states and societies can go through a process of change; security ideas can be learned; and security practices born in a particular culture can be shared with actors of different cultures. Adler's remarks on the importance of the experience matured by OSCE members is particularly illuminating in this regard:

"When assessing and measuring the influence of OSCE's practises, we cannot simply look at this institution's regulatory tasks or short-range activities, because what matters most is the long-range effectiveness of its practices and activities as constitutive of community identity and bonds. For example, when the OSCE sends a mission to Tajikistan or to Estonia, organizes a seminar on military doctrines or confidence-building measure (CBMs), or, as part of its CBM regime, requires states to open up their military activities for inspection, what matters most is not the short-range success of the mission, seminar, or inspection, but the construction of a foundation for

*community practice and behaviour. Moreover, one needs to assess whether OSCE innovative practices and activities have contributed to the collective understanding of the OSCE as a "region" and to changing the way that peoples in this region collectively think about their security. (1998: 121)*¹

The CSCE/OSCE model of international security is intimately linked to the conception of comprehensive and co-operative security. It has a strong demilitarised component and includes economic, environmental, political and human factors as maintained by the school of widening security agenda. The rationale of the political and human dimension, in particular, is that peaceful international relations depend on domestic conditions of all concerned countries. These conditions are, for example, justice and rule of law, democracy and pluralism, human and minority rights, free and autonomous civil society, individual freedom, market economy. The crisis of communism, increasingly manifest over the years of the Helsinki process, facilitated acceptance of the comprehensive security concept by people and governments of Eastern and Central Europe. In addition, practices and initiatives to socialize states to OSCE's norms and familiarize societies and individuals with political and human norms have been explicitly worked out and applied in Central and Eastern Europe and former Soviet countries. The aim of these practices was to learn how to become member of an enlarged community of states and institutionalise the norms of the community however distant some of the admitted members were from community norms (Flynn and Farrell, 1999). This was especially the case in the incorporation without assessment of congruity of the post-Soviet states in order to avoid the danger of leaving them outside and "against" (Adler, 1998: 133-134).

OSCE practices and mechanisms of comprehensive and co-operative security – like early warning, conflict prevention, protection of human and minority rights, and confidence and security building measures – have been designed to institutionalise collective (i.e. regional) solutions to conflicts and disputes, be they inter-state

¹ This chapter owes much to Adler's study (1998).

conflicts and disputes or domestic ones. The expected result of these practices and mechanisms has been the grounding of conflict resolution on a trans-national conception – or regional identity – of security. Initially aimed at reducing the danger of surprise attack by transparency of military apparatus, CBSMs and co-operative security became – under the effect of the norms of comprehensive security – also a tool to enhance mutual trust in general and community-building in particular.

Being the first ones to opt for co-operative security due to the awareness of the destructiveness of contemporary war fought with powerful, technological armaments, the Europeans do not exclude that people in other parts of the world could attain to the same end but – according to Krause and Latham – perceive themselves as the only rational and self-contained actor in international security among an array of aggressive and irrational enemies. The self image of the West as a rational and self-contained actor in international security changed with the disappearance of Soviet Union only to give the place of the Soviet Union to a small number of Third World countries, named *rogue states*. Krause and Latham point out two explanations of this conception: the “*uncomfortable position*” of military planners and foreign policy makers of

“having no embodied enemy and no clear conceptual framework to guide strategic conduct, and the centuries-old western symbolic cultural representation of non-Western societies as ‘irrational’, ‘dangerous’, impervious to the logic of reason and ultimately respectful only of superior military force” (1999: 36-37).

Since the anti-Western attitude of Third World countries did not grow after the end of the Cold War and no radical change in the behaviour of these countries occurred, Krause and Latham conclude that the present Western security culture “*has been shaped largely by the convergence of a deeply embedded Cold War arms control culture and a new discourse of threat and danger*” (1999: 39).

It is not hard to find Krause and Latham’s argument correct and to agree with two *supplementary elements* of the present Western security thinking that they point out: the focus on proliferation as the principal threat to global security and the belief that Western preponderance is the key of international peace and stability. But Krause and Latham’s interpretation is also partial and unsatisfactory

because it leaves aside the second element of the European security culture of the 1990s, i.e. co-operative defence, common security and comprehensive security. The correct presentation of the European security culture must account for both sides of the coin, that is the construction of the new enemies and the new discourse of threat and danger (that is, rogue states and proliferation of weapons of mass destruction) on one side, the conception of co-operative and comprehensive security on the other.

3. Chinese security culture

For the past fifty years, China's attitude towards the international system has been inspired by the aim of removing the economic and political effects of the oppression and abuse of the Imperialists of the colonisation and pre-decolonisation era. For this reason, economic development is the priority concern of the country and, differently from the past, in the last twenty years, openness to the outside world has been acknowledged as a condition for economic development. From the political point of view, the aim of removing the past condition has been always concerned with safeguarding national sovereignty and independence. Today, this concern is moderated by the acknowledged advantage of political interdependence and multilateralism.

Past oppression of sovereignty and independence by western imperialists explains why China believes that the national sovereignty of any country is always at risk in a world controlled by hegemonic powers. The experience of the Cold War and the division of the countries of the world into two hierarchical blocs has made the Chinese political élite oppose to the existence of leadership in any group of states [see Selected works of Deng Xiaoping as cited in Liang 1997, footnote no. 7]. However, China defines itself as a member of the group of Third World countries and is resolved to play the role of the big political power because it is a permanent member of the U.N. Security Council: not an economic and military power but "*one pole in the multi-polar world,*" China "*inevitably occupies a significant position [in the international society] and is playing an important role in shaping its future development*"¹⁰⁰ (Liang 1997: 33).

Contrary to the Western conceptualisation of international power, which conceives of military strength and national and domestic

product (GNP/GDP) as the source of the power of the state, Chinese culture has developed the concept of 'comprehensive national strength'. Comprehensive national strength is

"the accumulation of such considerations as a country's population, geographical size and natural resources, advancement in science and technological research, economy, its membership in formal international political institutions such as the United Nations, and military power" (Zha 1997: 73).

The building-up of comprehensive national strength will be conducive to maintaining political stability, supporting domestic cohesion, improving China's external environment, and dealing with territorial threats.

In Chinese culture, the international system is a web of state-to-state relations. In this system, national sovereignty means the state's reliance on its own means and independent participation in interstate relations. Accordingly, international conflicts are managed through the use of force. This belief has come to be called the *parabellum* or *realpolitik* view of the world: "*conflicts are perennial and zero-sum, and the use of force [is] the only effective means to ensure security, stability and peace*" (Yuan 1999: 87).

The Soviet Union's collapse placed the United States in the position of the sole super-power of the world, China's strength in world politics is credited by Chinese political thinkers and professionals with being the condition for multi-polarity in world politics. China's comprehensive national strength and her resolve to use this strength for the purpose of being *one pole in the multi-polar world* is the greatest check on the hegemonic aspiration of the United States and the risk this aspiration poses to the sovereignty and security of states².

Opposition to hegemony has been the basic theme of China's foreign policy since the 1950s but its origins are bound to the traditional Chinese view of international life (On this point see, for example, Bleiker 1993; Shambaugh 1991; Song 1997, Yuan 1999).

² See more on the 1998 official document China's National Defence (especially p.5), Beijing, Information Office of the State Council of the People's Republic of China.

These origins are seen in the period between the 8th and 5th B.C. century, when a series of rising and falling hegemony dominated China (the Spring and Autumn Period), and in the 3rd B.C. century when the philosopher and Confucius' disciple, Mencius, distinguished the legitimate benevolent ruler from the illegitimate one that needs to be opposed because he employs coercion and force to rule.

Understandably, the Gulf War and U.S. intervention in the Yugoslav conflict (and, recently, the NMD project, the national missile defence system) have enlarged the Chinese portrait of the United States as the global hegemon bent on extending domination on distant regions at the cost of violating the sovereignty and security of local powers. The expansion of American alliances and security partnerships since the end of the Cold War are interpreted as a move to create an international security order based on NATO enlargement and the use of the alliance for humanitarian intervention (as in the Kosovo war).

Chinese security thinking takes a zero-sum view of alliances. Mutual security pacts have no reason to exist unless they have an explicitly identified enemy. The notion that military alliance pacts and, most of all, security partnership agreements could be signed for preserving stability and deterring aggression seems alien to Chinese security thinking.

“Chinese analysts strongly suspect that these alliances (at least those in the Asia-Pacific region) are aimed at China. This is certainly true of Chinese perception of the U.S.-Japan alliance and the extension of Partnership for Peace to Central Asia, the reactivation of the Five-Power Defense Pact, as well as the recently enhanced U.S. security ties with Australia, Thailand, the Philippines, and Singapore” (Shambaugh 1999: 66).

The view of the international system based on the principles of equality and non-interference in internal affairs – always expressed and preferred as a model of the world order in the past by the Chinese political leaders and the majority of the Chinese scholars in the field of International Relations – is similar to the Western image of the state system known as the ‘billiard balls model’. In the Fifties and Sixties, Western scholars very commonly used the ‘billiard balls’ image to represent the realist theory of international relations.

In recent years, Chinese political leaders and scientists have been changing their view taking into consideration important changes of the international system. In particular, they admit that no country can survive and develop without contacts with the rest of the world (internationalism). These changes are mostly attributed to the development of the world economy. For this reason, respect for national sovereignty and multipolarism (as opposed to hegemonism) are not the only priority means for the purpose of building security in the international system. Overall economic development through internationalism and also involvement in the globalization process are seen as a fundamental means of building peace and security in the international system. Chinese leaders admit that the current process of growing economic interdependence has reinforced the requisite of national economic growth and imposed on states the condition of giving up portions of national sovereignty to achieve fast and strong development. Similarly, some Chinese analysts believe that traditional exclusive notions of sovereignty, should be subject to overall national interests (Yan 1996). In respect of the principle of sovereignty orthodox thinkers require that partial devolution of sovereignty should occur on a voluntary basis and on condition that portions of sovereignty are ceded for mutual benefits (Liang 1997: 34). In fact, overall development is fundamental to international security and peace. As the violation of national sovereignty, the violation of the right to wealth and economic development is the content of power politics and causes the interruption of peace and security. In the current stage of world politics the building of security is effective only when reforms are introduced in the unjust and unreasonable models which govern the world economic order.

Chinese thinking on current international politics, then, admits that "*global interdependence is a give-and-take process and that further integration in world affairs is inevitable*" (Chan 1997: 11).

In terms of the IR methodological debate known as the agent-structure debate, the recent Chinese approach to the analysis of the international system neither seems to favour the realist perspective nor Waltz's neo-realist perspective that the international structure shapes the behaviour of the states. It prefers the structure-agent perspective which sustains the theory of interaction between the

agent (the state) and the system with influence working in both directions³.

This perspective is used also in Chinese research on the current state of the international political economy. After the end of the Cultural Revolution, China's opening to the capitalist world market has imposed a revision of the traditional Chinese interpretations of international capitalism and its decadent nature (see more in Zha 1997: 64-73). Economic connections with the rest of the world and membership in world and regional economic organisations are imposed on the sovereign state to increase economic development. At the same time, these connections and membership are means to strengthen State's claim to sovereignty.

On the ground of the structurationist approach developed by Western scholars, Zha's (1997: 75) negative interpretation of the Chinese claim to reinforce state sovereignty by fostering economic linkages with the rest of the world is not fully correct. Keohane and Nye's well-known research on *Power and interdependence* made the same point in 1976. Just as Keohane and Nye acknowledged the inevitable reduction of sovereignty in the interdependent world, Chinese thinkers and political leaders acknowledge the inevitable loss of portions of sovereignty as the state decides to achieve greater economic development by engaging itself in world economic institutions. The negotiation for the accession of China to the World Trade Organisation supports this assertion.

Chinese civilian and military analysts demonstrate interest in the potential of regional co-operative security mechanisms. Shambough (1999: 75) mentions the appreciation of Chinese military analysts for the concepts of co-operative and comprehensive security. Multilateral security mechanisms are praised for increasing the security conditions of concerned countries and countering external powers' presence. In particular, the ASEAN states' project – known as ARF (Asian Regional Forum) – aimed at building a co-operative security system attracts China's interest. However, China's attitude towards cooperative security arrangements in the Asia-Pacific region

³ Wang Yizhou is cited as the most concerned Chinese scholar on the need to develop the study of IR in China along this perspective. See citations of Wang's works in Chan (1997: 12 and 18).

is defined as *conditional multilateralism*. Yuan (1999:99) gives the following definition:

- a. A multi-channel approach. *Regional security issues should be dealt with through a variety of channels, including bilateral, multilateral, and sometimes unilateral approaches at governmental levels. Indeed, China's approach to regional security issues can be seen as distinctly bilateral.*
- b. A multilateral approach. *Beijing continues to emphasize the importance of major powers in managing regional security issues.*
- c. A gradualist approach. *The regional security building process should begin with bilateral dialogues, moving to sub-regional, and then region-wide ones. Issues should be dealt with from an order of ascendance (i.e. from the relatively easy to the more difficult).*
- d. An Asia-Pacific approach to consensus building. *The region, because of its special characteristics – history, culture, economic development, political systems, religion, etc. should not blindly copy the CSCE model; substance is more important than form. Dialogues and confidence-building measures should serve to enhance political trust, which is the basis of stable security relationships.*

The conditional support of China to emerging regional security dialogues is explained by its interest in retaining the largest possible ability to manoeuvre and avoiding as much as possible any constraints on national actions. At the same time, China wants to be a player in the process of building regional security mechanisms and regimes and also to influence the agenda, because it recognizes the importance of regional security dialogues in avoiding uncertainties of unrest and conflict and enhancing reliance on self-organized arrangements against external interference.

Cultural experiences (the Mencian approach to order and morality and the realist perspective on the use of force to maintain peace) and the recent experience of imperialist humiliation made China less receptive to multilateralism and security through cooperation. For example, China was hostile to United Nations peace-keeping operations and demanded the reduction of the number of such U.N. operations. In many United Nations peace missions, China saw violation of the national sovereignty of the target country and

external interference in its domestic affairs. However, this hostile attitude to UN peacekeeping has significantly changed, particularly since the end of the Cold War (Gill and Reilly 2000). According to Yongjin Zhang (1998: 139), by 1980s and 1990s, China has reached a level of active cooperation with UN peacekeeping. Since the 1990s, China has sent 500 military observers to the relevant UN peacekeeping operations. It sent an engineering team of 800 people to Cambodia and 55 civilian policemen to the UN administrative authorities in East Timor. In January 2000, the Chinese government again sent five civilian peacekeeping policemen to the UN mission in Bosnia-Herzegovina. The decision of supporting U.N. peacekeeping missions and also of enlarging the budget of these forces has been attributed to the consolidation of a political group favourable to developing the openness of the country to multilateralism and world political institutions (Tassé 1999: 311). No doubt, the change of policy in relation to U.N. peace-keeping operations credits the country with determination to act as both responsible power and an effective pole in international politics.

The Chinese position on arms control has also changed over the years. During the 1960s and 1970s, China rejected US/Soviet arms control activities and proposals, regarding them as superpower propaganda and collusion aimed at maintaining the military monopoly of the nuclear power. China's argument was that nuclear arms control measures were aimed at freezing the military status of the nuclear powers, while condemning others to nuclear deterrence. For this reason, China did not accept to put its nuclear weapons programme development under any multilateral control. China's attitude shifted during the 1980s, when the Chinese government began to participate in the U.N. Conference on Disarmament in Geneva and other UN-based arms control forums. Finally, China's policy towards nuclear arms control turned to positive consideration at the end of the Cold War with accession to the TNP and other treaties on nuclear armaments test ban. China's policy on nuclear armament measures is aimed at complete destruction of these war instruments but makes this goal conditional to the need to remove the root causes of global and regional conflicts which are also economic and political. Yuan (1999: 121) points to the constitution of a Chinese arms control community which acknowledges that superpower nuclear arms negotiations to some extent contributed

to the reduction of East-West tensions and stabilized the European continent. The signature of the INF (Intermediate-Range Nuclear Force Treaty) is explicitly praised for inducing *détente* and stability.

4. Europe's and China's security cultures compared

A growing number of scholars is concerned with the importance of culture as determinant of national foreign and security policies. The definition of national interests, perception of security problems and management of external relations depend on the views of the political leaders and the culture of the country. For the past hundred years or so, in Europe and the Western world, liberal idealism and pragmatic realism have been both cultural traits and political approaches to solve international problems. Dualism is present also in China with the Confucian-Mencian cultural tradition and the *parabellum* paradigm. In the West, the League of Nations and the policy of appeasement have been the effect of idealism, while their failure has been the reason to opt for the realist policy of containment and the creation of the 'hierarchical' body of the Security Council in the United Nations. In China, the decline of the Qing Dynasty and the onset of "*a hundred years of humiliation*" caused the loosing of the national power view on the Mencian world order view (Yuan 1999: 90-91).

In the presentation of the security cultures of Europe and China, this paper has presented two different pictures and pointed to the *movement* and change of these cultures under the effect of external constraints and action of international institutions. It is apparent that the distance between these two different security cultures is not as large as it was in the past because the current process of interdependence and multilateralism affects the security culture of Europe and China in the same way. Interdependence is responsible for introducing in both cultures the multi-dimensional approach to security problems. The balance of economic, political and security matters is increasingly perceived by both sides as the key to achieve peace and stability in the international system. Multilateralism is responsible for the introduction of growing reliance on international institutions to build global and regional security arrangements based on cooperative and comprehensive security.

5. The construction of security partnerships

The construction of security partnerships can be the most important innovation in the security practices of states in the post-Cold War era. The definition of security partnership is close to the definition of security community, but security partnerships and security communities are different cases of security building. In Deutsch's terms, a security community is "*a group of people which has become integrated*" [Deutsch et al., 1957: 5] and, therefore, constitutes a group of countries among which war is obsolete as an instrument of conflict resolution. A security community is brought into existence by transaction and communication flows which binds a group of people together, enabling them to think of themselves as a community and producing the condition for the establishment of institutions of peaceful conflict resolution. Security partnership agreements, instead, are formed within groups of countries characterized by conflict division and small flows of transactions and communications but disposed to manage their conflict divisions by making steps towards the reduction of the risk of violent confrontation and allowing the development of increasing flows of communication and transactions among themselves (See also Attinà, 2001).

The building of a security partnership is also different from the building of military alliances. A military alliance is based on the traditional conception of state security as the condition reached by pooling national military forces to dissuade potential aggressors by means of threatening the use of violence. The building of a regional security partnership, instead, is based above all on the conception of security as developed in Europe during the Helsinki Process. According to this conception, a group of coherent international and internal measures must be created to improve the security conditions and defend the geopolitical stability of the region. The dissuasion of the expansionist design of (potential) aggressor states and the avoidance of international violence in a region are believed to be *better* obtained when a security system is built by embracing all or almost all of the states in the region and also extra-regional powers, rather than by pooling national forces in opposed military alliances.

In formal terms, a security partnership arrangement is based on a set of accords including one or few fundamental agreements and a number of related operative agreements. In the fundamental

agreements (like the 1975 Helsinki Final Act and the 1990 Charter of Paris for A New Europe; the 1995 Barcelona Declaration on the Euro-Mediterranean Partnership; and the 1994 Chairman's Statement at the First ASEAN Regional Forum), shared principles of peaceful relations are proclaimed and issues of conflict, tension and instability are also made public. In the operative agreements, measures directed to manage both international and internal problems are arranged by the governments and international organisations of the region in order to prevent the risk of conflict that can break down the stability of the region. The fundamental agreements are the initial step in the process of partnership building, but a regional security partnership really comes to life only when some operative agreements are put on the ground.

6. Security partnership building in Europe and the role of the EU

The construction of the European security partnership started in 1975 by the fundamental agreement named the Final Act of the Helsinki Conference on Security and Cooperation in Europe (CSCE), signed by 35 governments. This accord was redefined by the 1990 CSCE Charter of Paris which also opened the decisive phase of the making of operative agreements of security building in Europe. Since that year, a series of treaties and programmes has been produced to put in place a panoply of international and internal measures of security. This series includes the creation of the OSCE's *machinery* of offices and mechanisms. NATO's initiatives and programmes towards the former Soviet states and the Eastern and Central European states, the EU's common defence policy, and TACIS, PHARE and similar programmes directed to assisting the rehabilitation of the post-Soviet states and societies, along with the many initiatives and programmes for the Balkans in the 1990s.

The traditional security model of dissuasion of the potential aggressor by means of threatening the use of all-out military means has not been abandoned in Europe. Direct deterrence is the intact instrument of the collective defence of the NATO alliance under the United States leadership. However, it has also been agreed that the regional security partnership model is the preferred model of security for moral, cultural, economic and social reasons.

In the 1990s, the Atlantic Alliance has moved towards the

security partnership model negotiated in the long Helsinki process which contemplates security as being a cooperative, comprehensive and gradual process. In this decade, NATO has adopted many decisions to make its traditional strategy compatible with the new conditions of international security in Europe, taking into account the collapse of the Warsaw Pact and the violent disintegration of Yugoslavia.

Immediately after the collapse of the Soviet Union and the Warsaw Pact, the United States and NATO decided how to deal with former enemies. The decision involved dialogue with former enemies on security issues, turning a past hostile relationship into a friendly relationship. To this end, a dialogue forum, the NACC (North Atlantic Cooperation Council), was convened in 1992. In the following years, this early decision was adapted to cater for the different problems of the different groups of countries in which the former Soviet and Central-Eastern Europe countries divided in the new circumstances of the post-cold war Europe. In 1994, the Partnership for Peace (PfP) was offered to the former Warsaw Pact's members which agreed to take part in NATO's programmes tailored to their individual requirements. These programmes include different activities such as military exercises and civil emergency operations. In 1997, NACC was closed and substituted with the Euro-Atlantic Partnership Council (EAPC), a forum of political dialogue among 44 NATO Allies and Partners. In addition, two bilateral dialogue frameworks have been created: the NATO Joint Permanent Council with Russia and the NATO-Ukraine Commission. Lastly, NATO's enlargement policy has brought Poland, Hungary and the Czech Republic into the group of NATO's member countries and the door has been kept open to other countries wishing to become NATO members.

In addition to NATO's transformation, defence is the real object of the action of the EU governments and institutions today on the model of the ESDP, the common European Security and Defence Policy. Since the Amsterdam Treaty of the European Union entered in force in May 1999, decisions have been made to create common institutions in Brussels to carry out the project of creating a rapid intervention force of 60.000 soldiers within a wider European structure of crisis management including military and civilian capabilities.

Briefly, the security culture of post-Cold War Europe prompts European governments to adopt a variety of instruments, measures

and agreements which are rather different from the traditional security instruments, measures and agreements.

7. Security partnership building in Asia and the role of China

The construction of security partnerships in Asia is quite a new practice, compared with that in Europe. It started with the inaugural meeting of the ASEAN Regional Forum (ARF) in Bangkok in July 1994.

The ARF is the only official forum for multilateral dialogue on security issues in the Asia-Pacific region. It has been established with the aim of managing the transition from the period of the Cold War to the new realities in the Asia-Pacific region today. Its objectives, which were outlined in the First ARF Chairman's Statement in 1994, are to:

- a. Foster constructive dialogue and consultation on political and security issues of common interest and concern, and to
- b. Make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region. Its membership has increased from an initial 18 to 23 member nations following North Korea's participation in July 2000. It is evolving from confidence-building to preventive diplomacy. Many efforts have been made to explore the concept and the principles of preventive diplomacy in the ARF recently.

The ARF seeks to build mutual confidence and trust among its members through regular consultations at the ministerial, senior officials and experts levels, and joint activities. It also seeks to develop a capacity to prevent conflict through diplomacy. Meanwhile, confidence-building measures of the ARF, such as the publication of defence white papers, a regional registry of conventional arms, joint training in disaster relief, de-mining, and search and rescue, exchanges between defence colleges, and visits by high-ranking defence and military officials, help to strengthen security and stability in the Asia-Pacific region.

The ARF is proceeding at a pace comfortable to all participants, which have diverse interests, capabilities, and expectations thus making it very difficult to move forward at a faster pace. Its process is characterised by informality: it has no collective bureaucratic apparatus, and even no secretariat. Its decision-making procedures

are based on consensus and its agreements have no legally binding force on its members. Still, most of the decisions are implemented by its members on a voluntary basis. It has no resource and ability to resolve a conflict when it emerges.

These features of the ARF have created some discontent and criticisms from inside and outside of the ARF. However, it should be pointed out that these features are vital to the existence and sound development of the ARF in this region. Obviously, these features make the ARF unique and different from European security partnership buildings. It is true that the ARF is not anywhere near the OSCE, but this does not mean that it can not achieve the same effects in building regional security. In fact, just as Friedberg observes, "*Less highly structured, bureaucratic and visible than their European counterparts, Asian institutions may nevertheless turn out to be equally effective in achieving their objectives, perhaps even more so.*" (Friedberg 2000, pp.152-153)

China has attended every meeting of the ARF since 1994. This includes about twelve meetings each year at the level of ministerial, senior official, and ARF-designated track two sessions. Since 1997, China has hosted several ARF meetings and seminars, such as the ARF Professional Training Program on China's Security policy, the 4th ARF Meeting of Heads of Defence Colleges, and the Seminar on Defence Conversion Cooperation. China began to accept the view of warfare indivisibility and to acknowledge the virtue of transparency measures in the ARF and other processes through sharing defence and defence policy information and by exchanging white papers and policy papers with other member states. Every year China submits to the forum a statement on national defence policy. China has also attended every meeting of the Council for Security Cooperation in Asia Pacific (CSCAP), which is closely connected to the ARF, since China joined it in December 1996. According to Johnston and Evans (1999, p.256), Chinese participants in the ARF and the CSCAP have been increasingly pro-active in advancing specific approaches and positions, and are in the mainstream of the discussion. The number of Chinese participants in these fora has greatly expanded. The Ministry of Foreign Affairs of China established a special unit within the Asia Department to manage regional cooperation fora including the ARF, the CSCAP, and other track two channels in Asia in 1996.

Apart from the ARF, other examples of security partnership building are conducted at the sub-regional level in Asia. The

“Shanghai Five” mechanism which originated from the summit meeting of five states (China, Russia, Kazakhstan, Kyrgyzstan and Tajikistan) held in Shanghai in April 1996, has proved a successful regional security partnership building. Since the first summit meeting in April 1996, a series of agreements among the five states have been concluded and practical measures have been adopted and effectively implemented to construct security partnership. The Agreement on Confidence-Building in the military Field Along the Border Areas and the Agreement on Mutual Reduction of Military Forces in the Border Areas, signed in 1996 and 1997 respectively, were the most important agreements to the security partnership building among the five countries. Practical measures to crack down on international terrorism, drug trafficking, arms smuggling, illegal immigration and other forms of cross-border crimes have been included in the security partnership building measures. (Zhang, 2001)

The development of “Shanghai Five” mechanism has been regarded as an important practice in international relations, which initiated a new type of security conception featuring mutual trust, disarmament and cooperative security. The “Shanghai Five” mechanism also enriched the brand new inter-state relationship jointly initiated by China and Russia with the core of non-alignment, and created a new regional cooperative mode featuring joint proposition, priority of security, mutual benefit and friendly cooperation. The “Shanghai Five” mechanism has played an active role in stimulating and deepening mutual trust, good-neighborly and friendly relations among the member states, strengthening regional security and stability, and promoting common development since its establishment.

The “Shanghai Five” mechanism was transformed into a higher level of cooperation with the declaration of the establishment of Shanghai Cooperation Organization (SCO) on June 15, 2001. This indicated that the “Shanghai Five” mechanism has developed from an early consultation mechanism for cooperation in solving boundary issues into an organization of extensive cooperation in the economic, political and security fields. The SCO has six member states with the admission of Uzbekistan. According to the Declaration of the Shanghai Cooperation Organization, the SCO has characterized its aims as strengthening mutual trust and good-neighbourly friendship among member states and their effective cooperative cooperation in various fields so as to make concerted efforts to safeguard and

guarantee peace, security and stability in the region and the world at large. It also plans to organize annual formal meetings of heads of states of the member states and regular meetings of heads of governments to be hosted by its members in turn. The first summit meeting of the heads of government of the SCO will be held in Alma-Ata, Kyrgyzstan. The Shanghai Spirit, a result of the Shanghai Five process with mutual trust, reciprocity, equality, consultation, respect for multifarious civilizations and seeking common development as the basic content, is the experience accumulated and treasure gained by states in the region in their cooperation in the past few years, and it will continue as a guiding norm for relations between SCO member states. The pact on battling terrorism, separatism and extremism signed by the six heads of state has shown that these countries have made concrete steps in their cooperation, making a breakthrough from political documents to legal documents. It set up the Council of Coordinators of Member States to coordinate cooperation among the member states. It also established an anti-terrorism centre in Bishkek, Kyrgyzstan, to coordinate between member states.

The SCO attaches special importance to make every effort to ensure regional security and sets the deepening of their cooperation in security as a top priority. The SCO, which grew out of the "Shanghai Five" mechanism, successfully created a regional security framework among nations that have different backgrounds of religions, cultures, social systems and ideologies and that once had severe hostility against each other and military confrontation. Not only do many Chinese analysts view the SCO as the model of the future new Asia-Pacific security system. Russian analysts also hold the same idea and argue that the dynamics of the SCO deserves attention as an example of setting up multilateral security arrangements.

China's active participation in the construction of security partnerships shows that its traditional ways of dealing with security are changing. China came to realize the utility of the building of security partnerships. These security innovations have provided China with good opportunities to increase its international status as a responsible regional big power, and improve the external security environment which is important for China to focus on its economic development and internal affairs. More importantly, the principles of security partnership building in Asia (known as the "ASEAN Way,"

"Asian Way," or "Asia-Pacific Way") are in line with China's basic foreign policy, known as the Five Principles of Peaceful Coexistence, and the new security concept, which has been advocated by China recently and elaborated in its National Defense Paper in 2000. This convergence of principles can guarantee that China will be more cooperative in building regional security and further integrated into the construction of security partnerships.

8. Conclusions

The construction of security partnerships is gaining momentum both in Europe and Asia. The development of the OSCE, the creation of the ESDP, and the adaptation of NATO to the new security environment are the chief evidence of the development of security partnership construction in Europe. In Asia, the development of the ARF, the establishment of the SCO, and the proliferation of multilateral security dialogues are cases in point. It is not coincidental that both the European Union and China are playing an important role in the construction of regional security partnerships. Just as we analysed in the first part in this paper, European security culture and Chinese security culture are converging on similar positions under the effect of the current changes in international politics and security. The construction of security partnerships in Europe and Asia is a reflection of this tendency.

However, the convergence of the security cultures of Europe and China does not mean that their security partnerships are constructed in the same manner and following the same model. On the contrary, they may be quite different in many specific aspects. Security partnerships are constructed in the specific regional context and influenced by political, social and cultural traditions. This is why the security partnership buildings in Europe and in Asia have taken on distinctive scenarios. In Europe, the conditions for security partnership buildings are much more favourable than those in Asia. The influence of the OSCE's practises on member states has laid the basis for further cooperation in security affairs. The process of European integration and NATO have linked the European states more closely and made them more interdependent. Further-more, the common values, similar political and economic systems, and shared identity among European states have made the security partnership buildings in Europe more stable and more

institutionalized. The construction of security partnerships in Europe has already moved beyond the CBMs.

Asia does not enjoy these favourable conditions. The history of cooperative security in Asia is less than a decade old. Many countries, including China, in the Asia-Pacific region lack experience and habits of consultation and cooperation on security issues. The general diversity of the region has decelerated the process of the construction of security partnerships. The military alliances, hostility and misunderstanding among some countries, and the security flashpoints in Asia have hampered the process of cooperative security. For these reasons, the construction of security partnerships in Asia is still in a nascent stage. Building confidence and understanding among regional states through the implementation of CBMs is still, and will continue to be, the primary focus of Asian security partnership construction. It goes without saying that in the absence of a universally, high degree of confidence and understanding, the real security partnerships cannot be realized. Mutual confidence and understanding is necessary but not enough for building regional security. The construction of security partnerships in Asia needs to go further. Just as the concept paper of the ARF in 1995 has stated, *"If the ARF is to become, over time, a meaningful vehicle to enhance the peace and prosperity of the region, it will have to demonstrate that it is a relevant instrument to be used in the event that a crisis or problem emerges"*. The ARF has no enforcement action capability at present. However, without this capability, the security partnerships will be fragile and can easily be damaged by an incident. Therefore, the ARF must develop its own mechanisms to carry preventive diplomacy and conflict-resolution. This will be an evolutionary process which cannot be realized in a short time.

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LE CRITÈRE D'APPARTENANCE A UN CERTAIN GROUPE SOCIAL DANS LA CONVENTION RELATIVE AU STATUT DES RÉFUGIÉS DE 1951

NAÏMA HADJ SAHRAOUI BENBERNOU



The need for a clear definition of the concept of a "refugee" arose with compelling urgency in the wake of the marked intensification in the flow of refugees that followed the Second World War. The 1951 *Convention relating to the Status of Refugees* responded to this exigency: providing criteria which make it possible to identify those individuals who could be classified as refugees. The Convention limits the recognition of refugee status to those individuals who "have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Unlike the other criteria, the meaning of "membership of a particular social group" remains obscure. Since 1951, court judgements and scholarly publications have supplied various interpretations of this criterion: manifesting the need to have a clear definition so as to avoid weakening the very notion of a refugee. In this article Benbernou addresses the need to define this criterion 121

by analysing: (a) the historical evolution of the concept; (b) various theoretical interpretations; and (c) court judgements. Thus the author constructs a clear definition of this concept that highlights its progressive function, since it is the only criterion that can accommodate new situations that were not envisaged by the drafters of the Convention. The *ejusdem generis* theory is seen as providing the best interpretation of this criterion that satisfies scientific rigour as well as humanitarian exigencies. There is persecution motivated by "membership of a particular social group" when what are threatened are characteristics that are innate, immutable or such an intrinsic aspect of group identity, that forcing members to renounce to them would constitute a violation of their fundamental human rights.¹

¹ Table des matieres:

Introduction. 1. Le Contenu Du Critere d'appartenance A Un Certain Groupe

Introduction

Les chauffeurs de taxi à El Salvador², les jeunes cadres en âge de faire leur service militaire dans ce même pays³, les militaires au Guatemala⁴, l'élite intellectuelle au Ghana⁵, les chefs héréditaires du peuple esubète au Nigeria⁶, le cercle rapproché d'Imelda Marcos aux Philippines⁷, les grands propriétaires terriens⁸, les fabricants de fromage salvadoriens⁹, les membres d'une famille¹⁰, les femmes victimes de violence sexuelle¹¹, les femmes célibataires vivant dans un pays musulman sans la protection d'un membre de la famille masculin¹², les homosexuels¹³,

Social. 1.1. Origine Du Concept. 1.1.1. L'introduction Du Concept Dans La Convention De 1951. 1.1.2. Acception Originelle. 1.2. Interprétation Du Critère. 1.2.1. Méthode d'interprétation Des Traités Relatifs Aux Droits De l'homme. 1.2.2. Interprétation Restrictive: Absence d'autonomie Du Critère. 1.2.3. Interprétation Libérale: Caractère Résiduel Du Critère. 1.2.4. Interprétation Ejusdem Generis. 1.2.5. Les Orientations Du HCR. 1.3. Conclusion. 2. Applications Particulières Du Critère d'appartenance A Un Certain Groupe Social. 2.1. Cas De Persécution En Raison Du Sexe. 2.1.1. Les Spécificités De La Persécution En Raison Du Sexe Comme Illustration D'appartenance A Un Groupe Social. 2.1.2. Examen Des Textes Relatifs A La Persecution En Raison Du Sexe. 2.1.3. Les Femmes Victimes De Persecution En Raison De l'appartenance A Un Certain Groupe Social Dans La Jurisprudence. 2.2. Autres Cas De Persecution. 2.2.1. Cas De Persécution En Raison De l'orientation Sexuelle. 2.2.2. Cas De Persécution En Raison De l'appartenance A Une Famille. 2.2.3. Cas De Persécution En Raison De l'appartenance A Une Association Volontaire. Conclusion. Bibliographie.

² *Matter of Acosta*, Int. Dec. 2986 (BIA, 1985), Etats-Unis.

³ *Sanchez-Trujillo v. INS*, 801 F.2nd 1571 (Ninth Cir. 1986), Etats-Unis.

⁴ *Arriaga-Barrientos v. INS*, 925 F.2nd 1177 (Ninth Cir. 1991), Etats-Unis.

⁵ *Ananeh-Firempong v. INS*, 766 F.2nd 621 (First Cir. 1985), Etats-Unis.

⁶ *Adebisi v. INS*, 952 F.2nd 910 (Fifth Cir. 1992), Etats-Unis.

⁷ *Rodriguez v. INS*, N° 91-70226, 1992 WL 116029 (Ninth Cir. 1992), Etats-Unis.

⁸ *Gatchalian v. INS*, N° 90-70204, 1991 WL 92349 (Ninth Cir. 1991), Etats-Unis.

⁹ *Alvarez-Flores v. INS*, 909 F.2nd 1 (First Cir. 1990), Etats-Unis.

¹⁰ *Luis Enrique Toha Seguel*, Immigration Appeal Board Decision 79-1150, C.L.I.C., notes 28.8, November 13 1980, Canada.

¹¹ *Gomez v. INS*, 947 F.2nd 660 (Second Cir. 1991), Etats-Unis.

¹² *Zekiye Incirciyan*, Immigration Appeal Board Decision M87-1541X, 10 août 1987, Canada.

¹³ *Matter of Toboso*, N° A23 220 644 (Board of Immigration Appeal, 1990), Etats-Unis.

les hommes d'affaires¹⁴, les officiers corrompus de l'armée ghanéenne¹⁵ peuvent-ils se voir reconnaître le statut de réfugié sur la base d'une crainte fondée de persécution en raison de l'appartenance à un certain groupe social, telle que la définit la *Convention relative au statut des réfugiés* du 28 juillet 1951¹⁶?

Ces exemples, qui oscillent entre le saugrenu et le dramatique, sont en fait tirés de la jurisprudence. Cette énumération montre que les circonstances les plus diverses peuvent être invoquées pour justifier une demande de reconnaissance du statut de réfugié. Elle illustre la complexité de la question du critère d'appartenance à un certain groupe social dans la définition retenue par la Convention. Elle révèle la nécessité, pour opérer un tri entre les situations possibles, de déterminer des critères précis pour qualifier l'appartenance à un certain groupe social.

Il n'est cependant pas possible de détacher ce sujet du cadre général de la protection des réfugiés. A cet effet, il nous faudra procéder, nécessairement de façon brève, à un rappel historique de l'appréhension du problème des réfugiés par la société internationale et à un commentaire de la définition du réfugié aujourd'hui retenue.

La définition de la Convention de 1951 n'est pas la première tentative de définition du réfugié en droit international. Depuis les années vingt, date à laquelle la Communauté internationale a pris conscience de l'exigence de faire face à ce problème, plusieurs arrangements, résolutions et conventions avaient proposé des définitions du terme "réfugié".

Dans le contexte de phénomènes de flux massifs de groupes déterminés, les réfugiés furent dans un premier temps définis selon leurs origines nationales ou le territoire qu'ils avaient quitté. En raison de l'absence de protection de la part du pays d'origine; il s'agissait là de définitions par catégories¹⁷.

¹⁴ Cour administrative de Gelsenkirchen, arrêt du 29 mars 1985, N° 17 K 10. 343/83, Allemagne.

¹⁵ Cour administrative d'Hanovre, arrêt du 6 juin 1984, N° 1 OVGA 91/82 As, Allemagne.

¹⁶ *Convention relative au statut des réfugiés*, Nations Unies, Recueil des Traités n° 2545, Vol. 189, p. 137.

¹⁷ Ainsi l'arrangement du 12 mai 1926 (réfugiés russes et réfugiés arméniens), l'arrangement du 30 juin 1928 (réfugiés assyriens, assyro-chaldéens et assimilés)

A ce type de définitions furent préférées par la suite des définitions individuelles où l'élément essentiel devenait l'examen des raisons personnelles contraignant l'individu à quitter son pays et à ne plus pouvoir (ou vouloir) se réclamer de la protection de son Etat d'origine¹⁸. Bien que plus générales, ces définitions restaient limitées à des types de réfugiés précis.

Face à l'intensification des flux de réfugiés après la Seconde Guerre mondiale, il est apparu nécessaire d'introduire un instrument complet de protection fondée sur une définition générale du terme "réfugié". La *Convention relative au statut des réfugiés* répond à ce besoin. En se référant aux divers instruments examinés ci-dessus, elle établit un lien avec le passé et assure la continuité de la protection internationale dont bénéficiaient jusque là les réfugiés, définis par catégories.

L'article premier, section A, paragraphe 2 énonce que le terme "réfugié" s'appliquera à toute personne:

"qui, par suite d'évènements survenus avant le 1^{er} janvier 1951 et craignant avec raison d'être persécuté du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels évènements, ne peut ou, en raison de ladite crainte, ne veut y retourner".

et réfugiés turcs), résolution du Conseil de la Société des Nations n° 3593 du 24 mai 1935 (réfugiés de la Sarre), la convention du 10 février 1938 (réfugiés provenant d'Allemagne), résolution du Conseil de la Société des Nations n° 4119 du 17 janvier 1939 (réfugiés du territoire des Sudètes), le protocole du 14 septembre 1939 (réfugiés autrichiens victimes de la persécution nazie). Malheureusement, ces instruments successifs furent signés par de moins en moins d'Etats. Pour une référence rapide à ces définitions, voir Recueil de traités et autres textes de droit international concernant les réfugiés, Office du Haut Commissaire des Nations Unies pour les réfugiés, Genève, 1982, pp. 48-55.

¹⁸ Voir en particulier la définition contenue dans l'Annexe I de la Constitution de l'Organisation Internationale pour les Réfugiés, résolution 62 (I) du 15 décembre 1946 de l'Assemblée générale des Nations Unies.

Cette définition s'articule en trois axes:

1. la crainte fondée d'être persécuté pour des motifs énoncés dans une liste limitative;
2. le fait que le réfugié se trouve hors de son pays d'origine (l'Etat de sa nationalité ou, s'il est apatride, celui dans lequel il avait sa résidence habituelle);
3. l'absence d'une protection nationale, d'où le besoin d'une protection internationale.

Le problème de l'appartenance à un certain groupe social s'insère dans la première branche. Mais il nous faut le placer dans son contexte, et, pour ce faire, examiner rapidement les autres éléments.

La définition évoque d'abord une crainte fondée d'être persécuté. Elle introduit ainsi un élément subjectif à la base de la reconnaissance du statut de réfugié: il faut examiner l'état d'esprit du demandeur. Cette crainte doit cependant être raisonnable et correspondre à une situation objective. La demande sera examinée en tenant compte des antécédents personnels et familiaux du requérant, de son appartenance à tel ou tel groupe racial, religieux, national, social ou politique, de sa propre interprétation de son expérience et même des conditions générales existantes dans son pays d'origine.

Aucune définition de la "persécution" n'est énoncée dans la Convention. Mais en prenant appui sur l'article 33, on peut déduire que des menaces à la vie ou à la liberté ou d'autres violations graves des droits de l'homme constitueraient des persécutions. Un traitement moins favorable réservé à certaines personnes n'équivaut pas en lui-même à une persécution. Celle-ci ne sera réalisée que lorsque les mesures discriminatoires auront des conséquences gravement préjudiciables pour la personne affectée ou provoquent un sentiment d'appréhension et d'insécurité chez le demandeur.

Seules les persécutions fondées sur les motifs énumérés dans le paragraphe 2 de l'article 1 sont pertinents pour la reconnaissance du statut de réfugié:

1. Il s'agit d'abord de la "race", entendue comme l'appartenance à un certain groupe ethnique.
2. Par "religion", il faut comprendre toutes les formes d'exercice de cette liberté, y compris le droit de changer de religion ou de conviction, la liberté de manifester sa religion ou sa conviction tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.

3. La notion de "nationalité" est proche de celle de race et semble devoir être comprise dans un sens large, comme l'appartenance à un groupe ethnique ou linguistique particulier.
4. En ce qui concerne les "opinions politiques", une protection doit être accordée non seulement à ceux dont les opinions et les affiliations sont clairement identifiables, mais également à ceux qui sont vulnérables devant les forces politiques de leur propre pays¹⁹.

Si ces motifs de persécution semblent relativement clairs, l'expression "appartenance à un certain groupe social", intercalée subrepticement dans cette liste, reste nébuleuse. C'est à cette question que la présente étude tente de répondre.

Le caractère obscur du critère d'appartenance à un certain groupe social fait sa force mais aussi sa faiblesse. Son manque de précision a permis des interprétations fort variées. Il est ainsi nécessaire de se pencher tout d'abord sur les différentes théories portant sur le contenu de ce critère. Sur cette base et en prenant appui sur les jurisprudences nationales, on abordera les applications particulières du critère à l'heure actuelle: la souplesse dudit critère a permis d'appréhender des situations très éloignées des préoccupations initiales des auteurs de la Convention.

1. Le Contenu Du Critère D'appartenance A Un Certain Groupe Social

On ne peut bien comprendre un concept juridique sans connaître les circonstances qui lui ont permis de voir le jour. L'obscurité théorique qui entoure le critère d'appartenance à un certain groupe social s'explique avant tout par les conditions présidant à son avènement.

Une étude de l'origine de ce concept s'impose donc de prime abord,

¹⁹ Pour l'ensemble de ces considérations, voir Bureau du Haut Commissaire des Nations Unies pour les réfugiés, Guide des procédures et critères à appliquer pour déterminer le statut de réfugié au regard de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés, U.N. Doc. HCR/PRO/4 (1979) (ci-après "Guide").

après quoi il sera possible d'évaluer les diverses théories développées par la doctrine et la jurisprudence.

1.1. *Origine du concept*

Comment ce critère a-t-il été dégagé? Quelles étaient les intentions de ceux qui l'ont formulé pour la première fois?

1.1.1. L'introduction du concept dans la convention de 1951

La Convention relative au statut des réfugiés du 28 juillet 1951 est le fruit d'une longue élaboration par divers organes des Nations Unies dans la période 1947-1950²⁰. Le 14 décembre 1950, l'Assemblée générale approuve deux résolutions fondamentales en matière de réfugiés: la résolution 428 (V) invite les gouvernements à coopérer avec le Haut Commissaire des Nations Unies pour les réfugiés dans l'exercice de ses fonctions et porte en annexe le Statut du Haut Commissariat²¹; par sa résolution 429 (V), l'Assemblée approuve le *Projet de Convention relative au statut des réfugiés*, et décide:

"de convoquer à Genève une conférence de plénipotentiaires pour achever de rédiger et pour signer la Convention relative au statut des réfugiés et aussi le Protocole relatif au statut des apatrides".

Cette Conférence de plénipotentiaires se réunit ainsi entre le 2 et le 25 juillet 1951²². Or, si la discussion relative aux apatrides a été

²⁰ Sur le fondement d'une résolution de la Commission des droits de l'homme, le Conseil économique et social, dans la résolution 116 (VI) D du 2 mars 1948 (UN Doc. E/1618, E/AC.32/5), invita le Secrétaire général à étudier la situation des apatrides et "à présenter des recommandations au Conseil sur l'avantage qu'il y aurait à conclure une nouvelle Convention à ce sujet". En réponse, un Comité spécial pour les réfugiés et les apatrides composé de représentants de 13 gouvernements fut nommé par le Conseil pour élaborer "une Convention révisée et globale relative au statut international des réfugiés et apatrides". Le texte en résultant (UN Doc. E/1850, E/AC.32/8) fut soumis à la cinquième session de l'Assemblée générale.

²¹ Cette résolution fait écho à la résolution 319 (IV) du 3 décembre 1949 qui prévoyait la création, à partir du 1 janvier 1951, d'un Haut Commissariat pour les réfugiés.

²² Les plénipotentiaires, si l'on compte les deux observateurs, représentaient 17 Etats d'Europe, 6 du continent américain, 4 d'Asie, un d'Afrique et un d'Océanie (Acte final de la Conférence de plénipotentiaires des Nations Unies sur le statut des réfugiés et des apatrides).

reportée à une date ultérieure, les Etats présents se sont en revanche mis d'accord sur la question des réfugiés. Ils ont adopté un texte qui contient d'une part une définition précise du terme "réfugié", et définit d'autre part les droits et obligations des Etats et des bénéficiaires du statut.

S'agissant de la définition du réfugié, les discussions au sein de la Conférence avaient pris pour base un texte calqué sur la résolution portant Statut du HCR, qui, dans son article 6, A, ii), cerne ce concept comme englobant:

"(...) toute personne qui, par suite d'événements survenus avant le 1er janvier 1951 et craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité, et qui ne peut ou, du fait de cette crainte ou pour des raisons autres que de convenance personnelle, ne veut se réclamer de la protection de ce pays; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de ladite crainte ou pour des raisons autres que de convenance personnelle, ne veut y retourner".

Le critère d'appartenance à un certain groupe social n'était, comme on peut le constater, pas prévu dans le projet originel. Il a fait l'objet d'un amendement de dernière minute proposé par le représentant suédois au sein de la Conférence:

"... experience had shown that certain refugees had been persecuted because they belonged to particular social groups (...) Such cases existed, and it would be as well to mention them explicitly."²³

Ainsi, la différence entre la définition du réfugié retenue par le mandat du HCR et celle proposée par la Convention s'explique par l'introduction de ce concept selon cette proposition, soit en 1951, alors que le statut du HCR avait été adopté dès 1950.

²³ Déclaration de M. Petren, représentant de la Suède, UN Doc. A/CONF.2/SR.3, p. 14, 19 novembre 1951 et UN Doc. A/CONF.2/SR.19, p. 14 du 26 novembre 1951.

Cependant, on peut s'interroger sur la valeur réelle de l'introduction de ce concept. Il est utile à cet effet d'examiner la question à la lumière des textes contemporains relatifs aux droits de l'homme: la Charte des Nations Unies, la *Déclaration universelle des droits de l'homme* et la *Convention sur la prévention et la répression du crime de génocide*.

L'appartenance à un groupe social pour justifier une protection renforcée des droits de la personne ressortait déjà dans la *Déclaration universelle des droits de l'homme*. Son article 2 envisage l'origine sociale comme un motif de discrimination:

*"Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamées dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation"*²⁴

La *Convention pour la prévention et la répression du crime de génocide*²⁵, par contre, ne contient aucune référence au groupe social dans la définition de ce crime²⁶, et s'est vue souvent critiquée pour cette omission. Ainsi, DROST remarque que la définition y contenue laisse

*"a wide and dangerous loophole for any government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security (...)"*²⁷

En incluant l'appartenance à un groupe social parmi les motifs

²⁴ Résolution de l'Assemblée générale 217 A (III) du 10 décembre 1948.

²⁵ Approuvée et soumise à la signature et à la ratification ou à l'adhésion par l'Assemblée générale dans sa résolution 260 A (III) du 9 décembre 1948.

²⁶ Le champ d'application *ratione personae* de la Convention est prévu à l'article 2: *"Le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux (...)"*.

²⁷ DROST, P., *The Crime of State* (Book II), Genocide 122 (1959), cité dans: UN Doc., E/CN.4/SUB. 2/416, p.22.

de persécution, la définition du réfugié de la Convention de 1951 se place donc dans la perspective la plus progressiste de la protection des droits de l'homme.

En revanche, si l'on procède à une comparaison entre *la Convention sur le statut des réfugiés* et les autres instruments protégeant les droits de l'homme, on remarque la surprenante omission de la persécution à raison du sexe. Ainsi, la Charte des Nations Unies, dans les nombreuses dispositions relatives aux droits de l'homme proclame

*“le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion”*²⁸

La référence au sexe est aussi présente, comme il a été vu ci-dessus, dans la Déclaration universelle. Compte tenu de ces précédents, l'omission de la référence au sexe dans la Convention de 1951 apparaît donc bien comme le résultat d'une volonté délibérée. Elle est d'autant plus grave que les cas de persécution en raison du sexe sont très fréquents, et donnent lieu à des cas souvent très dramatiques dans les faits.

1.1.2. Acception originelle

L'amendement suédois a certes eu pour effet d'élargir le champ d'application de la Convention en appréhendant des situations de persécution beaucoup plus larges. Cette préoccupation d'étendre la définition du réfugié avait déjà été exprimée par le représentant italien²⁹. L'amendement fut adopté sans discussion des plénipotentiaires par 14 voix pour, 0 contre et 8 abstentions. Il n'y eut donc aucun vote négatif.

Les travaux préparatoires³⁰ ne contiennent, quant à eux, aucune indication sur les délégations favorables à l'amendement et celles

²⁸ Article 1, paragraphe 3. Voir également, les articles 13 et 55 (c).

²⁹ U.N. Doc. E/AC.32/L.40, p. 13 (1950).

³⁰ TAKKENBERG A., TAHBAZ C., *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (Vol. 1), published by the Dutch Refugee Council under the auspices of the European Legal Network on Asylum, Amsterdam 1990.

qui se sont abstenues. L'article 1 du projet de convention tel qu'amendé par la proposition suédoise incluant l'appartenance à un certain groupe social comme motif de persécution fut adopté par un vote favorable de 22 voix à 0 et une abstention. Il est donc délicat, compte tenu des modalités d'adoption du critère du groupe social, de déterminer les intentions qui ont animé les plénipotentiaires.

Le critère de l'appartenance à un certain groupe social peut cependant être lu à la lumière d'un certain nombre d'éléments. Un indice révélateur se trouve dans la recommandation E de l'Acte final, dans laquelle les participants à la Conférence reconnaissent que la situation de certaines personnes pourrait ne pas être couverte par la définition du réfugié retenue par la Convention. Aussi cette recommandation demande-t-elle aux États signataires d'appliquer la Convention au-delà de sa portée purement conventionnelle:

“La Conférence exprime l'espoir que la Convention relative au statut des réfugiés aura valeur d'exemple, en plus de sa portée contractuelle, et qu'elle incitera tous les États à accorder dans toute la mesure du possible aux personnes se trouvant sur leur territoire en tant que réfugiés et qui ne seraient pas couvertes par les dispositions de la Convention, le traitement prévu par la Convention”.

S'agissant de la portée du groupe social, il faut également prêter attention à un échange de vues entre le représentant de la Fédération américaine du travail et le délégué français:

“Mr. Stolz (American Federation of Labour) recalled that people sometimes left their country for social and economic reasons, an eventuality which was not specifically mentioned in (draft of article 1)...”

“Mr. Rain (France) thought that the nature of the persecution should be described in very broad terms. In actual practice he felt that the people referred to by the American Federation of Labour representative would be recognized as refugees”³¹.

³¹ U.N. Doc. E/ AC.32/ SR. 17, p.3-4 (31 janvier 1950).

Si ces éléments ne sont pas suffisants pour décrire avec précision le critère d'appartenance à un certain groupe social, ils fournissent cependant de précieux instruments pour son interprétation.

1.2. *Interpretation du critere*

La Convention une fois en vigueur, il s'agit de l'appliquer et donc de l'interpréter. A cet effet, le droit international propose un certain nombre d'outils. Face à un texte pêchant par manque de clarté, des interprétations contrastées ont été proposées.

1.2.1. Methodes d'interpretation des traites relatifs aux droits de l'homme

L'interprétation d'un traité "*consiste à dégager le sens exact et le contenu de la règle de droit applicable dans une situation donnée*"³². En général, un problème d'interprétation survient lorsque le sens d'un traité est douteux ou controversé, ce qui est certainement le cas de l'expression "appartenance à un certain groupe social". La coutume internationale et la *Convention de Vienne de 1969 sur le droit des traités* ont permis de dégager des règles interprétatives précises. S'il n'est pas question ici d'élaborer une théorie générale de l'interprétation des instruments internationaux relatifs aux droits de l'homme, il convient toutefois de signaler les méthodes d'interprétation les plus pertinentes afin de mieux comprendre le concept qui nous intéresse ici.

La règle générale, codifiée par l'article 31 de la Convention de Vienne, stipule:

"un traité doit être interprété de bonne foi, suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son but et de son objet".

Trois méthodes interprétatives se dégagent de cette norme: l'interprétation textuelle, l'interprétation systématique et l'interprétation téléologique.

L'interprétation textuelle privilégie le sens ordinaire à attribuer aux termes. C'est en effet l'élément qui reflète le mieux les intentions

³² NGUYEN QUOC DINH, DAILLIER, P., PELLET, A., *Droit international public*, Librairie générale de droit et de jurisprudence, Paris, 1992, p. 245.

des parties. Dans le cas qui nous occupe, il s'agira de chercher une définition autonome de "certain groupe social", ce qui pose des obstacles de taille, puisqu'aucune description du critère n'est fournie ni par la Convention elle-même, ni par d'autres instruments.

L'interprétation systématique préconise de placer les expressions à interpréter dans leur contexte. Par "contexte", comme le précise le paragraphe 2 de l'article 31, il faut entendre le texte, le préambule et les annexes. On doit y ajouter tout accord ayant rapport au traité et intervenu entre toutes les parties au moment de sa conclusion, et tout instrument établi par une ou plusieurs parties à cette même occasion et accepté par les autres parties à cette fin (sans parler des moyens susceptibles de révéler un accord ultérieur des parties envisagés au paragraphe 3).

Cette forme d'interprétation est utilisée pour dégager la portée de deux ou plusieurs expressions au sein d'un même alinéa, de deux paragraphes l'un par rapport à l'autre au sein de la même disposition, pour éclairer la structure de l'instrument ou le rapport de ses dispositions avec d'autres instruments internationaux. Ici, il faut bien sûr faire référence aux autres motifs de persécution énoncés par la définition: l'appartenance à un groupe social n'est qu'un élément d'une énumération ayant une logique et une raison d'être précises et qu'il ne faut pas perdre de vue.

L'interprétation téléologique s'appuie sur le but du texte pour en éclairer le sens et permet ainsi d'aller au-delà d'une lecture littérale du traité. Il faudrait ainsi rechercher la raison d'être de l'introduction du critère de l'appartenance à un certain groupe social dans le cadre général d'une convention visant à protéger des personnes fuyant des situations de persécution. S'appuyer sur le but du texte pour tenter d'élargir son champ d'application ne doit en aucun cas aboutir à une dénaturation du traité. Il s'agit de conserver l'équilibre entre les exigences humanitaires et le respect du texte originel.

Si ces méthodes se révèlent insuffisantes, si elles laissent le sens ambigu ou obscur ou conduisent à un résultat qui est manifestement absurde ou déraisonnable, il peut être fait usage de moyens complémentaires, développés par l'article 32 de la Convention de Vienne, en particulier le recours aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu. C'est pour cette raison qu'il a été utile de se pencher sur l'historique de l'expression de l'appartenance à un certain groupe social.

Parmi les règles méthodologiques, qui permettent à l'interprète

d'appliquer les techniques précitées, une place particulièrement importante doit être réservée à celle de l'effet utile. Ce principe veut que les mots ou phrases insérés dans un traité l'aient été, non pour créer un effet de style, mais pour entraîner des conséquences précises. On doit donc se refuser à toute interprétation qui les rendrait inutiles. L'introduction de l'expression "appartenance à un certain groupe social" devrait donc être interprétée de façon telle qu'elle ait un effet réel.

Tous ces moyens doivent être appliqués en gardant bien en vue que la matière des droits de l'homme doit répondre à des priorités particulières: l'enjeu de l'interprétation des traités relatifs aux droits de l'homme est d'accorder le maximum de garanties aux individus. Ces exigences ont été mises en exergue dans la jurisprudence de la Cour européenne des droits de l'homme³³, mais elles doivent rester toujours présentes à l'esprit de l'interprète des traités universels.

1.2.2. Interpretation restrictive: absence d'autonomie du critère

Une des interprétations proposées consiste à nier l'indépendance du critère de l'appartenance à un certain groupe social comme motif de persécution. Ce critère ne pourrait être dissocié des autres critères contenus dans la définition du réfugié de la Convention de 1951. Il viendrait seulement corroborer l'existence d'une persécution pour des motifs de race, de religion, de nationalité ou d'opinions politiques.

C'est là l'interprétation développée par GOODWIN-GILL qui voit dans le critère de l'appartenance à un groupe social une clarification des autres critères³⁴: ce motif ne jouerait donc que s'il intervient cumulativement avec les autres motifs de persécution. Mais la thèse de GOODWIN-GILL est restrictive à un autre égard: l'appartenance ne reposerait en effet que sur des éléments indépendants de la volonté de l'individu, sur lesquels il n'a aucun contrôle. Un groupe social

³³ Voir par exemple, arrêt *Delcourt* du 17 janvier 1970, Recueil des arrêts de la Cour européenne des droits de l'homme, A n°11, p. 14-15, par. 25: "Dans une société démocratique au sens de la Convention, le droit à une bonne administration de la justice occupe une place si éminente qu'une interprétation restrictive de l'article 6, par. 1, ne correspondrait pas au but et à l'objet de cette disposition".

³⁴ GOODWIN-GILL, G., "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR", *Michigan Yearbook of International Legal Studies*, 1980, p. 297.

serait constitué par un ensemble d'individus qui partageraient les mêmes intérêts, les mêmes valeurs, le même environnement socio-culturel: lors de la détermination du statut de réfugié, on devrait prêter une attention particulière aux facteurs unificateurs tels que l'origine ethnique, culturelle, linguistique, l'éducation, le milieu familial, l'activité économique, des valeurs partagées et des aspirations communes; devront également être examinés la perception du groupe par la société à laquelle il appartient, et notamment le traitement que les autorités gouvernementales réservent au dit groupe³⁵. Ainsi, c'est un véritable faisceau d'indices que les autorités nationales compétentes devraient considérer dans la procédure de reconnaissance.

On retrouve des illustrations jurisprudentielles de cette interprétation. Par exemple, les autorités canadiennes n'ont, dans un premier temps, accordé le statut de réfugié sur la base de l'appartenance à un groupe social que si ce motif étayait l'existence d'une des autres raisons de persécution. Dans l'arrêt *Obertz Belfont* de 1975, l'*Immigration Appeal Court* affirmait:

*"Either the group must be political and proclaim and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious beliefs. In a multinational state, a racial minority might also constitute such a group"*³⁶.

Ainsi, les demandeurs du statut de réfugié au Canada qui se fondaient sur l'appartenance à un certain groupe social devaient être: d'une part, soit des tenants d'opinions politiques divergentes de celles du gouvernement, soit des membres d'un groupe religieux persécuté, ou d'une minorité; et, d'autre part, être persécutés pour cette raison par les autorités gouvernementales³⁷.

³⁵ GOODWIN-GILL, G., *The Refugee in International Law*, Clarendon Press, Oxford, 1983, p. 29-30.

³⁶ Cité par HATHAWAY, J., *The law of Refugee Status*, Butterworths, Toronto, Vancouver, 1991, p. 157.

³⁷ BAGAMBIRE, D., "Terrorism and Convention Refugee Status in Canadian Immigration Law: The Social Group Category according to *Ward v. Canada*", *International Journal of Refugee Law*, vol. 5, n° 2, 1993, p. 188.

Cette interprétation a été l'objet de diverses critiques. Elle ferait de l'appartenance à un groupe social un critère superflu, ce qui semble contraire à la règle de l'effet utile dans l'interprétation des traités. D'autre part, lier ce critère exclusivement à des caractéristiques involontaires ne permet pas d'appréhender le problème dans son intégralité.

1.2.3. Interpretation liberale: caractere residuel du critere

Le critère de l'appartenance à un certain groupe social a une vocation beaucoup plus ambitieuse dans sa perception libérale: il aurait un caractère résiduel par rapport aux autres critères, et permettrait ainsi de reconnaître le statut de réfugié aux victimes de persécution pour des raisons allant parfois au-delà de la race, la religion, la nationalité ou les opinions politiques. Ainsi, aucune situation de persécution ne devrait échapper au champ d'application de la Convention de 1951 et tout vide juridique serait évité³⁸.

Cette interprétation a été notamment développée par GRAHL-MADSEN. Celui-ci classe les motifs de persécution envisagés par la *Convention relative au statut des réfugiés* en deux catégories. La première englobe les caractéristiques dont le contrôle échappe à la volonté des individus, tels la race, la nationalité, l'héritage religieux et l'appartenance à un certain groupe social. La seconde catégorie regroupe quant à elle les caractéristiques sur lesquelles les individus exercent un contrôle, comme les opinions politiques et le comportement religieux.

Cette classification permet de ne pas exclure du champ d'application de la Convention les individus appartenant à un certain groupe social en raison de qualités volontaires.

Grâce à cette grille d'analyse, la noblesse, les propriétaires fonciers, les fonctionnaires, les hommes d'affaires, les personnes exerçant une activité professionnelle, les fermiers, les travailleurs, les membres d'un groupe linguistique ou d'une minorité, voire les membres de certaines associations, clubs ou sociétés pourraient être considérés comme des groupes sociaux au sens où l'entend la Convention³⁹.

³⁸ "Whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision", GRAHL-MADSEN G., *The Status of Refugees in International Law*, Sijthoff, Leyden, 1966, p. 220.

³⁹ GRAHL-MADSEN G., *The Status of Refugees in International Law*, Sijthoff, Leyden, 1966, p. 219.

Pour les groupes dits "économiques", l'appartenance peut paraître à prime abord volontaire. Cependant, propriétaires terriens, hommes d'affaires ou professionnels, même s'ils abandonnent terres, entreprises ou professions, continueront à être perçus par leur entourage comme faisant partie de ce groupe. Ainsi, durant la révolution culturelle en Chine, les enfants d'anciens propriétaires terriens ou riches paysans faisaient à ce titre l'objet de persécutions.

Des cas de jurisprudence, émanant notamment de la République Fédérale d'Allemagne, reflètent cette conception libérale du critère d'appartenance à un certain groupe social. Ainsi, un arrêt de la Cour administrative de Bavière a reconnu la qualité de réfugié à un Chinois devenu orphelin à l'âge de cinq ans et victime de persécutions au sein de la coopérative agricole dont il faisait partie en raison du fait que ses grand-parents et parents étaient propriétaires terriens⁴⁰. L'asile fut également octroyé à une roumaine issue d'une famille aisée dont le père avait été directeur de banque et l'époux médecin dans l'armée royale, et qui faisait l'objet de persécutions en raison de ses origines sociales⁴¹.

L'interprétation de GRAHL-MADSEN a été suivie plus récemment par plusieurs auteurs, dont HELTON⁴². Or, pour séduisante qu'elle apparaisse du point de vue de considérations humanitaires, cette thèse n'en est pas moins critiquable.

En effet, GRAHL-MADSEN ne tire pas toutes les conséquences de la distinction qu'il a opérée entre les caractéristiques volontaires

⁴⁰ Cour administrative de Bavière, arrêt du 29 mars 1983, cité par FULLERTON M. dans "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a particular Social Group", *Cornell International Law Journal*, vol. 26, N° 5, 1993, p. 515.

⁴¹ Cour administrative de Saarland, arrêt du 10 décembre 1982, cité par FULLERTON, M., dans "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a particular Social Group", *Cornell International Law Journal*, vol. 26, N° 5, 1993, p. 515.

⁴² Afin de démontrer que la catégorie de l'appartenance à un groupe social répond, dans une interprétation dynamique de la Convention, à cette vision libérale, HELTON propose une analyse de la notion dans la pratique internationale, dans celle des Nations Unies (dans le cadre de la théorie dite de l'"arbre vivant") et dans la jurisprudence nationale des Etats parties à la Convention, HELTON A., "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", *Columbia Human Rights Law Review*, vol. 15, N° 1, Fall 1983.

et les caractéristiques involontaires. Seules ces dernières constituent, selon lui, des fondements de persécutions à raison de l'appartenance à un certain groupe social.

Il n'aborde pas davantage la question des caractéristiques volontaires qu'un individu serait en droit de conserver, et n'identifie pas les abandons qui constitueraient une violation des droits fondamentaux de la personne.

De plus, le critère d'appartenance à un certain groupe social devient ici une sorte de catégorie "fourre-tout", ce qui tend à priver la définition du réfugié proposée par la Convention de sa rigueur juridique: puisque le droit des réfugiés est destiné à accorder une protection à une catégorie d'individus particulièrement vulnérable, l'introduction d'un concept trop large nuirait à ce but. Enfin, cette approche ouvre la porte à toutes sortes d'abus. Les Etats signataires, soucieux de se préserver de flux d'immigration massifs, ne sauraient l'accepter.

1.2.4. Interpretation ejusdem generis

Une conception médiane entre les deux voies précédentes, par ailleurs plus fidèle aux règles générales d'interprétation des traités, est celle dite de l'*ejusdem generis*, ce qui signifie "du même type".

Selon cette théorie, le critère de l'appartenance à un certain groupe social devrait être interprété à l'instar des autres motifs (la race, la religion, la nationalité ou les opinions politiques) qui possèdent tous une caractéristique commune: celle d'être immuables au demandeur. Soit cette caractéristique est innée, comme la race ou la religion et il est au-delà de son pouvoir de la changer, soit elle est si fondamentale, si inscrite dans son identité ou sa conscience individuelle, que lui demander de s'en départir serait une atteinte à ses droits fondamentaux.

Cette interprétation est d'abord le résultat d'une élaboration jurisprudentielle. Le premier arrêt dégageant le principe *ejusdem generis* est l'arrêt *Matter of Acosta*⁴³ du *Board of Immigration Appeals* (BIA) des Etats-Unis. Le raisonnement y adopté part de l'affirmation de la règle d'interprétation suivante:

"General words used in an enumeration with specific words should be construed in a manner consistent with the specific words."

Une telle règle appliquée à la définition du réfugié mène à définir

la persécution en raison de l'appartenance à un certain groupe social comme:

*"... persecution that is directed toward an individual who is member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience"*⁴⁴.

Cette définition exclut donc les groupes identifiés par des caractéristiques que l'on peut modifier ou dont peut se dissocier sans renoncer à des droits et libertés fondamentales. Un lien logique est ainsi établi entre les différents éléments de la définition de réfugié. Le critère d'interprétation de la notion de persécution coïncide avec celui des motifs de persécution: c'est l'atteinte aux droits fondamentaux de la personne⁴⁵.

⁴³ En 1985, le *Board of Immigration Appeals* dut se pencher sur la reconnaissance du statut de réfugié d'un ressortissant de El Salvador. Le requérant Acosta était chauffeur de taxi et membre d'une coopérative de travail dont il avait été l'un des fondateurs. La guérilla locale avait demandé à la coopérative de se mettre en grève afin de nuire au gouvernement en place. Devant le refus d'Acosta et des autres membres de la coopérative, les guérilleros avaient procédé à des actes de terreur. Des taxis furent volés et incendiés et surtout, plusieurs membres de la coopérative furent assassinés dans leurs taxis. Acosta, après avoir reçu des menaces de mort et avoir été agressé dans son taxi, décida de chercher refuge aux Etats-Unis. Il avait fondé sa demande de reconnaissance du statut de réfugié sur son appartenance à un certain groupe social, à savoir "membre d'une coopérative de travail". Cette décision est intéressante non pas pour son résultat (puisque Acosta a vu sa demande rejetée), mais pour l'évolution de l'interprétation du groupe social.

⁴⁴ *Matter of Acosta*, Interim Decision 2986 (BIA, 1985), Etats-Unis.

⁴⁵ La définition de persécution généralement retenue parle de "menaces à la vie ou à la liberté" ou d'"autres violations graves des droits de l'homme": voir Bureau du

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⁴⁴ *Matter of Acosta*, Interim Decision 2986 (BIA, 1985), Etats-Unis.

⁴⁵ La définition de persécution généralement retenue parle de "menaces à la vie ou à la liberté" ou d'"autres violations graves des droits de l'homme": voir Bureau du

L'arrêt *Matter of Acosta* n'est pas resté isolé. Il a servi de point de départ à une jurisprudence consolidée dans les juridictions américaines⁴⁶. De plus, cette même interprétation s'est vue également accueillie, et affinée, au Canada.

Dans un premier temps, les autorités canadiennes font leurs arguments élaborés aux Etats-Unis⁴⁷. Mais une évolution apparaît dès l'arrêt *Cheung v. Canada* de 1993, où la Cour Fédérale d'Appel, face au cas d'une femme chinoise, mère de plus d'un enfant et risquant la stérilisation forcée, déclare:

“Des personnes forment un groupe en ce qu'elles ont le même statut social et un même intérêt que ne partage pas leur gouvernement. Elles ont en commun certaines caractéristiques fondamentales. Toutes les personnes composant ce groupe sont unies par un but, ou s'identifient à ce but qui est si fondamental pour leur dignité humaine qu'on ne devrait pas exiger qu'elles le modifient parce que l'atteinte à la liberté de reproduction des femmes est un droit fondamental placé à un rang élevé dans notre échelle de valeurs.”

Haut Commissaire des Nations Unies pour les réfugiés, Guide des procédures et critères à appliquer pour déterminer le statut de réfugié au regard de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés, U.N. Doc. HCR/PRO/4 (1979).

⁴⁶ Voir par exemple le cas *Sanchez Trujillo v. INS*, 801 F.2nd 1571, Ninth Circuit Court, 1986.

⁴⁷ Ainsi dans le cas *The Minister of Employment and Immigration v. Mayers* rendu en 1992 par la Cour Fédérale d'Appel, sur la question de la reconnaissance du statut de réfugié d'une ressortissante de Trinidad et Tobago, victime de violences conjugales. La Cour a reconnu le statut de réfugié sur le fondement de l'appartenance au groupe “femmes trinidiennes victimes de violences conjugales”. Dans un *obiter dictum*, la Cour, dans la lignée de l'affaire *Matter of Acosta*, définit quatre catégories qui peuvent être considérées comme des “groupes sociaux”: 1) une association volontaire ou involontaire de personnes, 2) des personnes partageant des origines communes, un même statut social, une histoire, des valeurs, des aspirations, une activité commune, une activité économique ou des intérêts souvent en contradiction avec ceux du gouvernement au pouvoir, 3) des personnes partageant des caractéristiques intrinsèques innées et immuables et une conscience solidaire, 4) des personnes partageant un statut volontaire dans un objectif si fondamental pour leur dignité humaine qu'il ne devrait pas leur être demandé de s'en départir.

Pour la première fois, dans cet arrêt, apparaît la référence aux droits fondamentaux de la personne pour examiner la possibilité ou non de renoncer à l'appartenance au groupe. Une renonciation qui impliquerait une violation d'un droit fondamental devrait être considérée équivalente à une renonciation impossible.

Dans son raisonnement dans l'arrêt *Ward*⁴⁸, la Cour Suprême canadienne passe en revue les théories en présence. Elle rejette la théorie libérale qui considère le critère d'appartenance à un groupe social comme résiduel. Elle rejette également la théorie restrictive qui nie au groupe social tout caractère indépendant. Elle adopte ensuite une démarche qui suit le principe *ejusdem generis*. La Cour précise alors les catégories dégagées dans les arrêts précédents, à savoir:

- groupes à caractéristiques communes innées ou immuables. Entreraient dans cette catégorie les victimes de persécution basée sur des caractéristiques comme le sexe, l'orientation sexuelle ou le régime linguistique.
- groupes dont les membres se sont volontairement associés pour des raisons si fondamentales à leur dignité humaine qu'on ne peut leur demander de s'en dissocier. La Cour prend comme exemple les personnes qui sont persécutées du fait des activités humanitaires qu'elles exercent.
- groupes dont l'association est définitive pour des raisons historiques. Selon la Cour, le passé d'une personne constitue une caractéristique inaltérable.

⁴⁸ Le demandeur Francis Ward était un résident de l'Irlande du Nord qui avait joint un groupe terroriste, l'Armée Irlandaise de Libération Nationale (AILN). Il avait reçu l'ordre de ses supérieurs d'assurer la surveillance d'otages. Ayant appris qu'ils allaient être exécutés, Ward organisa leur évasion. Il fut emprisonné et torturé par les membres de l'AILN et condamné à mort devant un simulacre de Cour martiale. Ward réussit à échapper et se livra aux autorités. Après que Ward ait subi une peine d'emprisonnement pour sa participation à la prise d'otages, les autorités irlandaises, incapables d'assurer sa protection contre l'AILN, organisèrent sa fuite au Canada afin qu'il puisse y déposer une demande de reconnaissance du statut de réfugié sur la base de l'appartenance à un certain groupe social, à savoir l'AILN. *Canada v. Ward*, arrêt de la Cour Suprême, 30 juin 1993, 2 Recueil de la Cour Suprême, p. 689.

Cet arrêt pose ainsi les critères de base pour définir la notion de l'appartenance à un certain groupe social et en donne une description suffisamment détaillée. La théorie de l'*ejusdem generis*, qui recherche un équilibre entre les exigences humanitaires et celle de ne pas vider la catégorie d'appartenance à un groupe social de tout son sens, aboutit ainsi à une solution cohérente et complète.

Hathaway, dans la doctrine, a synthétisé les différentes propositions de la théorie de l'*ejusdem generis*. Partant de l'arrêt *Matter of Acosta*, cet auteur retrace les fondements juridiques de cette interprétation. Il distingue ainsi trois catégories de groupes:

- les personnes qui partagent les mêmes caractéristiques innées ou immuables,
- les personnes définies par les mêmes expériences passées, qu'il leur est désormais impossible de changer,
- les groupes qui se sont formés volontairement, et qui sont liés par une caractéristique si fondamentale à leur dignité, qu'ils ne devraient pas avoir à y renoncer.

Cette conception dégage un critère suffisamment ouvert pour permettre des évolutions et suffisamment rigoureux pour rester fidèle à l'esprit de la Convention.

1.2.5. Les orientations du HCR

Malgré les efforts des auteurs de la Convention de 1951, la détermination de la qualité de réfugié reste soumise à des aléas. Une définition parfois sibylline du réfugié a mené les autorités étatiques, seules compétentes pour reconnaître le statut de réfugié selon la Convention, à des applications les plus diverses et parfois contradictoires. La matière souffre ainsi de quelques incohérences et d'un manque d'homogénéité.

Les auteurs de la Convention avaient cependant envisagé ce problème et avaient confié au Haut Commissariat des Nations Unies pour les réfugiés un rôle de garde-fou. En effet, l'article 35, relatif à la coopération des autorités nationales avec les Nations Unies, énonce:

“Les Etats contractants s'engagent à coopérer avec le Haut Commissariat des Nations Unies pour les réfugiés, ou toute autre institution qui lui succéderait dans

l'exercice de ces fonctions et en particulier à faciliter sa tâche de surveillance de l'application des dispositions de cette Convention"⁴⁹.

Parmi les méthodes utilisées par le Comité exécutif du HCR⁵⁰ pour remplir cette mission on peut citer l'adoption de recommandations destinées aux gouvernements sous forme de "conclusions sur la protection internationale des réfugiés" et la publication d'un *Guide des procédures et critères à appliquer pour déterminer le statut de réfugié*⁵¹.

Pour l'élaboration de ce Guide, le bureau du Haut Commissaire a examiné la pratique de détermination du statut de réfugié des Etats signataires de la Convention et du Protocole, la doctrine concernant le statut de réfugié et les échanges de vues qui ont pu avoir lieu entre les Etats membres et le HCR, se fondant sur l'expérience acquise par l'Organisation depuis l'entrée en vigueur de la Convention de 1951.

Ce guide est une sorte de manuel pratique contenant un commentaire des divers éléments de la définition du terme "réfugié" au sens de la Convention de 1951 et du Protocole de 1967. Sa vocation première est celle de servir d'instrument de travail pour les fonctionnaires des Etats contractants qui sont chargés de procéder à la reconnaissance du statut de réfugié⁵². Il est dénué de toute valeur juridique contraignante pour les Etats, mais, de par sa qualité et son origine, s'est rapidement imposé comme une référence essentielle pour la jurisprudence, qui y fait souvent mention. Ainsi, par exemple, les juridictions des Etats-Unis ont-elles considéré ce Guide comme

⁴⁹ Cette même préoccupation se retrouve dans le Statut du HCR, paragraphe 8, lettre g) du chapitre II, qui envisage un "*contact suivi avec les gouvernements et les organisations intergouvernementales intéressés*".

⁵⁰ Le Comité exécutif du programme du Haut Commissaire, dans sa structure actuelle, a été institué par la résolution 1166 (XII) de l'Assemblée générale du 26 novembre 1957 et la résolution 672 (XXV) du Comité économique et social du 30 avril 1958. Il est composé, depuis 1978, de 40 Etats membres.

⁵¹ Bureau du Haut Commissaire des Nations Unies pour les réfugiés, *Guide des procédures et critères à appliquer pour déterminer le statut de réfugié au regard de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés*, U.N. Doc. HCR/PRO/4 (1979) (ci-après "Guide").

⁵² Guide, Préface, p. 1-2.

une “*significant source of guidance*” pour l’interprétation de la notion de réfugié selon la Convention⁵³.

D’une façon surprenante, la définition du groupe social donnée par le Guide dans son paragraphe 77 s’avère particulièrement simple pour un critère qui a fait l’objet d’aussi vives controverses:

“Par ‘un certain groupe social’, on entend normalement des personnes appartenant à un groupe ayant la même origine et le même mode de vie ou le même statut social. La crainte d’être persécuté du fait de cette appartenance se confondra souvent en partie avec une crainte d’être persécuté pour d’autres motifs, tels que la race, la religion ou la nationalité.”

Certains auteurs ont considéré cette description suffisante⁵⁴. Pourtant, elle laisse sans aucun doute une marge d’ambiguïté. Si les expressions “origine” et “mode de vie” sont susceptibles d’être cernées, celle de “statut social” reste incertaine et rend peut-être même tautologique l’entière définition. De plus, tout comme celle proposée par GRAHL-MADSEN, cette interprétation tend à nier une nature indépendante au critère de groupe social, en le liant explicitement aux autres motifs de persécution (parmi lesquels, d’ailleurs, celui des opinions politiques est mystérieusement absent).

Le Guide poursuit son analyse dans le paragraphe 78:

“L’appartenance à un certain groupe social peut être à l’origine de persécutions parce que les prises de position politique, les antécédents ou l’activité économique de ses membres, voire l’existence même du groupe social en tant que tel, sont considérés comme un obstacle à la mise en oeuvre des politiques gouvernementales.”

Ce n’est qu’ici qu’apparaît le motif des opinions politiques, auquel s’ajoutent cependant d’autres considérations (activités économiques ou les “antécédents”) traditionnellement absents dans la définition

⁵³ S’agissant de la valeur à accorder au guide, voir les arrêts *Sanchez-Trujillo v. INS* (9th Circuit Court, 1986); *Hernandez-Ortiz v. INS* (9th Circuit Court, 1985); *Matter of Acosta* (BIA, 1985).

⁵⁴ FULLERTON, *cit.*, p. 518.

de réfugié. Le concept devient alors vraiment ambigu: il est en même temps élément qui confirme les autres critères et motif autonome de persécution, un peu comme dans la théorie de Grahl-Madsen. Au lieu d'éclairer une notion nébuleuse, ce commentaire semble plutôt la rendre encore plus incertaine. A ceci s'ajoute, dans ce même paragraphe *in fine*, la référence aux autorités gouvernementales, que l'on peut considérer d'autant plus regrettable qu'il semble désormais acquis qu'il existe d'autres agents de persécution possibles. La persécution peut notamment émaner de la société dans laquelle un individu évolue ou de groupes terroristes⁵⁵.

L'interprétation ébauchée ci-dessus se précise dans le dernier paragraphe consacré à ce sujet par le Guide qui précise que:

“Normalement, la simple appartenance à un certain groupe social ne suffira pas à établir le bien-fondé d'une demande de reconnaissance du statut de réfugié. Il peut cependant y avoir des circonstances particulières où cette simple appartenance suffit pour craindre des persécutions.”

L'appartenance à un certain groupe social apparaît en ligne générale comme un critère confirmant la présence d'autres motifs de persécution et ce n'est que dans “des circonstances particulières” qu'il recouvre une autonomie mal précisée.

1.3 Conclusion

A l'issue de l'analyse qui précède, nous nous trouvons face à une palette de théories qui, dans l'application du critère, combinent de façon différente les exigences humanitaires et celles du formalisme juridique. Dans la recherche d'un équilibre harmonieux entre ces deux lignes de force, la théorie de *lejusdem generis* apparaît sans doute comme la plus séduisante. Elle fait place aux dites exigences humanitaires sans sacrifier pour autant la rigueur scientifique, et fournit un paramètre de gestion des cas les moins évidents de reconnaissance du statut de réfugié: c'est l'identification du groupe

⁵⁵ MOORE, E., “Refugee Determinations: A Consolidation of Approaches to Actions by Nongovernmental Forces”, *Virginia Journal of International Law*, vol. 33, n° 4, Summer 1993, pp. 927-958.

social par des caractéristiques innées ou immuables, ou encore inscrites à un point tel dans l'identité des membres que s'en départir serait une atteinte à leurs droits fondamentaux. Encore faut-il savoir comment ce paramètre fonctionne, ce qu'une analyse empirique permettra de faire.

2. Applications particulières du critère d'appartenance à un certain groupe social

Les quatre motifs de persécution constitués par la race, la religion, la nationalité, et les opinions politiques dans la définition du réfugié représentent en quelque sorte un cadre strict, sinon un carcan, puisqu'ils sont fondés sur des notions relativement rigides. En revanche, le critère de l'appartenance à un certain groupe social, autrement plus souple, peut être la porte vers une possible évolution, car c'est le seul qui permette d'appréhender les situations nouvelles non envisagées par les auteurs de la Convention. Pour éviter le risque de dénaturer par là la notion même de réfugié, on doit comprendre comment le critère de l'appartenance à un certain groupe social est appliqué, et pour ce faire s'intéresser aux jurisprudences nationales.

Les types de cas les plus significatifs impliquant des personnes qui demandent la reconnaissance du statut de réfugié seront examinés dans les pages qui vont suivre. Ils mettent en cause, d'une part les femmes, auxquelles nous nous intéresserons plus longuement, puisqu'il s'agit certainement de l'application la plus fréquente du critère; et d'autre part, les membres d'une famille, les homosexuels, et enfin, les membres d'une association volontaire.

2.1. Cas de persécution en raison du sexe

La question des persécutions infligées aux femmes en tant que femmes n'est pas du tout marginale. Toutes espèces de violence, de menaces d'atteinte à la sécurité physique, de mauvais traitements ou de sévices sexuels⁵⁶ amènent les femmes à quitter leur pays d'origine en raison des persécutions qu'on leur y fait subir.

⁵⁶ Comité exécutif du programme du Haut Commissaire, conclusion n°39 (XXXVI), *Les femmes réfugiées et la protection internationale*, 1985.

2.1.1. Les spécificités de la persécution en raison du sexe comme illustration d'appartenance à un groupe social

Si le phénomène des femmes réfugiées mérite une attention spéciale, c'est tout d'abord en raison de la nature particulière des brimades dont elles peuvent faire l'objet.

On sait que, dans les faits, viols, exploitation sexuelle et sévices sont légion contre les femmes, ce qui en fait un groupe particulièrement vulnérable⁵⁷. Le problème à résoudre est celui de savoir dans quelle mesure ces actes constituent des persécutions au sens de la Convention de 1951. Pour cela, il nous faut revenir à la définition de la persécution déjà évoquée, à savoir les menaces à la vie ou à la liberté ou d'autres violations graves des droits de l'homme⁵⁸. Cette définition établit un lien avec les droits fondamentaux de la personne et nous amène donc à étudier les instruments internationaux en la matière.

Le *Pacte international relatif aux droits civils et politiques* de 1966 prévoit, dans l'article 3, un "*droit égal des hommes et des femmes de jouir de tous les droits civils et politiques énoncés dans le présent Pacte*" et, en son article 7, que "*nul ne sera soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants*"⁵⁹. En 1984, la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* nous apporte une précision supplémentaire à ce sujet en définissant la torture comme:

"tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment (...) de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne (...) lorsqu'une telle douleur ou de

⁵⁷ Voir, en ce sens, Comité exécutif du programme du HCR, Conclusion N° 54(XXXIX) de 1988, intitulé "Femmes réfugiées". Voir aussi, CASTEL, J.R., "Rape, Sexual Assault and the Meaning of Persecution", *International Journal of Refugee Law*, vol. 4, n° 1, January 1992, pp. 39-56.

⁵⁸ Voir *supra* page 3.

⁵⁹ Cette tendance se dessinait déjà en 1948 dans la *Déclaration universelle des droits de l'homme* déclare, dans son article 1, que "*tous les êtres humains naissent libres et égaux en dignité et en droits*" et, dans son article 3, que "*tout individu a le droit à la vie, à la liberté et à la sûreté de sa personne*".

telles souffrances sont infligées par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite.”

Par conséquent, toute violation grave des droits fondamentaux de la personne imposant une souffrance physique ou mentale à la victime doit être considérée comme une persécution au sens de la *Convention relative au statut des réfugiés*. Prendre uniquement en compte les atteintes à la liberté serait trop restrictif et laisserait la plupart des femmes qui ont fui leur pays d'origine parce que victimes de violence sans aucune protection⁶⁰.

Ce lien entre les droits de l'homme et la notion de persécution revêt un caractère irréfragable tant pour la doctrine que pour la jurisprudence et le HCR.

Ainsi Goodwin-Gill propose une lecture de la persécution à travers le prisme des droits de l'homme avec la définition suivante:

“measures, taken under basis of one or more of the stated grounds which threaten: deprivation of life or liberty; torture or cruel inhumane or degrading treatment; subjection to slavery or servitude; non recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security or integrity); and a pression, discrimination or harassment of a person in his or her private home or family”⁶¹.

Deux décisions émanant de juridictions américaines sont significatives à ce sujet. Face à deux requérantes victimes de viol, les juges ont été amenés à examiner le lien entre violence sexuelle et persécution et ont reconnu que les violences dont elles avaient été l'objet constituaient des persécutions au sens de la Convention de 1951⁶².

⁶⁰ Ainsi, dans le cas *Araya Heredio v. Minister of Employment and Immigration*, Immigration Appeal Board Decision 76-1127, C.L.I.C. n° 1.11, 20 mars 1979, les menaces de viol faites à la requérante ont été considérées comme constitutives de persécution.

⁶¹ GOODWIN-GILL, G., *The Refugee in International Law*, cit., p. 40.

⁶² Dans l'affaire *Sofia Campos-Guardado v. INS* (809 F.2nd 285 Fifth Circuit, 1987), la demanderesse avait été agressée par quatre membres de la guérilla

Le HCR lui-même, dans une note concomitante à la publication des *Lignes directrices sur la protection des femmes réfugiées* du 22 juillet 1991, précise que la protection des femmes réfugiées exige non seulement le respect de la Convention de 1951 et du Protocole de 1967 mais également des autres instruments pertinents relatifs aux droits de l'homme.

Les cas de persécution en raison du sexe se caractérisent, d'autre part, par l'identité de leurs auteurs. En effet, c'est surtout dans ces cas que les agents de persécution sont, non pas les autorités gouvernementales, mais des groupes ou la population en général. Comme le souligne le Guide du HCR:

*“Lorsque des actes ayant un caractère discriminatoire grave ou très offensant sont commis par le peuple, ils peuvent être considérés comme des persécutions s'ils sont sciemment tolérés par les autorités ou si les autorités refusent ou sont incapables d'offrir une protection efficace”.*⁶³

L'Immigration Appeal Board canadien identifie quatre situations dans lesquelles on observe un manquement à la protection étatique:

- “1. Persecution committed by the State concerned;
2. Persecution condoned by the State concerned;
3. Persecution tolerated by the State concerned;

salvadorienne, alors qu'elle était en visite chez son oncle. Alors que les hommes étaient exécutés, les femmes étaient violées et contraintes à la fuite sous menace de mort. Sofia Campos-Guardado a été par la suite menacée et harcelée par ces personnes à plusieurs reprises et elle décida ainsi de fuir aux Etats-Unis. Dans le cas *Olympia Lazo-Majano v. INS* (813 F.2nd 1432 Ninth Cir., 1987), la requérante dont le mari, membre d'une organisation d'extrême droite avait fui aux Etats Unis, avait été violée à maintes reprises par son employeur Zuniga, sergent de l'armée salvadorienne. Celui-ci, usant fallacieusement de ses prérogatives d'officier, l'avait menacée de mort, elle et ses enfants. Même si dans les deux cas les autorités nièrent le statut de réfugié aux requérantes puisque les menaces dont elles étaient victimes étaient dues à des motifs personnels (ils relèveraient de leur vie privée!), ils restent pertinents à notre sujet dans la mesure où ils reconnaissent que des viols ou des menaces à caractère sexuel envers des femmes peuvent constituer une “persécution”.

⁶³ *Guide cit.*, p. 18. Sur les agents de la persécution dans la doctrine, voir, par exemple, HATHAWAY, J., *The Law of Refugee Status*, Butterworths, Toronto-Vancouver, 1991, pp. 125-133.

4. Persecution not condoned or not tolerated by the State concerned but nevertheless present because the State either refuses or is unable to offer adequate protection.⁶⁴

S'ajoute à cela le problème des motifs de la persécution envers les femmes. Si ces actes de violence sont souvent motivés par des raisons de race, de religion, de nationalité ou d'opinions politiques⁶⁵, cela ne couvre certainement pas l'ensemble des raisons pour lesquelles les femmes sont contraintes à la fuite. Devant le silence de la Convention de 1951 sur les persécutions en raison du sexe, le motif le plus à même d'assurer la protection des femmes est l'appartenance à un certain groupe social. Le sexe, caractéristique certainement immuable et innée d'une personne, aurait la possibilité de distinguer un groupe social. Mais suffit-il par lui-même?

Probablement irait-on trop loin en affirmant que toutes les femmes constituent "un certain groupe social"⁶⁶. Il faut trouver un critère plus précis, qui permette de mieux appréhender le vrai problème qui reste celui de la violence dirigée contre les femmes en tant que femmes. Pour cela, il faudra s'intéresser aux textes et à la jurisprudence qui se sont occupés spécifiquement de ce problème.

⁶⁴ Immigration Appeal Board, *Zahirdeen Rajudeen v. Minister of Employment and Immigration* (1985), 55 N.R. 129 (F.C.A.).

⁶⁵ Ainsi, le cas tragique de l'épuration ethnique en ex-Yougoslavie peut-il être classé dans la catégorie des persécutions en raison de la race ou de la religion des victimes (voir Comité exécutif du programme du HCR, document A/AC.96/822 du 12 octobre 1993; *Note on Certain Aspects of Sexual Violence against Refugee Women*, en particulier le paragraphe intitulé "Sexual Violence as Persecution under the Refugee Definition"). De même, les traitements inhumains infligés aux femmes qui ont affirmé par leur comportement une opposition aux règles sociales de leur communauté appartiennent-ils parfois au chef des persécutions en raison des opinions politiques (voir HUMAN RIGHTS AND FOREIGN POLICY ADVISORY COMMISSION, "Threatened Women and Refugee Status", The Hague, décembre 1987, p. 4-7 et BONNERJEA, L., "Shaming the World: The Needs of Women Refugees", *Change*, World University Service, Londres 1985, p. 19-20).

⁶⁶ Ainsi, l'arrêt *Mayers v. Canada*, cit.: "il est peu probable que dans l'esprit des plénipotentiaires, présents lors de la négociation de la Convention de 1951, "les femmes", qui représentent la moitié de l'humanité puissent constituer un certain groupe social".

2.1.2. Examen des textes relatifs à la persécution en raison du sexe

C'est le Parlement européen qui, le premier, s'est prononcé sur la question de la protection des femmes persécutées qui ont fui leur pays d'origine, en se basant sur le seul instrument universel applicable, c'est-à-dire la Convention de 1951. Il proposait une lecture nouvelle du motif de l'appartenance à un certain groupe social afin de l'adapter aux besoins de ce cas spécifique. Dans une résolution du 13 avril 1984⁶⁷, il enjoignait les autorités nationales des Douze à considérer les femmes persécutées comme membres d'un groupe particulier.

Un long débat eut lieu par la suite au sein du Comité exécutif du programme du HCR. Conscients des lacunes de la Convention et de l'acuité du problème, certains Etats proposèrent de mettre à l'ordre du jour la question des femmes réfugiées. Devant la forte opposition des représentants de certains pays (notamment musulmans) qui craignaient qu'une référence trop large aux femmes victimes de persécution se traduise par une condamnation générale de leur système de valeurs, une formule de compromis fut finalement adoptée:

"Le Comité exécutif (...)

k) reconnaît que les Etats, dans l'exercice de leur souveraineté, sont libres d'adopter l'interprétation selon laquelle les femmes en quête d'asile soumises à des traitements cruels ou inhumains pour avoir transgressé les coutumes de la communauté où elles vivent peuvent être

⁶⁷ *Resolution on the Application of the Geneva Convention relating to the Status of Refugees*, 1984 O.J.(C127) 137. Cette même année, aux Pays-Bas, le Conseil pour les réfugiés avait donné la directive d'orientation suivante:

"Le Conseil néerlandais pour les réfugiés estime que la persécution en raison de l'appartenance à un certain groupe social peut aussi comprendre la persécution fondée sur la position sociale conférée par le sexe. Cela est particulièrement vrai dans les situations où la discrimination à l'égard des femmes dans la société, contraire aux règles de droit international, a été institutionnalisée et où les femmes qui s'opposent à ce genre de discrimination, où s'en éloignent, font face à des peines sévères, soit de la part des autorités elles-mêmes soit de la part de leur milieu social, où les autorités ne veulent pas ou ne peuvent pas les protéger" (HUMAN RIGHTS AND FOREIGN POLICY ADVISORY COMMISSION, *loc. cit.*, p. 7-8).

considérées comme appartenant à un "certain groupe social", aux termes de l'article premier, A.2) de la Convention des Nations Unies de 1951 relative au statut des réfugiés".

Cette conclusion, bien que reflétant une intention louable, était insuffisante. Aussi dès le 22 juillet 1991 le H.C.R. a élaboré des *Lignes directrices pour la protection des femmes réfugiées*⁶⁸. Dans ce document, le Comité exécutif du H.C.R. prévoit que:

"Les femmes qui craignent d'être persécutées ou d'être victimes d'une discrimination grave au motif de leur sexe, doivent être considérées comme appartenant à un groupe social aux fins de la détermination du statut de réfugié. Dans certains cas, on peut aussi considérer qu'elles ont pris une position religieuse ou politique qui transgresse les règles sociales de leur communauté".

Ces préoccupations ont eu des répercussions à l'échelle nationale, notamment au Canada, avec l'adoption de *Directives de la Commission de l'immigration et du statut de réfugié concernant les revendicatrices du statut de réfugié craignant d'être persécutées en raison de leur sexe*, et aux Etats-Unis, avec des *Guidelines for Women's Asylum Claims*⁶⁹.

Les premières examinent deux cas particuliers: d'une part, en se référant à la conclusion n° 39 du Comité exécutif du HCR, celui des femmes ayant transgressé les lois sur la religion ou les coutumes sociales et d'autre part —et c'est là une innovation— celui de la violence familiale⁷⁰. Elles considèrent, dans ces deux hypothèses,

⁶⁸ *Lignes directrices pour la protection des femmes réfugiées*, H.C.R., EC/SCP/67, 22 juillet 1991.

⁶⁹ Elaboré par *Women Refugees Project of Cambridge and Somerville Legal Services and Harvard Immigration and Refugee Program, and Clinical Instructor*, dans *International Journal of Refugee Law*, vol. 6, n° 4, 1994, pp. 517-534.

⁷⁰ Dans un commentaire du projet, la Présidente de la Commission de l'immigration et du réfugié se fonde sur l'objet visé par la définition de réfugié au sens de la Convention pour aborder la question de la violence familiale: le but de la Convention étant de protéger les personnes subissant un préjudice important pour l'un des motifs prévus par la Convention et à qui l'Etat n'offre pas une protection raisonnable, l'on devrait ainsi considérer ces femmes comme appartenant au

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que le critère de l'appartenance à un certain groupe social doit être appliqué⁷¹. Les secondes différencient les cas où la persécution constituerait un type de dommage spécifique au sexe (comme le viol, les abus sexuels, les mariages forcés, etc.), et ceux où la persécution a lieu à cause de la qualité de femme de la requérante, comme le refus de se conformer à des règles sociales qui restreindraient très sévèrement les droits des femmes. Mais les lignes directrices américaines identifient surtout un groupe social défini par le sexe de ses membres: une requérante d'asile n'aura pas besoin de prouver qu'elle a personnellement été persécutée, la preuve d'une pratique de persécution des femmes se trouvant dans une situation similaire suffira⁷².

Les résultats de cette analyse des textes sont contrastés. La conclusion n° 39 du Comité exécutif du HCR pêcheait par un excès de précaution, soucieuse qu'elle était de ménager la susceptibilité des Etats. Les *Lignes directrices pour la protection des femmes réfugiées* de 1991 vont plus loin en affirmant sans ambages que les victimes d'une discrimination grave au motif de leur sexe doivent être considérées comme faisant partie d'un groupe social. Mais cet instrument reste non obligatoire pour les Etats. Les autorités nationales surmontent ce dernier obstacle et fournissent à la jurisprudence des critères précis pour la reconnaissance du statut de réfugié aux femmes craignant une persécution en raison de leur appartenance à un certain groupe social. En l'occurrence, le résultat ultime, celui de l'application de ces critères, reste la tâche des juridictions.

groupe social particulier des femmes non protégées et victimes de violence familiale (MAWANI, Nurjehan, "Introduction aux Directives de la CISR concernant les revendicatrices du statut de réfugié craignant d'être persécutées en raison de leur sexe", *International Journal of Refugee Law*, vol. 5, n° 2, 1993, p. 253.

⁷¹ En plus, les Directives préconisent que l'audition des revendicatrices soit faite par des femmes ayant suivi une formation particulière. Elles prévoient l'élaboration d'une documentation objective et à jour sur la situation des femmes dans leur pays d'origine, sur la fréquence des cas de violence tant sexuelle que familiale et sur la protection de l'Etat dont peuvent se prévaloir les femmes, ce qui devrait permettre aux officiers de mieux comprendre le contexte de la demande d'asile.

⁷² Le projet contient également des lignes directrices sur la procédure de reconnaissance du statut pour les femmes, prévoyant par exemple que les preuves soient considérées dans la perspective de la requérante.

2.1.3. Les femmes victimes de persécution en raison de l'appartenance à un certain groupe social dans la jurisprudence

Dans la pléthore de décisions jurisprudentielles en la matière, nous ne choisirons que les cas les plus symptomatiques. On partira de certains types de persécutions dont sont victimes les femmes pour illustrer notre propos, à savoir:

- les femmes persécutées pour avoir transgressé les normes religieuses et sociales de leur communauté;
- les femmes qui souffrent de graves discriminations, par la loi ou par la coutume, dans leur pays;
- les femmes victimes de violences par des forces non-gouvernementales et qui n'obtiennent aucune protection des autorités nationales.

Dans le cas *Fatin v. INS*⁷³, une femme iranienne qui craignait des persécutions pour avoir refusé de porter le voile et du fait de son éducation occidentale demandait l'asile aux Etats-Unis. La Cour refusa la reconnaissance du statut de réfugié au motif que les politiques gouvernementales iraniennes s'appliquaient à toutes les citoyennes sans distinction aucune et que par conséquent on ne pouvait isoler un groupe spécifique, cible de persécutions, auquel Fatin appartiendrait. D'autre part, la Cour estima que cette dernière n'avait pas apporté une preuve suffisante de son refus de se conformer aux règles et de la force de ses convictions. Malgré son résultat négatif, cet arrêt reste, par son raisonnement, un bon exemple de la façon dont les cours américaines appréhendent le problème des femmes persécutées pour avoir transgressé les normes religieuses et sociales de leur communauté. La Cour a tracé les contours que la persécution doit revêtir pour justifier la reconnaissance du statut de réfugié.

Dans un cas similaire, l'Office fédéral pour la reconnaissance des réfugiés de la République fédérale allemande a accordé l'asile à cinq femmes iraniennes au motif que l'idéologie qui fonde le pouvoir des hommes sur les femmes se manifeste comme une politique générale

⁷³ *Fatin v. INS*, Third Cir., décision du 20 décembre 1993, n° 92-3346.

de répression à l'égard des femmes, sans aucun égard pour leurs libertés individuelles.

En ce qui concerne les femmes visées par de graves discriminations d'ordre légal ou coutumier dans leur pays, on peut citer le cas *In Re:X*⁷⁴ où une jeune femme du Zimbabwe réclamait l'asile au Canada parce qu'elle avait été contrainte à un mariage polygamique, moyennant paiement à sa famille, en application d'une coutume locale. Victime de violence conjugale et du refus tant de sa famille que des autorités de lui apporter une protection quelconque, elle avait fui son pays. La Cour accéda à sa demande, la considérant membre de deux groupes sociaux particuliers: celui des "femmes du Zimbabwe objet de violences conjugales et sans protection" et celui des "femmes du Zimbabwe forcées à un mariage arrangé en vertu du droit coutumier local". Cet arrêt marque le point de départ d'une jurisprudence canadienne qui, depuis lors, tend à inclure dans la catégorie du groupe social les femmes victimes de persécution en raison de leur sexe.

Toujours dans cette catégorie, on doit traiter le cas des mutilations sexuelles à travers deux affaires. La première est celle d'une femme qui avait fui le Mali pour échapper aux pressions familiales exigeant qu'elle se soumette à la pratique coutumière de l'excision, ainsi qu'aux discriminations visant les femmes non excisées. La Commission des recours française a reconnu que ce rite, lorsque commis, encouragé ou toléré par l'autorité publique, deviendrait une persécution à condition que les intéressées y aient été personnellement exposées contre leur volonté⁷⁵. Dans le second cas, une Somalienne demandant l'asile au

Canada, en raison notamment de la menace d'excision qui pesait sur sa fille, vit l'Immigration and Refugee Board le lui accorder: celui-ci fut d'avis que cette pratique constituait une violation grave des droits de la personne contre laquelle la protection fournie par l'Etat somalien était insuffisante.

⁷⁴ Immigration and Refugee Board, 13 novembre 1992.

⁷⁵ Commission des recours, décision n° 164078 de 1991. Dans le cas spécifique, une preuve suffisante de ces éléments n'ayant pas été fournie, la Commission rejeta la demande.

Parmi les cas de femmes violentées par des forces non-gouvernementales et qui n'obtiennent aucune protection des autorités nationales, on peut citer la décision concernant Nadia El Kebir. La requérante était victime de menaces et de violences répétées de la part d'éléments islamistes tant en raison de l'activité professionnelle qu'elle entendait continuer à exercer que de son refus proclamé, en dépit des pressions dont elle faisait l'objet, de se soumettre aux exigences qu'on entendait lui imposer en matière de mode de vie. La Commission des recours considéra que les autorités locales, restées impassibles malgré leur connaissance de ces agissements, devaient être regardées comme les ayant tolérés⁷⁶. Par conséquent, l'asile lui fut accordé.

De même, le statut de réfugié fut reconnu par l'Immigration Appeal Board canadien à une veuve turque, habitant seule, harcelée quotidiennement et agressée à maintes reprises. Les autorités gouvernementales refusaient de répondre à ses plaintes, au motif qu'il était contre-indiqué pour une femme de vivre sans la protection d'un membre masculin de sa famille⁷⁷.

Dans le domaine de la protection des femmes contre les persécutions, l'application du critère de l'appartenance à un certain groupe social a déjà fait ses preuves. Son potentiel à saisir des situations nouvelles non envisagées par les auteurs de la Convention se trouve là pleinement développé.

2.2 *Autres cas de persécution*

Cependant, il existe d'autres domaines où le besoin d'une protection internationale a été ressenti. Malheureusement, le matériau jurisprudentiel et doctrinal y est nettement moins riche. Cela ne nous dispense toutefois pas d'y prêter attention.

2.2.1. Cas de persécution en raison de l'orientation sexuelle

Cette question a été rattachée par HATHAWAY à une caractéristique immuable de l'être humain, approche que semble préférer la jurisprudence à celle qui classerait l'homosexualité

⁷⁶ Voir en ce sens, Commission des recours des réfugiés, 1994, *International Journal of Refugee Law*, "Cases and Comments", IJRL/0209.

⁷⁷ Immigration Appeal Board Decision, M87-1541X, 10 août 1987.

comme "une caractéristique à laquelle un individu ne saurait être forcé à renoncer sans qu'il soit porté atteinte à ses droits fondamentaux". Quel que soit cependant le point de vue adopté, le résultat, c'est-à-dire la reconnaissance du statut de réfugié, reste assuré. Les deux approches, bien que par des moyens différents, visent à rattacher l'individu à un certain groupe social, soit les homosexuels victimes de persécution.

Les juridictions nationale amenées à examiner les cas de tels demandeurs d'asile, se sont penchées sur deux éléments:

- les persécutions qui peuvent émaner des autorités gouvernementales, et
- le rejet de ce comportement par la société, assorti de brimades intolérables.

Ainsi, la Cour administrative fédérale allemande a considéré que la probabilité de persécution contre un homosexuel iranien était grande, puisque ce comportement est passible de la peine de mort en Iran. La Cour alla jusqu'à dire que l'homosexualité est une caractéristique personnelle irréversible et reconnut ainsi l'asile au requérant⁷⁸.

Dans l'affaire canadienne *Re:Inaudi*, l'Immigration and Refugee Board a reconnu à un Argentin le statut de réfugié sur la base de son homosexualité. Inaudi, harcelé, détenu et agressé à plusieurs reprises par les autorités, a été en outre forcé à céder au chantage et à payer divers pots-de-vin pour garantir que son homosexualité ne soit pas rendue publique⁷⁹. Le tribunal administratif considéra que Inaudi était: a) persécuté en raison de son orientation sexuelle et, b) que les homosexuels formaient un certain groupe social. La décision désigne les éléments caractéristiques d'un "certain groupe social" au sens de la Convention de 1951, c'est-à-dire, le degré de similarité des membres du groupe et l'immuabilité du facteur unificateur. Or, si le raisonnement adopté semble favoriser la première thèse citée

⁷⁸ Cour fédérale administrative, n° 9 C 278.86 du 21 août 1986, RFA.

⁷⁹ Par exemple, la police avait averti la propriétaire d'Inaudi de l'homosexualité de ce dernier, sur quoi il fut promptement évincé de son appartement; à une autre occasion, on informa son employeur, qui le renvoya séance tenante. Voir *Re: Inaudi*, Immigration and Refugee Board, n° T91-04459 du 9 avril 1992.

plus haut (celle de la caractéristique immuable), le tribunal confirme le peu d'importance pratique de la distinction en notant que, si tel n'était pas le cas, le choix de l'orientation sexuelle serait si fondamental que la seconde thèse justifierait sa décision.

2.2.2. Cas de persécution en raison de l'appartenance à une famille

L'article 16 de la *Déclaration universelle des droits de l'homme* énonce que: "la famille est l'élément naturel et fondamental de la société et a droit à la protection de la société et de l'État". Il n'est donc pas surprenant de voir que nombre de demandes de reconnaissance du statut de réfugié en raison du rattachement à une cellule familiale ont été reconnues comme faisant partie de la catégorie "appartenance à un certain groupe social".

Ce cas, s'il se rapproche de celui de la persécution sur la base des activités politiques, ne le recoupe pas pour autant. En effet, il s'agit ici de persécution "par ricochet", puisque ces agissements ne sont pas basés sur les opinions ou les activités de l'individu lui-même, mais sur celles d'un membre de sa famille. La violence peut être motivée soit par l'imputation de ces idées à la victime, soit par le désir d'obtenir des informations, soit par la volonté de punir la famille par cet intermédiaire.

Pour prouver une persécution pour ces motifs, on doit établir la relation familiale (caractéristique immuable, s'il en est) avec la cible des persécutions du gouvernement ou de tout autre agent, ainsi que l'appartenance à un certain groupe social. Mais de quel groupe social s'agit-il? Deux hypothèses sont envisageables:

- a. Soit l'on considère comme tel la famille elle-même. Ainsi, la jurisprudence canadienne a reconnu la possibilité de qualifier une famille comme "certain groupe social" dès 1979, dans l'affaire *Astudillo v. Minister of Employment and Immigration*⁸⁰, ce qui fut affirmé avec certitude en 1984 dans l'affaire de *Richard Cid Requena Cruz*:

"The application, based on social group, raises the question whether or not a family can be considered a social group(...). The answer to that question is a qualified yes. In some

⁸⁰ Federal Court of Appeal (1979), 31 N.R., p. 121.

cultures (...) it is quite likely that an individual will be assumed to be a supporter of specific social, religious or political ideas merely because his father, uncle or a prominent family member is a known advocate of those ideas."⁸¹

- b. Soit l'on identifie un autre groupe, formé, par exemple, par les femmes, les enfants, etc. de différentes familles sujettes à persécution. Dans une affaire concernant une femmes kurdes de Turquie, la requérante s'était vue accorder l'asile par une juridiction allemande parce que son mari était un opposant actif au régime et qu'elle était par conséquent victime de persécutions. Le groupe social identifiable en l'espèce était celui des femmes dont les membres de la famille sont opposants politiques⁸².

2.2.3. Cas de persécution en raison de l'appartenance à une association volontaire

La facette la plus controversée du concept d'appartenance à un certain groupe social est celle qui envisage les membres d'associations dont il serait possible de se retirer de son plein gré.

Si le but de l'association est essentiel au plein développement de l'identité ou de la conscience de l'individu, on peut raisonnablement penser que ses membres menacés de persécution devraient jouir d'une protection internationale, car les forcer à renoncer à l'intérêt qui les unit serait une violation de leurs droits fondamentaux. Dans cette catégorie pourraient entrer, par exemple, les étudiants ou les intellectuels. De même, en général, les groupes définis par leur emploi ou leur profession tombent-ils dans cette catégorie, tant il est vrai que la liberté de choisir son occupation est un droit fondamental. Il en irait de même pour les membres de syndicats ou d'associations ouvrières, si l'on en croit une certaine jurisprudence⁸³.

⁸¹ Immigration Appeal Board, n° T83-10559, du 8 février 1984.

⁸² Cour administrative fédérale, décision n° 9 C. 35.84 du 2 juillet 1985.

⁸³ *Wilfredo Alejandro Zubieta*, Immigration Appeal Board decision 79-1034, C.L.I.C., 31 octobre 1971 et *Oscar Trujillo Barraza*, Immigration Appeal Board decision 77-9449, 23 mars 1978.

Il est en revanche moins facile d'appliquer le critère lorsque le rôle de la volonté s'exerce, non pas sur la participation au groupe en tant que tel, mais sur le facteur qui singularise les membres. C'est pourtant ce qu'a accompli, dans une décision rendue en 1993, la Cour Fédérale du Canada. Il s'agissait d'une demande de reconnaissance du statut de réfugié formulée par une Chinoise⁸⁴ qui courait le risque d'être stérilisée parce que mère de plus d'un enfant. La requérante se vit accorder le statut demandé, car on la considéra comme remplissant les trois conditions énoncées par la Cour: *primo*, partager le même statut social et un intérêt non conforme à celui de son gouvernement; *secundo*, posséder des caractéristiques intrinsèques communes aux membres de son groupe; et, *tertio*, que les membres dudit groupe fasse l'objet d'une même atteinte à un droit fondamental, en l'espèce celui de se reproduire.

C'est le lien ainsi tracé avec les droits essentiels de la personne qui, comme dans les cas précédents, justifie ici la protection accordée, et ce même si la participation à (ou l'inclusion dans) l'association est volontaire et ne présente donc pas un caractère proprement immuable.

Conclusion

La présente étude s'est amorcée sur une certaine méfiance à l'endroit du concept de "l'appartenance à un certain groupe social". Non envisagé par le projet original de la *Convention relative au statut de réfugié* de 1951, introduit presque à la sauvette, sans opposition ni discussion, par les plénipotentiaires, le critère se présentait comme une boîte noire dont on pouvait cerner le contour mais pas le contenu. Cette aura mystérieuse s'avère être à la fois sa force et sa faiblesse.

La faiblesse réside dans une élucidation imparfaite du concept en termes formels. Celui-ci peut voir son sens soit exagérément restreint, c'est-à-dire dépourvu d'autonomie par rapport aux autres motifs de persécution et réduit à les corroborer; soit étendu hors de toute limite raisonnable, par une interprétation qui en ferait un critère résiduel trop généreux. Il pourrait donc s'agir, en l'occurrence, d'une boîte de Pandore.

⁸⁴ *Cheung v. Minister of Employment and Immigration*, [1993] F.C.J. N° 309

A l'inverse, le flou qui entoure la notion fait aussi sa force, puisque ce motif de persécution ouvre une porte plus large à l'évolution. On entend par là la capacité unique du critère à accommoder les situations non envisagées par les auteurs de la Convention, mais nécessitant néanmoins une protection internationale. Le critère de l'appartenance à un certain groupe social devient alors un instrument utile dans la matière changeante qu'est le droit des réfugiés, pour autant qu'on sache en faire usage avec discernement⁸⁵.

En ce sens, la phrase du juge Ganshof Van Der Meersch sur la Convention européenne des droits de l'homme est tout aussi valable dans le cas qui nous occupe:

“Le droit de la Convention n'est pas statique. Son objet ne le permet pas. Le milieu social dans lequel l'accord international a puisé son inspiration et sa justification vit et réagit directement sur le système normatif conventionnel. Les objectifs de la Convention sont solidaires du rythme de l'évolution de la société”.

Une boîte à ouvrir avec précaution, en somme. Et c'est la théorie de *l'ejusdem generis* qui nous en fournit la clé. En effet, en établissant un lien entre la notion d'appartenance à un certain groupe social et les droits fondamentaux de la personne, elle confère au critère un cadre dans lequel celui-ci peut s'épanouir: il suivra les progrès réalisés dans le domaine des droits de l'homme, lequel endiguera en retour l'imprécision dont on pouvait lui faire grief.

On peut sans doute voir là un reflet, à une échelle réduite, du lien essentiel qui existe entre le développement du droit des réfugiés et celui des droits de l'homme.

⁸⁵ W.GANSHOF VAN DER MEERSCH, cité dans *La Convention européenne des droits de l'homme, commentaire article par article*, sous la direction de PETITIT, DECAUX et IMBERT, *Economica*, mai 1995, p. 45.

HUMAN RIGHTS DOCUMENTATION IN MALTA

JOHN J. CREMONA

Elaborating on a number of Maltese human rights documents exhibited in Vienna on the occasion of an International Colloquy on Human Rights organized there by the Council of Europe, this paper seeks to bring out the special significance of these documents in the context of the promotion and protection of human rights in Malta. It ends up by focusing on the European Convention Act, 1987, which effectively incorporated the substantive provisions of the European Convention on Human Rights and its First Protocol into Maltese law and made judgments of the European Court of Human Rights against Malta enforceable by the Maltese Constitutional Court in the same manner as if they were its own judgments. In highlighting the far-reaching effects of this important piece of legislation, the paper also dwells on some related problems.

In 1965, as a judge of the European Court of Human Rights, I represented my country, still fresh from the Independence celebrations, in an International Colloquy about the European Convention on Human Rights, which was held in Vienna between the 18th and the 20th October. It was organized by the Faculty of Law of the University of Vienna, in conjunction with the secretariat of the Council of Europe and with the support of the Austrian Government.¹

What was special about this international gathering was that in its context an exhibition of documents was arranged in the historic Hofburg Palace, with the object of illustrating landmarks in the

¹ The writer also addressed the gathering on the subject of "prospects of world-wide protection of human rights – positive and negative aspects." See A.H. Robertson (ed.) *Human Rights in National and International Law*, Manchester University Press, 1968, pp. 325-326 (references in the summing up to the writer's intervention are at p. 328). See also *Times of Malta*, 15.10.65, p.19 and 22.10.65, front page, and *Malta Today*, Vol. 1, no. 1, January 1966, p.13.

protection of human rights and fundamental freedoms in the member States of the Council of Europe. The idea behind the exhibition was to show, by means of suitable documents, "*the part played by national authorities in the protection of human rights, since international guarantees can only play a complementary role.*"

Malta participated with seven historic documents selected by me, each of which was, as requested by the organizers, accompanied by a note explaining its place and importance in the development of the protection of human rights in our country. These notes, written by me in English, were circulated in booklet form not only in that language, but also in the French and German translations prepared by the Council of Europe secretariat.

Although, of course, the seven documents exhibited did not purport to exhaust the documentary evidence of the protection of human rights and fundamental freedoms in Malta over the years (the number of exhibits presented by each country had necessarily to be kept within prescribed limits), they are perhaps the most important Maltese documents in this sphere. I therefore collected both the documents and the accompanying introductory notes in a little book, *Human Rights Documentation in Malta*, which was published by the University of Malta in 1966. It was extensively used by students and soon went out of print and for many years later I kept receiving gentle and at times not so gentle reminders from the University of Malta for a second edition. But rather than produce a second edition with just texts and accompanying notes, I thought it might perhaps be more interesting to knit them together into a more cohesive whole, as I propose to do in the following pages.

The first of these landmark documents is a source of great pride to the Maltese people. It is the *Dichiarazione dei Diritti degli Abitanti delle Isole Malta e Gozo* (Declaration of Rights of the Inhabitants of the Islands of Malta and Gozo), which barely a few years after the celebrated French *Déclaration des Droits de l'Homme et du Citoyen* (1789) the Maltese solemnly drew up. On the 2nd September 1798 they had risen against the Napoleonic forces which had captured the Islands from the Order of St John less than three months earlier, and after a bitter struggle, which cost them many lives, they had succeeded with the aid of the British and other co-belligerents, to drive them away from their shores. Of their own accord, the Maltese then offered their homeland to the British Crown. Just as they showed a remarkable degree of political perspicacity in doing this at

that particular moment in history, so too they showed a remarkable degree of political maturity when, on the 15th June 1802, they drew up this memorable instrument.

We have here a soul-stirring charter of a small, proud, freedom-loving people. It opens with a solemn, spirited (and also rather long) paragraph:

"We, the Members of the Congress of the Islands of Malta and Gozo and their dependencies, by the free suffrage of the people, during the siege, elected to represent them in the important matter of assuring our native rights and privileges (enjoyed from time immemorial by our ancestors who, when encroached upon, have shed their blood to regain them), and of fixing a constitution of government, which shall secure to us and our descendants in perpetuity the blessings of freedom and the rights of just law, under the protection and sovereignty of the King of a free people, His Majesty the King of the United Kingdom of Britain and Ireland, after long and mature deliberation, we make the following declaration, binding ourselves and our posterity forever, on condition that our now acknowledged Prince and Sovereign shall, on his part, fulfil and keep inviolate his compact with us".

The Declaration then affirmed that the King of the United Kingdom was Malta's King, but that he had no right to cede Malta to any other power. If he chose to abandon his sovereignty, the right of electing another Sovereign, or of governing Malta, belonged to the Maltese alone. It also affirmed that the Sovereign's representatives in Malta were bound to observe the Constitution, which the representatives of the people would draw up, that the Maltese had the right freely to make representations to the Crown on any eventual violation of their rights, and that the right of legislation and taxation belonged to the Popular Council composed of the representatives of the people.

The above serves to give the general tenor of the charter. What is particularly important for the purposes of our subject is that other provisions affirmed freedom of religion and religious toleration, and safeguarded the human rights to life, property and personal liberty. "No man whatsoever," the Declaration concluded, "has any personal authority over the life, property or liberty of another. Power resides

only in the law and restraint or punishment can only be exercised in obedience to law".

In this we have in substance a solemn affirmation of that cardinal principle of democratic government, the rule of law, which is itself at the very heart of the whole concept of human rights.

This document is interesting not only for its "reception" of certain fundamental human rights but for other reasons as well. In its express reference to "free suffrage" (which is itself also a human right) it also embodies the principle of elective representation, even though at the time the notion of free suffrage, was of course still imperfect and incomplete. It will moreover be noted that the Declaration is stated to be of the "inhabitants" of the Maltese Islands in a broad sense and without distinction between native inhabitants and others who had made these Islands their home.

Historically and politically the document is also interesting because so soon after the celebrated French Declaration and (what is perhaps more striking) at the very inception of the British connection, it combines French revolutionary ideas with British constitutional principles.

As I had occasion to write elsewhere, there are two aspects of the early association of Britain and Malta (themselves in fact reflected in the Maltese Declaration), which strike the modern observer. In the first place, in the conduct of the Maltese at the time, the political scientist may perhaps perceive an early assertion of the principle of self-determination of peoples, which had only a few years earlier found expression in Merlin's report on the Alsatian question for the French Constituent Assembly (1790) and in the Polish Constitution of 1791. Secondly, to the constitutional lawyer the insistence of the Maltese on a sort of "voluntary partnership" status foreshadows in a sense one aspect of the modern development of the notion of the Commonwealth.²

Unfortunately, for a number of political and strategic reasons and in spite of the special and indeed unique manner of Britain's acquisition of Malta ("voluntary cession by the consent of the inhabitants themselves") British rule opened with complete autocracy

² J.J. Cremona, *Malta and Britain: The Early Constitutions*, Malta, 1966, p.27 and see also, by the same author, *Selected Papers 1946-1989*, Malta, 1990, pp.264-269.

and the concentration of all power in the hands of the Crown's representative. Strategic considerations at a particularly crucial period in European history overrode all others. If in 1815, with Waterloo, Napoleon's brilliant star was finally to wane, its memory was certainly slow to fade away. In any case, the Maltese were both sorely disappointed and painfully resentful and they strongly voiced their feelings in no uncertain terms. But there was at least one positive element in this rather sombre picture, in the shape of a salutary exercise in judicial and administrative reform in the very first years of the British connection.

Indeed on being appointed first Governor of Malta, Sir Thomas Maitland (also known, for obvious reasons, as King Tom) introduced, by a series of *sui generis* legislative instruments, a number of reforms, especially in the judicial field, which had far-reaching effects, particularly in relation to some significant aspects of human rights protection.

The second, third and fourth documents in the Vienna exhibition after the Declaration of Rights belong in fact to this group. The *Costituzione della Corte Criminale* (Constitution of the Criminal Court) of 1814 is particularly important in connection with the abolition of torture and the protection of the rights of persons criminally charged.

The very first article of this legislative instrument reads as follows: "All torture, of every description, is hereby entirely abolished and prohibited". This was in compliance with the wishes of the Maltese themselves, expressed in instructions given by them to their political agent in London, John Richards, and with instructions contained in an 1813 despatch from Earl Bathurst, British Secretary of State, to Maitland (before taking office). In their report the Royal Commissioners of 1812 had also stated that, although the punishment of torture was then already considered as virtually abolished, justice and good policy required that its abolition be made public and formal.

Indeed it is interesting in this connection to note that as early as 1780, when preparations were being made for the drafting of what was later to become the *Codice Municipale di Malta* (known as Code de Rohan), enlightened Maltese jurists had strongly opposed a proposal for its full-scale retention by a grandiloquent and retrograde Neapolitan lawyer, Giandonato Rogadeo, who had been brought over by Grand Master Emanuel de Rohan Polduc to do the drafting. Eventually after Rogadeo's unlamented departure from Malta its

partial retention in the new draft (by the Maltese Federico Gatto) was subjected to severe and important limitations. Even though it had since fallen into disuse, it certainly needed to be expressly and publicly abolished. And so it was.

Other important articles of this instrument provided for the time within which the written accusation against a person committed by the examining magistrate for trial was to be preferred (if not preferred within such time, he was entitled to demand to be brought before the court to be released), the serving of a copy of such accusation on him, the time to be given to him to prepare his defence, and access to his defence counsel. Provision was also made for the summoning of witnesses for the accused as well as for the Crown, the publicity of the trial, the *viva voce* examination of witnesses in open court and in the presence of the accused, the right of the accused to be heard, personally or through his counsel, in his defence, and the time within which the trial had to be concluded.

The principles of the publicity of proceedings³ and of the *viva voce* examination of witnesses in open court and in the presence of the person charged were affirmed also in the *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria* (Constitution of the Courts of Magistrates of Judicial Police), promulgated a few weeks later, which also imposed a time-limit within which proceedings, whether ending in sentence or committal, had to be concluded. (The word "*Pulizia*", so spelled, gives a distinctly Maltese tinge to the Italian text of the document.)

Another important document in the same group and of the same year was the *Stabilimento della Pulizia Esecutiva* (Establishment of the Executive Police), which is of particular importance in connection with the right to personal liberty. It was promulgated together with the already mentioned *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria* and provided in particular that, on arresting any person, whoever that might be and whatever the offence with which he might be charged, a police officer or subaltern was bound to bring such person "without the slightest delay" before a magistrate so that he

³ On the principle of the publicity of proceedings in Maltese criminal law, see J.J.Cremona, "Les procédures pénales et leur publicité dans la presse," *Revue Internationale de Droit Pénal*, Paris, 1961, pp.113-126.

might eventually be either convicted or committed for trial or else discharged.

It was added that it was to be clearly understood that no person might be detained by the Executive Police longer than forty-eight hours from the moment of his arrest without being so brought before a magistrate. A like provision was also inserted in the contemporaneous *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria*. Magistrates were also empowered to take cognizance of all complaints, which might be made to them in respect of any such detention exceeding the prescribed limit, and to punish the culprits. It is to be noted in this connection that a provision (section 137) of the Criminal Code (another Vienna exhibit, referred to later) lays down that any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint regarding an unlawful detention, and any officer of the Executive Police who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours are liable, on conviction, to a specified term of imprisonment. This provision and that of section 353 of the same code (which practically reproduces the above mentioned provision of the *Stabilimento della Pulizia Esecutiva*), read conjointly with other relevant provision of law, have afforded in Malta as effective a safeguard for the right to personal liberty as the writ of habeas corpus does in Britain.⁴

I would also add as a matter of interest that a framed reproduction of this instrument in the original Italian text hailing from the Vienna exhibition itself, could be seen hanging in the corridors of the European Court of Human Rights in Strasbourg throughout my entire tenure of office (twenty-seven years) as judge and later vice-president of that Court.

Next comes in the same 1814 reform-oriented group of instruments the *Costituzione Generale di tutte le Corti Superiori* (General Constitution of all the Superior Courts), which is particularly important in connection with the human right to have recourse to independent and impartial tribunals. Indeed it was this *Costituzione* that effectively ensured the independence of the judiciary. It provided

⁴ See J.J. Cremona, "The writ of habeas corpus in Maltese Law" in *Selected Papers 1946-1989*, *supra* pp.7-16.

that judges were to hold office during good behaviour (*"quamdiu se bene gesserint"*), could not be dismissed except with the Sovereign's approval signified through one of his principal Secretaries of State, and were to receive fixed salaries payable from public funds. The avowed object of this measure was, as Maitland put it, to *"fix the judges in a state of honourable independence"*.⁵

Under the previous system judges could be removed, even though apparently this seldom happened, without any reason being assigned, on the occasion of the annual *scrutinio*. So in his address to the judges assembled at the Palace in Valletta on the 2nd January 1815 before the start of that year's first forensic term Maitland said:

"You are now fortunately no longer liable to be removed at the pleasure of the executive local authority – you are made independent of that authority both with regard to your incomes and the permanency of your situations".

As a matter of interest, the President of the High Court of Appeal was mentioned separately in a contemporaneous instrument the *Costituzione dell'Alta Corte d'Appello* (Constitution of the High Court of Appeal), and, oddly enough, he was at first stated to hold his office during pleasure (*"durante beneplacito"*), but this arrangement was indicated as being of a temporary nature and appears to have been dictated by reasons of organizational expediency of the moment.

Provision was also made for the publicity of court proceedings (previously this was not always the case, and it sometimes happened that witnesses were heard at the judge's residence) and since under the old system advocates frequently also had access to the judge in private, any private communication with a judge on the subject of a lawsuit, pending or about to be initiated, was expressly prohibited, and this was also specifically inserted in the judicial oath of office.

The *Costituzione Generale* also provided that the judges were prohibited from receiving any fees or other emoluments of any sort in addition to their fixed salaries. This was inserted because previously the established fees (*propine*), collected by the Notaro and distributed to the judges monthly, were payable by the litigants themselves, which of course provided sufficient room for possible abuse. At the time of

⁵ *Malta and Britain: The Early Constitutions*, *supra*, pp. 32-33

the Order not only were the tribunals rather numerous, but there were also several possible means of appeal, the multiplicity of appeals being in fact one of the imperfections of the system singled out by the Royal Commissioners of 1812. The *Costituzione Generale* brought about an effective reduction in the number of both tribunals and means of appeal, which of course made for speedier justice, another important principle in the field of human rights.

The independence of the judiciary, which in Malta had its first effective affirmation in this instrument, remains a basic and hallowed principle in our system of government. Under the present Constitution judges and magistrates hold office until the attainment of a fixed age (sixty-five years for judges and sixty for magistrates) and are only removable by the President of Malta upon a parliamentary address, supported by the votes of not less than two-thirds of *all* members (not just those present) praying for such removal on the ground of proved misbehaviour or of proved inability to perform the functions of their office whether arising from infirmity of body or mind or any other cause. Their salaries are permanently charged on the Consolidated Fund and cannot be altered to their disadvantage after appointment.

The relevant provisions are also entrenched in the Constitution.

Another landmark document in the Vienna exhibition (of paramount importance in connection with freedom of the press) is Ordinance IV of 1839, which abolished "*the censorship*" and provided against "*abuses of the consequent liberty of publishing printed writings.*" It was ultimately drafted by the Royal Commission of 1836. The Maltese had in fact been clamouring for freedom of the press for several years. The subject figures prominently in practically all the petitions and memorials transmitted by them from time to time to London. Already in the *Appeal of the Nobility and People of Malta to the Justice, Public Faith and Policy of the British Government, for the fulfilment of the conditions upon which they gave up their Island to the King, namely their ancient Rights under a free Constitution*, transmitted to their political agent in London John Richards in 1810, we find a plea for "*a free press but not licentious nor offensive to religion*". Freedom of the press was also one of the first subjects to be discussed by the first Council of Government established in 1835, the members of which showed themselves unanimously in favour of the principle. Luckily, the then Secretary of State in London (Lord Glenelg) was also both receptive and

sympathetic, feeling that the Maltese should not be denied what he called this "*most valuable of civil rights*".

Censorship had been exercised, in pursuance of what the Royal Commissioners termed a "*jus gentium*", through the Government monopoly of printing. Since, according to law, no trade or business could be exercised in Malta without a prior government licence, the administration, by simply refusing to grant a licence to exercise the trade of printer ensured that nothing was printed in Malta except at its own press and with its previous permission, which could be withheld without any reason being assigned. Nothing could be passed for printing if it contained strictures on the local government or on that of any neighbouring State, attacks on the Catholic dominant religion or others, and statements injurious to the reputation or interests of individuals. This was of course open to interpretation.

Now a remarkable anomaly was that censorship, as locally practised, did not extend to writings printed abroad. In 1835 a book entitled *The Claims of the Maltese founded upon the Principles of Justice*, which would definitely not have passed the censorship in Malta, was published by the Maltese patriot George Mitrovich in London. Apart from giving the local administration an unexpected jolt, it was largely instrumental in bringing the abovementioned Royal Commission to Malta.⁶

The two opening provisions of the Ordinance read as follows:

"Section I. – Whereas printed writings, printed in these Islands, are liable and subjected to the censorship immediately hereafter described, and other printed writings are liable to the same censorship, although in practice they are not subjected thereto. And whereas it is expedient that the aforesaid censorship should be abolished: – Now his Excellency the Governor, with the advice and consent of the Council of Government, hereby enacts as follows:

From the day of the promulgation of the present Ordinance, no printed writing shall be subjected or liable to the censorship, which is now exercised in these Islands by Her Majesty's government therein.

⁶ *Malta and Britain: The Early Constitutions, supra*, pp. 66,68

Section II. – Whereas the aforesaid censorship will be abolished by virtue of the enactment in the first section of the present chapter: And whereas a liberty of publishing printed writings (printed in or out of these Islands) will result from the abolition of the aforesaid censorship. And whereas it is expedient that the provisions against abuses of the aforesaid liberty of publishing, which are contained in the second and following chapters, should be substituted for the aforesaid censorship, on the abolition thereof: – Now his Excellency the Governor, with the advice and consent of the Council of Government hereby enacts as follows:

From the day of the promulgation of the present Ordinance, the provisions in the second and following chapters thereof, shall have in these Islands the force of laws.”

The Ordinance of 1839, in spite of certain weaknesses, represented at the time a great step forward in the protection of the right to freedom of expression. The matter is at present regulated by the Press Act (Act XI of 1974, as subsequently amended), which also takes due account of technological advances in this field.

The sixth important document is the Criminal Code of Malta, which of course because of its bulk could not be hung on the walls of the Hofburg. Only the title page was symbolically hung instead, together of course with my explanatory note. This Code, promulgated in 1854, is remarkable for the liberal protection afforded to persons charged or accused and for effectively safeguarding the right to a fair trial. While in general elaborating and consolidating the liberal principles contained in the *Costituzione della Corte Criminale* and the other 1814 instruments, it introduced others. It was hailed at the time, both in Malta and abroad (the eminent Italian criminal law writer Enrico Pessina, for instance, had praise for it), as a most enlightened code.

It provided for bail, fixing the limits of the amounts involved, and for legal aid to be given gratuitously to all those who had not briefed an advocate of their choice. It extended trial by jury, which since its introduction in 1815 had had a limited scope, to all indictable

offences.⁷ It expressly and specifically required for the admissibility of confessions by the party charged or accused, that they should have been made voluntarily and not have been extorted or obtained by means of threats or intimidation or by any promise or suggestion of favour, it made provision against double jeopardy and retroactive penal legislation (the prohibition of which has an important place in the field of human rights) and sanctioned the inviolable right of the person charged or accused to his silence both before the examining magistrate and at the trial. In general it provided for the essential ingredients of a fair and public trial and for the proper observance of the presumption of innocence, two principles which again have a prominent place in the field of human rights so far as the protection of a person charged or accused is concerned.

The law of evidence was substantially modelled on English Law. The procedural part of the Code is contained in the Second Book. It is interesting to note that while the substantive criminal law of Malta was modelled, like many other continental codes, on the *Code Napoleon*, the law of procedure drew inspiration from English law and, like the English criminal system, the Maltese one is essentially weighted in favour of the accused.

Indeed the Maltese system may be regarded as a sort of felicitous marriage of convenience between the continental tradition so far as substantive law is concerned and the English tradition so far as procedural law is concerned, and some marriages of convenience are known to have worked remarkably well.

This document was followed, in the Vienna exhibition, by Chapter IV of the Malta Constitution, incorporating an extensive and enforceable bill of rights. The Independence Constitution of 1964, (which was drafted at the request of the Maltese government by the present writer, then Attorney General),⁸ in fact devotes a whole chapter to "*the fundamental rights and freedoms of the individual*". These comprise the rights to life, personal liberty, privacy of the home and other property, freedom of conscience, freedom of

⁷ On trial by jury in Malta see J.J. Cremona, *The Jury System in Malta* (American Journal of Comparative Law, University of Michigan, Vol.13, No.4. Autumn 1961 pp, 570-583).

⁸ See *Malta Independence Conference*, 1963, Cmnd 2121, HMSO, p.6.

expression, freedom of assembly and association (including the right to form and belong to trade unions), freedom of movement, the right to a fair administration of justice and freedom from forced labour, from inhuman or degrading punishment or treatment, from collective punishments, from deportation, from deprivation of citizenship or juridical capacity by reason of political opinion, from discrimination and from deprivation of property without adequate compensation. Many of these rights, as is normal and understandable, are not absolute but are guaranteed subject to permissible statutory limitations, related to specified purposes in principle linked to the public interest and based on a democratic standard. The inspiration of the European Convention on Human Rights ("the Convention") is very evident.

Thus, for instance, section 41 provides that all persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective modes of religious worship. This is then followed by the rider that nothing contained in, or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the protecting provision to the extent that the law in question makes provision that is reasonably required in the interests of public safety, public order, public morality or decency, public health, or the protection of the rights or freedoms of others, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

It will be noted that the constitutionally protected human rights are essentially the by now classic ones. The historical justification for the provision against deportation of Maltese citizens is that a number of Maltese political internees were during the last war deported by the British without a trial to Uganda. True, two decades had passed when the Constitution was drafted, but the historical wound was, so to speak, still open. Interestingly, a paragraph against banishment figures also in some of the Maltese memorials of the early years of the British connection.

Although the Constitution came into force in 1964, it is interesting to note that some of the human rights provisions in it, like the one just mentioned and freedom of movement, took effect before their counterparts in some of the additional Protocols to the Convention.

While in the European Convention human rights are sometimes worded rather broadly and some of them are also made subject to

regulation by or pursuant to law, in the Malta Constitution they are in general enunciated in specific and very detailed terms. The rights protected are basically the traditional civil and political ones. Political rights, essential in a democracy, are in fact safeguarded by other provisions in other parts of the Constitution, which essentially enshrine the principles of free and periodic parliamentary elections by secret ballot and of representative parliamentary democracy. The Constitution also formulates in Chapter II a set of social and economic rights, which, although not judicially enforceable, are nevertheless held up as objectives of State policy.

The human rights chapter of the Constitution is also important in another respect, and this is that it makes all the protected rights judicially enforceable. An effective remedy in case of breach or violation (actual or even reasonably apprehended as probable) of any of them is also provided in that the person concerned may apply to the competent court (the First Hall of the Civil Court) for redress, and powers are conferred upon the court for the purpose of enforcing or securing the enforcement of any of them. From the decisions of this court there is an appeal as of right to the Constitutional Court. Free legal aid is available in the normal manner. All the provisions of this chapter of the Constitution are also safeguarded by entrenchment, and thus cannot be altered save by a law supported by the votes of not less than two-thirds of all members of parliament.

The time factor, of special importance in this field, has not been lost sight of. Rules of Court, made in pursuance of power conferred by the Constitution, in fact provide that the competent court must set down a human rights application for hearing within a maximum of eight working days, and the procedure to be followed must then ensure that, consistently with the due and proper administration of justice, the hearing and disposal of the case is as expeditious as possible. Procedural formalities have been reduced to a minimum. It will thus be seen that with us human rights really have teeth, and good ones too.

This was the last of the Maltese documents in the Vienna exhibition, and indeed at the time it was also a brand new one, having been promulgated only the previous year. But for the sake of completeness I should add that if the Vienna exhibition were to be mounted again today, then one additional document would certainly and indeed rightfully claim an important place in it. This is the European Convention Act, 1987 ("the Act"), which followed closely

on the heels of Malta's acceptance of the optional Articles 25 and 46 of the European Convention concerning the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights ("the European Court").

Apart from providing that no person (which expression is stated to include any physical person, non-governmental organization and group of individuals) may be hindered in the right to take a case to Strasbourg under section 25, the 1987 Act took the important step of incorporating the substantive provisions of the Convention and its First Protocol ("Convention provisions") into Maltese law and made them judicially enforceable here as part of Maltese law, vesting the competent Maltese courts in relation to alleged violations of such rights with the same jurisdiction and powers as in the case of alleged violations of the constitutionally protected ones.

Indeed in the matter of giving direct effect to the Convention provisions Malta has gone quite far. Not only have these provisions been declared to be part of the law of Malta and enforceable as such (section 3), but eventual judgments of the European Court against Malta have also been declared to be enforceable by the Maltese Constitutional Court "*in the same manner as judgments delivered by that Court and enforceable by it*" (Section 6) and thus without the need of resorting, as in various other contracting States, to administrative means.

In particular, as to the enforceability of the European Court judgments Malta's position may be considered as certainly among the most *avant-garde*. But daring, however admirable in itself, is not always devoid of possible problems. Indeed the Convention substantive provisions and the constitutional ones may be regarded to a large extent as mutually complementary. They are often invoked together and the Act itself in fact provides expressly for their joining together. Difficulties, however, start in the event of inconsistency.

Indeed in the matter of human rights provisions the Act has established a certain hierarchy of norms. In case of inconsistency the Convention provisions prevail over ordinary law provisions (these being, to the extent of their inconsistency, void – Section 3); but "ordinary law" is defined (section 2) as excluding the Constitution, so that the Constitution ultimately prevails over both the Convention and of course "ordinary law".

In particular, where a Convention human rights provision is more favourable to the person concerned but is inconsistent with a

constitutional one the Constitution clearly prevails. But then it is questionable whether in the last analysis this prevalence is indeed real since if the matter is taken to the European Court, which applies only the Convention, and this Court finds in favour of the applicant (contrary to the domestic court's decision *grounded on this prevalence*) the Strasbourg decision must under the Act be enforced here and this, rather uncomfortably, by the Constitutional Court itself as if it were its own decision, unless (I can hypothetically add) the enforcement provision of the Act is itself conceivably held by the national court to be *pro tanto* unconstitutional.⁹

Even though in principle not binding on Maltese courts, judgments of the European Court have been judicially cited in Malta as having, in pertinent cases, persuasive authority well before the 1987 Act and indeed not very long after the bill of rights in the Independence Constitution took effect, which in fact roughly coincides with the "effective" start of the European Court's jurisprudence.

⁹ See *Selected Papers 1946-1989, supra.* pp.228-236 and *The Maltese Constitution and Constitutional History since 1813, supra,* p.84.

A JUSTIFICATION FOR PEACE AS A HUMAN RIGHT

PATRICK HAYDEN

Recent years have seen increased debate about the contributions that human rights make to the creation of conditions of peace. However, less attention has been paid to the claim that peace itself is a genuine human right. Whereas some critics argue that a focus on rights results in an overly formal juridical account of peace at the expense of a more robust notion of positive peace, others contend that a legal framework of rights is all that is needed to eliminate violent conflict. In this paper I strike a position between these two arguments and articulate a normative defense of the human right to peace embedded within a broader discourse of social justice. I do so by demonstrating that a right to peace is a genuine human right because it satisfies appropriate justificatory tests, including those concerning its scope, the duties it generates, and its economic feasibility.

1. Introduction

In his treatise of 1795 titled 'Perpetual Peace: A Philosophical Sketch,' Immanuel Kant writes that 'reason... absolutely condemns war as a test of rights and sets up peace as an immediate duty' (1991: 104). For Kant, humanity's highest moral purpose is to establish universal and lasting peace. The problem of peace is an extremely topical and urgent matter. In the past several decades, discussion of the protection of human rights has been at the forefront of the agenda of peace scholars, activists, and organizations. As a result, human rights have gained greater visibility and recognition through their increased assertion in situations of conflict that threaten such rights. However, less attention has been paid to the claim that peace itself is a genuine human right. The task of articulating this claim, persuading critics that peace is a right which merits national and international recognition, and translating this recognition into meaningful implementation is one of the primary

human rights challenges of the twenty-first century. This paper presents a small contribution to that task, as it articulates a normative defense of the human right to peace (HRP). Overall, I argue that a right to peace is a genuine human right because it satisfies appropriate justificatory tests.

Some controversy exists at present about how extensively the discourse of rights should be used in expressing values and norms favorable to peace. Enthusiasts among theorists and activists argue that rights discourse ought to be the primary and fundamental approach to most if not all issues of peace, including warfare, disarmament, and political oppression (Alston, 1980; Thee, 1997; Tomasevski, 1982). By contrast, others hold that discussion of peace issues should make very limited appeal to the discourse of rights and the formal legalisms that allegedly accompany it, or that rights talk ought to occupy a place of secondary importance to discussions of positive peace. Still others deny that there can even be such a thing as a right to peace.¹

However, speaking of rights within a broader discourse of social justice is necessary and useful for dealing with some of the most serious consequences of human violence and conflict, and human rights are by now regarded as integral elements of theories of international justice. In particular, the right to peace can play a useful role in protecting human interests and in providing a link between the peace and human rights movements. This is not to say, however, that HRP is justified solely on the instrumental grounds that it will be useful to peace activists. It is important to note that HRP will prove useful to peace activists only if people find plausible the claim that it is a genuine human right satisfying appropriate justificatory tests.² Thus, if employed wisely, HRP can prove to be a

¹ See, for example, Forsythe (1993: 3-7), who dismisses the notion of a right to peace as 'diplomatic rhetoric' that leaves the claimed right without 'independent and specific meaning,' such that we cannot 'know what we are obligated to do under' such a right. In the sections that follow I attempt to clarify the meaning of, and specify the obligations that follow from, the right to peace. For an approach that emphasizes the secondary role of rights in the creation of a peace culture, see Kothari (1988).

² For discussions about the appropriate justificatory tests for human rights, see Cranston (1967), Donnelly (1989: 9-45), and Shue (1996: 13-20).

valuable normative asset in trying to resolve violence and security crises. For this reason, HRP can play a central role in justifying and guiding a wide range of peace principles and programs, but it should do this together with other norms of social justice such as the fair distribution of social goods and obligations to future generations.

In Section 2 I offer an account of the scope of HRP, in Section 3 I describe the duties generated by HRP, and in Section 4 I provide a justification for HRP.

2. The Scope of the Human Right to Peace

2.1 *Categories of Human Rights*

The idea that peace is a condition conducive to the realization of basic human rights has been declared since the adoption of the United Nations Charter in 1945.³ To 'save succeeding generations from the scourge of war,' to 'live together in peace,' and 'to maintain international peace and security' are phrases concerning the purpose of the United Nations that appear in the Preamble to the UN Charter. In subsequent international instruments, we find similar expressions on the contribution of human rights to peace. For example, the 1948 Universal Declaration of Human Rights (UDHR) provides in the Preamble that recognition of 'the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'⁴ The International Covenants of 1966—on economic, social and cultural rights, and on civil and political rights—repeat this claim.⁵

³ U.N. Charter, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).

⁴ Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, U.N. Doc A/810 (1948).

⁵ International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976); International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976).

Further references to the relationship between the maintenance of peace and human rights are to be found in various other resolutions and declarations. However, all of these documents share the view that the recognition and implementation of human rights will aid in creating conditions conducive to the emergence of peace. They do not speak of the right to peace per se. We do not find an explicit reference to peace as a human right until the 1981 African Charter on Human and Peoples' Rights, which asserts that 'All peoples shall have the right to national and international peace and security.'⁶ In 1984 the UN General Assembly approved the succinct Declaration on the Right of Peoples to Peace.⁷ In four points, the Declaration provides (1) that the peoples of our planet have a sacred right to peace; (2) that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state; (3) that ensuring the exercise of the right of peoples to peace demands that the policies of states be directed towards the elimination of the threat of war and the renunciation of the use of force in international relations; and (4) that all states adopt appropriate measures at both the national and international level to implement the right of peoples to peace.

Clearly, the actual commitments and policies of states as yet contain no recognition of such a right. The existence of prudential relations but not of peace exactly, between states is generally regarded as pragmatically helpful for the continuance of basic human rights within the conventional scope of international law and relations. Yet to say, as the Declaration on the Right of Peoples to Peace does, that all peoples, both individual and collective, have a right to domestic and international peace is to make the more powerful claim that all persons are entitled to the existence of peace whether or not the state in which they live recognizes this fact. Such an entitlement, it is suggested, must have a place among people's other basic entitlements affirmed in the international human rights documents.

⁶ African Charter on Human and Peoples' Rights, art. 23.1, adopted 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force 21 Oct. 1986).

⁷ Declaration on the Right of Peoples to Peace, adopted 12 Nov. 1984, G.A. Res. 39/11, U.N. GAOR, 39thSess., 57th plen. mtg., U.N. Doc. A/Res/39/11 (1984).

Human rights are often delineated according to three stages. Under this scheme civil and political rights are defined as first-generation human rights, and economic, social and cultural rights are defined as second-generation rights. More recently a third generation of human rights has been articulated. These third-generation or 'solidarity' rights are thought to include development, a healthy environment and peace (UNESCO, 1980; Marks, 1981). The concept of generations of human rights serves some analytical and pragmatic purposes in helping to identify the character and content of different types of rights, yet it is important to recognize the indivisibility and interdependence of all human rights.⁸ Civil and political rights are sometimes characterized as 'negative' rights insofar as they entail the freedom of individuals from governmental interference. Economic, social and cultural rights are generally characterized as 'positive' rights insofar as they promote governmental policies designed to create the social conditions that enable individuals to flourish. It is clear, though, that the realization of civil and political rights often requires state intervention in order to guarantee the participatory rights of individuals, while the progressive realization of economic, social and cultural rights requires safeguards to protect against the possible abuse of individual rights by the actions of government.

Third-generation rights are typically characterized as rights that inhere in groups and not merely individuals. The concern for solidarity rights stems from the recognition of the broad common interests of humanity, especially to certain basic conditions of life that are indispensable to the promotion of human dignity and well-being and to the effective fulfillment of other human rights. There is much disagreement as to whether group rights are in fact human rights, but the details of that particular debate need not occupy us here (Marks, 1981; Alston, 1984; Donnelly, 1989: 143-154). Instead, we can understand third-generation rights as referring to the rights of individuals existing as members of social groups. The right to peace, then, means broadly the right of individuals, acting collectively, to conditions of peace indispensable to living a fully

⁸ On the dangers of employing the metaphor of successive generations of human rights, see Wellman (2000: 640-41).

human life. To this point very little indication has been given as to what is meant by conditions of peace and the range of issues this concept raises, such as the content of such a right and the correlative duties needed to secure the right in question.

2.2 What the Human Right to Peace Prescribes

Although one might propose a broad formulation of HRP that claims a right to a nonviolent, secure, pleasant, cooperative, friendly, harmonious and even loving world, a narrow formulation focusing exclusively on human security and nonviolence has the best chance of gaining acceptance as a genuine human right. Consequently, I will argue for a right to a secure a nonviolent world, meaning a world that is not destructive of the central capabilities characteristic of flourishing human existence.

The meaning of a 'peaceful,' or safe and nonviolent world is ambiguous, since the term 'peace' may be defined in both a positive and a negative sense. In its negative sense, peace is defined as the formal absence of war. Negative peace refers to the state that exists during the period between wars, such as between World Wars I and II. In its positive sense, peace is defined as the presence of such 'life-affirming and life-enhancing values' as cooperation, harmony, friendship, and love (Barash, 2000: 2). Positive peace refers to a condition that is greater than the mere absence of war, although the precise characteristics of this condition are difficult to identify.

Nonetheless, proponents of the concept of positive peace point out that mere negative peace falls short of the fundamental goal of absolute nonviolence. The absence of the overt violence of war does not preclude the presence of various forms of indirect or 'structural' violence within a given society (Galtung, 1975). For example, one state may not be literally at war with another state, but its social, cultural and legal institutions may be structured according to discriminatory beliefs and policies that deny rights and access to education, employment, or health care to certain individuals. In cases where social practices deny education, housing, the opportunity to work or to participate in governance because of race, religion, sex and so forth, great psychological, social, and economic harm is being done to human beings, even if tanks and bombs are not being used. Such 'unjust social arrangements,' John Rawls (1999a: 302) has noted, 'are themselves a kind of extortion, even violence.' In addition, as

Kant pointed out it is common for 'peacetime' to be viewed as little more than a temporary suspension of hostilities that allows the various parties the luxury of preparing for war (Kant, 1991: 94).

However, proponents of the concept of positive peace also claim that genuine peace cannot be had unless, in addition to the absence of war and structural violence, a radical transformation of human consciousness also occurs. In their view, every individual must alter his or her beliefs and modes of thought so as to prefer 'affirmative' values such as cooperation, harmony, brotherhood, compassion and love (as well as others like faith, hope, humility, courage and trust). Both Martin Luther King, Jr. and Mohandas Gandhi exemplify this perspective. King believed, for example, that 'only love' can 'drive out hate' from the human heart. Gandhi's and King's claim is that we must reject all forms of violence *and* reshape human consciousness if we are to create a world that is free of violence. Thus proponents of positive peace share not only the supposition that violence is morally impermissible, but also the assumption that violent beliefs and structures of consciousness can be, and must be eliminated from human thought.

My argument for HRP does not address the psychological issue of the transformation of human consciousness. Rather HRP is concerned only with a particular set of threats to human security and safety, namely those *large-scale threats which stem from war and the brutalities of despotic regimes*. Broadly speaking, HRP is concerned with security from armed conflict, whether domestic or international, and the structural violence associated with political oppression. Given this, peace can be equated with the absence of direct and structural collective violence. My argument for HRP is further distinguished from the ideal of positive peace insofar as there are, under some conditions, limited and justifiable uses of force and violence.⁹ Specifically, these are for purposes of protecting the human rights of individuals against harm caused by wars of

⁹ Gandhi rejects the use of violence as a way of eradicating violence, stating that 'it would be absurd to say that violence has ever brought peace to mankind' (Gandhi, 1946: 127). He reasoned that while resorting to violence in order to eradicate violence 'appears to do good, the good is only temporary; the evil it does is permanent' (Gandhi, 1925: 134).

aggression and widespread violence perpetrated by despotic regimes against their own citizens. The complete and permanent elimination of conflict is, I believe, highly unlikely. Therefore, the argument offered in support of HRP is grounded in a conception of 'just' rather than positive peace. Just peace moves beyond mere negative peace but does not require the highly utopian features of positive peace. Just peace is a realistic yet stringently normative position, which requires the presence of basic social and political institutions committed to principles of fairness, equality, respect, opportunity, democratization, and the protection of human rights.¹⁰ While just peace maintains a preference for nonviolent mediation and resolution of conflict, it also recognizes the legitimate use of force in certain limited cases where violence must be used to resist and abolish greater instances of injustice, such as genocide and other gross violations of human rights.¹¹ In this way, the argument for HRP does not force us to choose between either peace or justice in such difficult cases.

¹⁰ We might think of the position advocated here as being 'realistically utopian' in the sense proposed by Rawls for his political philosophy of the Law of Peoples. Rawls writes that political philosophy 'is realistically utopian when it extends what are ordinarily thought of as the limits of practical political possibility' insofar as 'it depicts an achievable social world that combines political right and justice for all liberal and decent peoples.' A 'realistic utopia' would 'set limits to the reasonable exercise of power' by employing 'political (moral) ideals, principles, and concepts to specify a reasonable and just society' (Rawls, 1999b: 6, 12-14).

¹¹ Following the recommendations of the Carnegie Commission for the Prevention of Deadly Conflict I support the use of force for preventing the outbreak or recurrence of violent conflict in circumstances of postconflict peacekeeping and preventive deployments, under the following conditions: (1) Any threat or use of force must be governed by universally accepted principles, as the UN Charter requires. Decisions to use force must not be arbitrary, or operate as the coercive and selectively used weapon of the strong against the weak; (2) The threat or use of force should not be regarded only as a last resort in desperate circumstances. Opportunities may arise when clear demonstrations of resolve and determination can establish clear limits to unacceptable behavior; (3) States—particularly the major powers—must accept that the threat or use of force must be part of an integrated, usually multilateral strategy (e.g. with a UN Security Council resolution specifying a clear mandate and detailing the arrangements under which force will be used), and used in conjunction with political and economic instruments. See Carnegie Commission (1997: xxv-xxvi). For a justification of humanitarian intervention on the basis of a human rights liberalism see Smith (1999).

Threats to human well-being are the primary focus of HRP because the most severe effects of military conflict and political violence are death, dislocation, and harm to physical and mental health. Threats to human well-being—such as the use of bombs, guns, torture, and the denial of health care—not only kill, but maim, disfigure, shorten a person's life, cause permanent physical and emotional disabilities, and lead to temporary or recurring illness. Threats to human well-being also extend beyond the traditional limits of physical health and affect aspects of what Martha Nussbaum calls the 'central human capabilities.' These capabilities are functions characteristically performed by human beings and 'are so central that they seem definitive of a life that is truly human' (Nussbaum, 1999: 39). Without the availability of these capabilities, Nussbaum writes, 'we would regard a life as not, or not fully, human' (1999: 39). The central capabilities Nussbaum identifies are (1999: 41-42):

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely or before one's life is so reduced as to be not worth living.
2. *Bodily health*. Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter.
3. *Bodily integrity*. Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, imagination, and thought*. Being able to use the senses; being able to imagine, to think, and to reason—and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training; being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's choice (religious, literary, musical, etc.); being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise; being able to have pleasurable experiences, and to avoid nonbeneficial pain.

5. *Emotions*. Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us; being able to grieve in their absence; in general, being able to love, to grieve, to experience longing, gratitude, and justified anger; not having one's emotional development blighted by overwhelming fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. (This entails protection for the liberty of conscience.)
7. *Affiliation*. (a) Being able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship. (Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedom of assembly and political speech.) (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. (This entails provisions of nondiscrimination.)
8. *Other species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play*. Being able to laugh, to play, to enjoy recreational activities.
10. *Control over one's Environment*. (a) *Political*: being able to participate effectively in political choices that govern one's life; having the rights of political participation, free speech, and freedom of association. (b) *Material*: being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

These capabilities point to some basic aspects of well-being in

HRP, namely, those that pertain to avoiding unnecessary misery and to securing the possibility of a minimally good human life.¹² For example, having to live without access to adequate educational facilities, without the opportunity to freely express one's opinions, or without the possibility of participating in political governance might not destroy one's physical health, but each deprivation would seriously harm human functioning, cause humiliation and assault one's dignity. In sum, HRP should address forms of military and political violence that create significant risks of killing people or depriving them of the possibility of a minimally good life defined in terms of the central human capabilities. This is a general criterion that sets the level of the elimination of violence at an attainable standard, and describes the level of protections against violence that states should guarantee. Because the quality of life and threats to human functioning vary from one country to the next, assessment of conditions and implementation of relevant public policy must remain open to plural specification. International human rights typically set broad normative standards that can be interpreted and applied by appropriate legislative, judicial, or administrative bodies at the national level, even as the standards offer reasonable guidance to policymakers. Standards for nonviolence should be specified further at the national level through democratic legislative and regulatory processes open to all citizens.¹³

3. Correlative Duties of the Human Right to Peace

In order to define further the scope of HRP it is necessary to describe the duties that individuals, governments, corporations and international organizations must bear in relation to this right. This is because a right is not merely a claim to some freedom or benefit;

¹² A minimally good human life means that all people should have at least their basic capabilities protected from violent harm, whatever else they have and pursue. For an alternative discussion of the possibility of generating a list of goods valuable to all agents, see Pogge (1999).

¹³ For more on the argument that human rights norms require democratic governance, and on the linkage between democratic norms, human rights and the peaceful resolution of conflict, see Beetham (1997), Held (1990), Ray (1995), and Russett (1993).

it is also a claim against certain parties to act so as to make that freedom or benefit available. With respect to the duties of individuals and corporations, then, it should first be recognized that persons, organizations, and corporations have a duty to refrain from activities that generate unacceptable levels of violence. For example, individuals have a duty to refrain from discriminating against others on the basis of race, gender, religion or sexual orientation, and to refrain from the deliberate or predictable harming, injuring, mutilating, or killing of others. Hospitals have a duty to provide access to adequate medical care to all persons in need of such care regardless of their race, gender, religion or sexual orientation. Companies that manufacture advanced technological goods have a duty to take strong precautions against the illicit acquisition and use of such technology for harmful purposes. Corporations that produce such goods also have a duty to compensate victims should harm occur.

Similar to individuals and corporations, governments have negative duties to refrain from actions that give rise to serious threats of violence to human life and well-being. For example, governments have a duty not to produce, stockpile, and use nuclear weapons since these weapons indiscriminately maim and kill thousands of innocent human beings. In addition to these negative duties, governments also have a duty to protect the citizens of their states against violence generated by other governmental or private agencies. An effective system of human rights protection requires a governmentally-enacted system of regulation to ensure that police, intelligence, and security agencies comply with its standards, and impose significant penalties on those who fail to comply. An adequate system of human rights regulation also requires that citizens, non-governmental human rights organizations, and governmental organizations have the power to prosecute violators, whether public or private, and seek compensatory damages. Furthermore, all citizens should be allowed to exercise rights to political participation, enabling democratic participation in decisions about significant risks of violence. As Kant recognized, a democratic (or republican) form of government offers the best prospect of attaining peace. This is because 'the consent of the citizens is required to decide whether or not war is to be declared' and 'it is very natural that they will have great hesitation in embarking on so dangerous an enterprise' (Kant, 1991: 100).

Finally, international organizations have negative duties to refrain from generating significant risks of violence. For example, the United Nations has a duty to ensure the safety of non-combatants when using military force to conduct peacekeeping operations and in cases of humanitarian intervention. The World Bank has a negative duty to refrain from loaning money to countries and projects that will produce major risks of violence to human well-being, such as facilities that can produce weapons-grade nuclear materials. These international organizations also have positive duties to promote and protect HRP through declarations, regulations and enforcement measures providing for the reporting of violations, the mediation of disputes, the use of diplomatic, political, and economic pressure to coerce violators to comply, and the use of international military force to rescue endangered peoples, stop ethnic cleansing or genocide, and restore territorial integrity.

4. Justification of the Human Right to Peace

Human rights are fundamental international moral and legal norms that protect people from severe social, political, and legal abuses, simply because one is a human being. Human rights are justified in general for broad normative reasons. They secure claims to life, liberty, equality and fairness and in so doing protect our fundamental interests and central human capabilities. The argument of this paper is that they should also secure a claim to nonviolence and security. To qualify as a human right, however, HRP must satisfy at least four criteria. First, proponents must demonstrate that the proposed right-holders have a strong claim to the object of the right by showing that this object is of great value to individuals and society, and by showing that these values are frequently threatened by military and political abuses. Second, they must show that this claim cannot be adequately satisfied unless people are granted rights rather than weaker forms of protection which might prove inadequate. Third, proponents must demonstrate that the parties that bear duties under the right can legitimately be subjected to the negative and positive duties required for compliance with and implementation of the right. Finally, the proposed right must be practicable given current economic and institutional resources.

4.1 *Threats to Fundamental Values*

The rights specified in various documents ranging from the Magna Carta to the UDHR were enumerated in response to perceived abuses by governments. Legal rights, such as the rights to habeas corpus and protection against arbitrary arrest and detention (UDHR, Articles 9-11), reflect the fact that repressive governments often use the legal system to harass, torture and kill political opponents. There is good reason, then, to view the articulation of the specific right of HRP against the background of those threats and forms of violence that frequently lead to the abuse of human dignity and destruction of the central human capabilities.

Technological developments underlying the proliferation of relatively inexpensive, mass-produced weapons have contributed to the creation of major, direct violent threats to human security and well-being. Globally, military expenditures amounted to approximately \$780 billion US Dollars in 1999, an increase of roughly two percent over 1998 expenditures. The largest spender in 1999 was the United States, whose \$260 billion dollar expenditure accounted for 36% of the world total, followed by Japan, France, Germany, and the UK, whose combined expenditures account for another 23% of the world total (SIPRI, 2000). Although military expenditure and arms production have declined since the end of the Cold War, in 1998 the combined sales of the top 100 companies in the world arms industry amounted to \$155 billion US dollars. Conventional weapons, particularly small arms and light weapons, are the major items exchanged in the global arms market, which is subject to minimal control and provides for massive illicit weapons trafficking. In the past decade alone, more than four million people have been killed in violent conflicts and, in 1997, there were more than 35 million refugees and internally displaced persons around the world as a result of war or mass violence (U.S. Committee for Refugees, 1997: 84).

When violent threats reach this level of severity the security and well-being of many people are significantly degraded. Few human rights violations, other than genocidal programs of mass extermination, cause such extensive and large-scale damage to the welfare of so many individuals and communities. Yet the very existence and use of these weapons is typically accepted as a common feature of modern society, and is rarely viewed as the violation of a specific human right.

Even in an apparently less severe case, such as when a government denies its citizens the opportunity to organize peacefully and to express themselves freely, substantial harm to people's well-being is caused by repression of this sort. This is not to say that every person living in these states is physically harmed in a direct sense. Nevertheless, the indirect effects of state repression on the central human capabilities are extensive and far-reaching. The long-term emotional, mental, and physical trauma caused by political oppression and social marginalization are well documented and constitute a persisting legacy of violent conflict which undermines the quality of life for many survivors of such conflict.¹⁴ The effects of structural violence are not trivial. State repression kills some people, injures and shortens the lives of others, and causes emotional and material suffering. While the basic interests in life, health, and a minimal level of welfare are identified for protection by a number of existing human rights, such as rights against murder, torture, or physical injury, war and structural violence are significant and frequent threats to collective interests that are not yet protected by a human right to peace. The human right to peace aims to protect people against war and structural violence and their consequences, *in their entirety as systemic problems* and not merely as isolated instances of otherwise acceptable domestic and international activities.

4.2 *The Need for Rights*

Because a rights claim is a demand for some sort of social action, it is also important to show that the right-holder's enjoyment of the object of the right cannot be secured by any norms weaker than a right. For example, one might contend that severe conflict and repression could be eliminated by expressions of diplomatic disapproval, or by mass nonviolent movements. If the vast majority of people could be drawn into a Ghandian movement of nonviolence and love, this might make it unnecessary to declare and implement HRP. Alternatively, one might criticize the very notion of human

¹⁴ These issues are surveyed in Carnegie Commission (1997). A significant effort to document the traumatic effects of state oppression and violent conflict is *The Truth and Reconciliation Commission of South Africa Report* (1999), which includes extensive testimony by both victims and perpetrators of political violence.

rights for being an inappropriate source of social and political change. Karl Marx (1978), for example, argued against basing social and political change on rights because such rights supposedly are predicated on the egoistic separation of humans from one another and weaken the bonds of community relations. In similar fashion, some pacifists might advocate instead developing a nonviolent consciousness of positive peace rather than perpetuating the status quo in the guise of legalistic reform.

While the spread of nonviolent consciousness would certainly be a welcome development, it is nevertheless imperative to retain the language of rights when the enjoyment of the object of a rights-claim is threatened or denied. Present circumstances around the globe attest, I think, to the prevalence of threats to peace and to the widespread denial of peace. The claim to a human right to peace is in effect a final appeal because weaker norms and the absence of such a right have proven to be ineffective in protecting collective human interests to nonviolence and security. The hope that nonviolent consciousness can make HRP unnecessary is an example of what James Nickel has called the 'threat-elimination strategy.' According to Nickel, the 'threat-elimination strategy has sometimes been advocated by those who see the possibility of a transformation of human motivation and consciousness through religion or other forms of enlightenment. They hope that such a transformation will eliminate selfishness, greed, conflict, and corruption' (Nickel, 1987: 117). In the case of HRP, this strategy suggests that if people had the right sort of nonviolent consciousness, they would not willingly pursue violent ends through violent means, thus eliminating the need for HRP. The approach represented by those who prefer consciousness-raising-strategies overemphasizes the importance of good motivation and underestimates the need to institutionalize human rights, thereby giving effective legal force to these rights. If the time should come when all people voluntarily eschew violence, then the claim to HRP will no longer be necessary.

4.3 *Legitimate Duties*

Effective rights empower right-holders by imposing moral or legal burdens on duty-bearers. Proponents of HRP must show not only that the right-holders have a strong case for the object of the right, but also that the burden of providing for the enjoyment of this right

can be legitimately imposed on the duty-bearers. As discussed above, individuals, organizations, and corporations have negative duties to refrain from activities that create unacceptable levels of violence. Governments and international organizations also have positive duties to protect citizens from violence and promote their security and well-being. Those who engage in activities which harm citizens' security and well-being should bear the burden of regulations which require compensation.

One complex aspect of violent risks and harms is that they often result from activities engaged in by many people, such as armed conflict and state repression. These activities produce risks or harms as the result of the cumulative effect of individual decisions and actions made by hundreds or thousands of people. Such collective action can bring about a variety of human deprivations, such as population displacement, illness and starvation, which may not be attributed to a single actor. This raises the issue of collective responsibility for actions leading to the widespread violation of HRP.

An extensive discussion of this issue is beyond the scope of this paper. Nevertheless, some basic points can be addressed. Collective responsibility has long been a problematic topic for philosophers. The paradigm of moral responsibility is the individual actor who has intentionally harmed some other person or persons. In this case the actor's causal relation to the harm is a necessary but not sufficient condition for assigning moral blame or obligation. Authentic responsibility also requires some element of intentionality on the actor's part. In the case of groups, the roles of agency and intentionality are less clear than with individuals. A group may collectively produce a certain result without each individual agent's knowledge or awareness that he is contributing to that result, such as when a traffic jam occurs when many drivers just happen to be on the road at the same time.

Despite this difficulty, it can be said that responsibility for some result is assignable to particular individuals, including the members of groups for their contributory acts. Individuals may be held responsible for choosing to become and remain members of groups pursuing goals that involve harming others, as well as for their degree of active contribution to a harmful result (Held, 1971: 471). An individual may argue of course that his particular contribution to a result is insignificant and thus avoids responsibility, but if every member of a group makes this claim the possibility is raised that no

one can be held responsible for the result. Derek Parfit has countered that, although an individual contribution may seem insignificant, even a seemingly minor act contributes directly to the harmful effects of the 'set of acts' that results from its combination with the actions of others. Therefore, an individual who performs an act knowing that it will contribute, even in some small way, to the overall result of harming others, can be held morally responsible (Parfit, 1986: 67-86).

Responsibility also may be assignable to the group itself, provided that intentionality as well as causality is present. Certain activities, especially those of waging war and harming large numbers of people through government oppression, can succeed only by means of organized group effort. Such coordination and unification of individual actions into collective actions introduces the element of overt purposiveness to the group as a whole. Group responsibility thus follows from the existence of collaborative coordination—evidenced by consensus, representative endorsement, or delegative authorization—that establishes collective and not merely individual intentionality (Rescher, 1998: 49-50). Given the possibility of normative responsibility for the kinds of collective actions violative of HRP, negative and positive duties can be imposed on organizations, corporations, and governments, as well as individuals, for the protection of right-holders. Doing so then makes it possible to hold accountable those who commit abuses of HRP and other human rights.

4.4 Economic Feasibility

The final matter that must be addressed is the possibility that HRP could fail to be a justified human right if its costs were unduly onerous. Many financial resources and significant institutional endeavors are needed to implement rights, and if these resources are limited or unavailable it may be impossible for duty-bearers to satisfy the obligations flowing from the rights. Because human rights impose correlative duties and 'ought' implies 'can,' one might contend that it would be incoherent to hold that HRP is to be implemented if it were economically impossible.

It is often argued that war is 'good' for the economy of a state insofar as a state's military spending is a contributor to its overall economic health. High military spending, it is thought, supports both the expansion of military forces and the growth of domestic economies; if that is the case, reducing military spending will have

unfavorable economic consequences. Consequently, a reduction in military spending and in military forces for the purpose of eliminating sources of deadly conflict will incur a prohibitive economic cost that threatens the feasibility of HRP. Yet the connection between military spending and economic health is less favorable than this argument would have us think. Consider, for example, that during the Cold War that state with the highest military spending—the Soviet Union at approximately 20% of GDP—had the worst economic performance among leading powers, while the leading power with the lowest military spending—Japan at approximately 1% GDP—had the highest economic performance (Mintz and Chan, 1992). Moreover, over time military spending tends to compete with other economic needs, such as investment in other government projects or civilian industry, and reduces economic growth by depriving the rest of the economy of valuable resources, technology, and talent. Fewer jobs are created, per dollar of U.S. government funds, in the military than in education, housing, construction, health care and similar areas that are of great social need (Mintz, 1992; Mintz and Chan, 1992).

It can be argued, then, that reducing military spending and transforming military development towards civilian sector development within a process of economic conversion, will allow for the more productive use of economic resources and strengthen economic growth in the long term. Moreover, the resources saved by preventing losses due to the destruction of property, land, farms, factories, health, and life can help to finance the implementation of HRP. Indeed it is quite likely that in eliminating the drain on resources caused by constant expenditures for the preparation and executing of war, economic development will become more successful in both developed and developing nations. Overall, then, the economic feasibility of HRP would appear to be no less than, and quite likely greater than, military development (Klein et al., 1995; Dumas and Thee, 1989). Given this, the standard of protection prescribed by HRP would prove affordable with the refocusing of resources toward the production of goods and services that enhance rather than threaten human security and well-being.¹⁵

¹⁵ For an early ethical argument in support of this type of economic conversion, see James (1962).

5. Conclusion

One of the greatest challenges facing the post-Cold War world is establishing a global order that creates the conditions for the peaceful coexistence of all peoples. One way to meet this challenge is to recognize and implement a human right to peace. I have argued in this paper that a strong case exists for HRP. Defined in terms of the absence of large-scale collective violence rather than the harmonization of all interests and the transformation of human consciousness, HRP has a coherent scope. The possibility of reducing collective violence and maintaining peace requires, first and foremost, implementing a juridical system of rights within international law. If a strong and enforceable human right to peace with the scope articulated here were effectively implemented at the national and international levels, it would protect human beings against the substantial and recurrent harms associated with collective violence, protection which cannot be afforded by weaker norms. In addition, HRP has identifiable duty-bearers that can legitimately satisfy the normative and economic obligations flowing from such a right. As a norm that satisfies the tests appropriate to human rights, HRP should be recognized both as a general human right and as an important basis for claims to peace. Implementing HRP would obviously require substantial efforts, but as Kant suggested more than two hundred years ago, the goal of peace requires nothing less than our sustained commitment and perseverance.

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CONSTITUTIONAL JURISDICTION AND THE ROLE OF THE EUROPEAN COURT OF JUSTICE

ANTONIO LA PERGOLA

The present legal system of the European Union is the outcome of various case decisions over a long period of time. The evolution of European law has over the years been characterised by the pronouncements of the European Court of Justice. Hence the legal system, as it was gradually formed by the Court of Justice, has required that the role of the European judge be more akin to that of a judge of a national legal order. This article aims to clarify and discuss this point.

1. My starting point is a well-known fact. The E.U. legal system is what it is today precisely because, to a large extent, it is the result of court decisions. Both the Treaty, which is the supreme source of E.U. law, and the huge volume of secondary legislation which derives from it, concern us as legal functionaries because they are translated into reality via the case-law of the Court of Justice. The judicial pronouncements of this court are generally and effectively observed throughout the E.U. member states. Without the regulatory role of case law, the legal system of the European Union would still be based on conventional international law. The Court of Justice, however, distinguished European law from international law and thus severed the bonds which tied E.U. law to the founding treaty of the European Union and has defined its essential characteristics in conformity with the aims and needs of the integration process. The E.U. legal system, has, in fact, evolved in the manner and for the purposes that the Court has largely determined. Its jurisprudence has become, from the crucial phase of the inception of the common market, an indispensable and – I would say – an institutional leverage point for the establishment, even before the successive development, of the plan that can be said to date back to the authors of the Treaty.

The subject matter would require a deeper and more detailed discussion than it is possible for me to undertake in this forum. I will limit my discussion to just one – decisive – jurisprudential contribution to the construction of a Europe which unites us. The legal system as it was gradually formed by the Court of Justice has allowed, or rather, required, that the role of the E.U. judge be more akin to that of the judge who is the interpreter and the guarantor of the constitution of the legal system of a State. It is important to consider the constitutional judge who is a well-known figure in our democracies. The observations which follow aim to clarify and justify this point of view.

2. I wish to start by making reference to Art. 220 of the Treaty: *“the Court of Justice shall guarantee the respect of the Law in the interpretation and application of the present Treaty.”* This is a formula which does not only give a jurisdictional role to the Court, but it also gives the Court the specific competence of guaranteeing observance of the Treaty as the primary source of the European legal order. One may also add – as was also noted by certain commentators – that the law which the ECJ seeks to protect includes, in its deepest strata, a law which is subjected to the Treaty itself; a law from which general rules and fundamental principles originate. What remains to be seen is which procedures are in place so that the Court would be in a position to guarantee the observance of the Treaty in the same way as the competent internal judge is called to protect fundamental law. Hence Article 220 ought to be read in conjunction with all the others, which are linked to its general provisions outlining the competencies of the Court. I'll here simplify the discussion as much as possible. E.U. jurisdiction embraces three areas:

- a. The Court takes cognisance of the illicit behaviour of Member States that fail to fulfil the obligations arising – directly or indirectly – from the Treaty (Art. 226-228). Hence the E.U. judge's role as an international judge is defined in this manner. Even if the procedures prescribed to allow him to verify the existence of illicit acts committed by the Member States have been regulated through the organs of the European Union, it is in reality the Commission and not another Member state which sets such decisions in motion.

- b. Another competence of the Court involves the determination of the lawfulness of E.U. acts and their conformity to the Treaty. This competence is exercisable through the procedures introduced according to: (i) Articles 230-231; together with (ii) the application to annul, in Article 232, (which states that should the European Parliament, the Council or the Commission, fail to act and hence infringe the Treaty, the Member States and the other E.U. institutions may bring an action before the Court of Justice to have the infringement ascertained); (iii) Article 241, which establishes the incidental plea of illegality; and (iv) Article 300, through requests to the Court to vet, in a preliminary way, the compatibility between the Treaty establishing the E.U. and any agreement which the E.U. intends to conclude with third party states or other subjects of International Law (Art. 300). The power to certify the conformity of the act which has to be judged by the Court to the principles which have to be observed including the consequences, as the case may be, which follow from the pronouncements of the Court, (starting with the annulment of an act which has been judged invalid) – correspond to those of a constitutional jurisdiction. As is the case in these jurisdictions, the E.U. judge protects the hierarchy of the normative sources, the order of the competencies and the balance between the institutions. And it is significant that even the individual has been empowered to impugn, under the conditions established in Article 230, acts which interfere with the sphere of his legally protected interests, or to invoke, with the plea of unlawfulness, their inapplicability to the case in question. This is a concrete remedy originating from the founding fathers who conceived the European Community – and the same can be said of the Union by which it has been recently superceded – as composing the Member States, their peoples and their citizens, whose rights and interests not only deserve to be taken into consideration in the political field but also to be judicially protected. They believed that a factor which would promote the development of the process of European integration would be the recognition of the rights and expectations of the individual, apart from and in addition to the recognition of the reciprocal duties of co-existence of the Member States. Jurisprudence has developed the theory that

this aspect of the system conceived by the founding fathers operates beyond the cases in which the individual appears as a party in the judgement on the legality and validity of E.U. acts. To achieve these results, the Court has resorted to another power to resolve the preliminary matters which would have been submitted by the national judges according to the provisions of Article 234 of the Treaty.

- c. Let's focus on this last competence. The Court has the monopoly on the binding interpretation of the Treaty and the E.U. law. Thanks to the machinery of Article 234, the Court can favourably apply a wide and objective jurisdiction for the purpose of ascertaining whether E.U. law has been unfairly applied vis-à-vis the national subject. The Court acts as a general interpreter of the whole E.U. Law, identifying the principles on which it has to base its interpretation, and when it decides upon them, it has at its disposal the wide resources of teleological and systematic interpretation, a natural prerogative of constitutional judges. Two very well-known core principles come to mind: the supremacy of E.U. law and its direct effect in the national legal system. The Court has developed these principles as corollaries from the characteristics and the indispensable requisites of the legal system of which it is the interpreter. I would attribute the basic principles of this jurisprudence to the same category as the famous pronouncements which have determined the course of the legal and constitutional history of some nations, such as that pronounced in *Marbury v Madison* by the North-American Supreme Court; in which the power to oversee the ordinary laws, not expressly recognised to the judge, is derived from a rigid constitution, such as the American one. In certain respects, the case of the European jurisdiction is analogous. The logical consequence of the two fundamental principles enunciated by the Court is, in fact, the following: the jurisdictional system of the E.U. is adapted to the relationship which is forged between the legal orders of the member States. More precisely, the powers of the Court are interlinked between themselves and with those recognised to the internal judge to achieve the aims, which, I would say, belong to constitutional justice. Let's see how.

The Treaty and E.U. law prevail over an incompatible internal law. E.U. law can be immediately and necessarily directly applicable in the national legal orders to the extent permitted by E.U. law itself. The internal judge will have to refrain from applying any norm, regardless of its status, which could impede the attainment of this result. In other words in every Member State, internal norms which involve the non-observance of the E.U. duties cannot be upheld in judgement. The legislator of that state would, on his part, be bound to remove or modify these rules so as to ensure that these duties are no longer violated. This system has stood the test of time, satisfies the needs of actuality and it is no coincidence that it has managed to escape the stringent scrutiny of the Constitutional Courts of the Member States. The judgements of these courts have also specified that the judgements pronounced by the Court – as the judge of the legality or illegality of actions or of the interpretation to give the law – become, in the field of the State, directly applicable E.U. law and should hence be immediately applied in preference to any opposing internal norm. In this manner, it has been possible to remedy the limit inherent in the competence attributed to the E.U. judge, who, unlike the constitutional judges of federal States, can neither challenge the laws of the member States nor declare them invalid. It has been said across the Channel that this is '*judge-made federalism*'. In any case, we find in the European Union a legal system which has been enriched, not to say completed, and made to function by jurisprudence which corresponds, at least in practice, to the institutes of constitutional justice within States. Another aspect will now be considered.

3. E.U. law also effects inter-subjective relations. The internal judge is the *lunga manus* of the European Union, ensuring the capillary observance and application of this law in every Member State. From centralised jurisdiction because it is reserved, decentralised jurisdiction derives. Decentralised jurisdiction is exercised by all the national judges and finds its expression in the diffuse and incidental protection of the subjective rights arising from the E.U. legal system. The internal judge would have to consider all these rights as fundamental and as equally entitled to protection. These are subjective rights deriving from an E.U. legal system, which has become dominant and omnipresent, thanks to the jurisprudence of the Court. The national judge protects these rights, it bears repeating,

even if they are incompatible with the provisions of the internal legal order. Added to all this, there is the recognition of the individual's right to compensation for damages. This right also emerged from a Court decision (the Francovic Case) and applies in the case of an omission or other illicit practice on the part of State legislation, consequent to which subjective rights guaranteed by the Treaty or the E.U. legislation are violated. This specific remedy for the violation of a right is fundamental in the context I specified, in that it offers the individual a protection which is immediate and more advanced, even when compared to the protection afforded by the legal systems of those states in which an appeal to the constitutional judge is permitted. The interested subject is thus enabled to resort to such measures, to obtain the annulment of the act – whether legislative or of another nature – which he perceives as a violation of his *Grunrecht*.

4. What has just been said requires clarification. When I state that the rights of individuals under European law are all equally fundamental from the point of view of the national legal system and the national judge, I do not mean to ignore the level of protection which surrounds them in their state of origin, arising out of the hierarchy of the normative sources from which they derive. The rights emanating from E.U. sources are subjected to the Treaty – regulations, directives and so on – and co-exist with those rights which are afforded the highest level of protection and which are at the basis of the Union – the freedom of movement, the rights of citizenship of the EU – without, of course, being able to take their stead.

Co-existence between these differently qualified rights is not always easy. How do the following come together – free movement of services, and hence also of medical services, sanctioned by the Treaty and its liberal view of the market and also the social right to health care and to the reimbursement of medical expenses, for example – rights which the E.U. regulations leave to national regulation, where these arise, being founded on the criteria of a beneficial but fiscally efficient “welfare state”? Moreover, what about the right to freedom of movement and residence in all the European Union? This right is established in Article 18 of the Treaty as a right belonging to all the citizens of the Union and it is a prerequisite for the enjoyment of other rights related to the European citizenship

(both participative and electoral rights), which are recognised to the residents in other Member States, different from their state of origin. To which extent, however, is the exercise of such a fundamental freedom limited by the provision which restricts subsidiary law, established in the same article of the Treaty which establishes this freedom?

Hence the most important freedoms are not hierarchical. One can interfere with another, but each freedom, has, after all, its own protected area of application and the judge has to allocate it rationally in the system. The problem becomes complicated when the Treaty refers to a whole series of protected freedoms. Let's consider Article 6.2 of the Treaty of the European Union:

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of E.U. law."

The Court exercised, even before the entry into force of the TEU – and today it goes on to carry out, with the comfort of Article 6 – a supervisory role over the enforcement of all the fundamental rights since they were recognised and guaranteed through those provisions. The parameters of those supervisory powers are those derived from the Rome Convention or from the constitutional traditions of Member States. The protection afforded by the Court operates with regard to not only to the Institutions of the European Union but also vis-à-vis the Member States in the cases in which they are called upon to apply E.U. Law. This is another and very important function of protection of individual subjects. However, in fulfilling this function, the Court tries, as much as possible, to avoid the difficulties which may derive from what could be termed the "heteroprotection" which falls on the fundamental rights in question. In fact, human rights, and fundamental liberties are also guaranteed in the respective legal systems, the Strasbourg Courts and by the national judges. Article 6 gives the Court a wide discretion and hence it does not prevent it from basing its judgements, on a case-by-case basis, on other case-law emanating from institutions which protect human rights. It also does not prevent it from finding "neutral" solutions which are suited to highly controversial constitutional matters, which are the subject

of lively debate in the Member states when the controversy concerns their possible violation in the field of E.U. justice. Hence, for example, the decision in the Crogan case (1991) portrays abortion as being the performance of a service which could be held to be legitimate in some national legal orders whilst not in others, which however, in no case is considered as a fundamental freedom guaranteed in the Treaty. On the other hand, it is also significant that certain constitutional courts, such as the German Court of Karlsruhe, have asserted on their scales the "essential equivalence" of the protection reserved to the fundamental rights in the E.U. and state legal systems, even if, for a moment, it had accepted the opposite solution.

5. It is important to mention regarding this last point that issues concerning liberties and fundamental rights are central in the European Union, as in the States. The internal judge may protect the E.U. rights of individuals by basing his decision on that of the Court. He will always find Article 234 which deals with preliminary pleas of interpretation within reach, or even that concerning the validity of the acts adopted by the institutions of the European Union. Let's remember that the institute of the preliminary ruling is inspired by corresponding schemes of the internal legal systems. In our countries, it has been the preliminary reference of ordinary judges which has endowed constitutional justice with the merits of concrete justice and justice which is close to the citizen. The same thing happens in the E.U. legal system. The preliminary matters which have a bearing on the re-conciliation of the causes and values at stake in the protection of rights and fundamental liberties are frequently the result of the application of the law, in the ordinary flow of controversies which arise between the national courts. It is in this area of juridical experience of integration that one can find the actual raw material which leads to the development of E.U. law and also those of its characteristics which establish it as a higher law; a fundamental law which directly protects the individuals whilst going beyond the States. And it is here that the jurisprudence dictated by the Court at the heart of the system – a jurisprudence of interests, values or principles, – undoubtedly becomes a form of constitutional justice, always ready to protect what we all recognise as this 'Union which is ever so close'.

HUMAN RIGHTS IN TUNISIA: DILEMMAS FOR THE EUROPEAN UNION

EMMA C. MURPHY

The European Union has repeatedly expressed its concern that the Southern Mediterranean Partner states (SMPs) should promote and protect human rights as defined by the United Nations Declaration of Human Rights and as recognised by those states in the Barcelona Declaration of 1995. Europe's concern is both normative, expressing a principled belief in the universal applicability of the human rights discourse, and pragmatic in so far as human rights and democracy are seen as necessary correlates of economic reform and development. In 1996 an Association Agreement came into effect linking Tunisia and Europe through a series of economic, security and political "baskets", or common agendas. Human rights and democratisation were seen by Europe to be a fundamental condition of economic assistance and the opening of European markets to Tunisian products. Yet, despite its own claims to have significantly advanced the human rights agenda in Tunisia, and to have introduced a level of political pluralism unseen since independence, the Tunisian regime has come under consistent attack from human rights organisations and even the EU itself for its own human rights abuses and for the increased centralisation of political power. This paper examines the accusations levelled against Tunisia, and the Tunisian regime's defence, through the lens of Tunisian political history. The case raises important questions for the EU in terms of the ambiguities and inconsistencies in its own policies and policy-making processes.

1. Introduction

The European Union has shown an increasing concern since the mid-1980s with the human rights of both its own inhabitants and those of the countries with which it trades. The preamble of the Single European Act included a statement to the effect that the promotion and protection of human rights was a cornerstone to the international relations of the European Union, a reference repeated

in the Lomé IV Convention of 1989. In 1991, human rights were linked to the issue of democracy in the Declaration on Human Rights by the European Council of Luxembourg (28-29 June) and again in the Council's Resolution on human rights, democracy and development (28 November).¹ The Treaty of the European Union itself introduces human rights and respect for democratic norms and the rule of law as fundamental requirements for EU membership and guiding principles of collective activities. Not surprisingly then, human rights found their way into the Barcelona Declaration of 1995, with all EU members and the southern Mediterranean partner states (SMPs) committing themselves to act in accordance with the United Nations Declaration on Human Rights, the United Nations Charter and the principles of international law. Subsequent association agreements between the EU and SMPs included a political basket, part of which demanded the promotion and protection of human rights. Again, the linkage was made between the desirability of democratisation in SMPs, and the need for them to advance the human rights agenda within their own countries. The advocacy of democracy as a preferable mode of government stemmed from two sources: firstly, a normative belief in the ethical and humanist supremacy of that form of government; and secondly from the modernisationist understanding that liberal and transparent forms of governance are necessary for the efficient working of a market economy. Within this context, advocacy of human rights also assumes a dual function.

Tunisia reached such an agreement with Europe in 1995, which subsequently came into effect in 1996. At the time Tunisia was still reeling from the often violent assault by the regime on the Tunisian Islamist movement, known as *Nahda*. In rhetoric at least, however, the regime remained committed to a programme of democratisation, which included the promotion and protection of human rights. Enough reforms had been made to the political system for the EU to take the Tunisian intention seriously, and the issue of political

¹ For more details see Laura Feliu, "Human Rights and the Barcelona Process", in Fulvio Attinà and Stelios Stavridis (eds), *The Barcelona Process and Euro-Mediterranean Issues From Stuttgart to Marseille*, (Milan: Università di Catania), 2001, pp.67-95.

conditionality did not hinder either European or Tunisian ratification of the agreement. Since then, however, Tunisia's human rights record has appeared to deteriorate rather than improve. The military, security and judicial services have been accused of acting for political purposes to harass, persecute, torture and illegally imprison opposition figures and human rights activists in an effort to defend the position of the present regime. Indeed, Tunisia now figures regularly in the reports of international human rights organisations such as Amnesty International and Human Rights Watch. The list of reported violations of human rights is long: from torture, beatings and illegal imprisonment, to harassment, surveillance, the criminalisation of free speech, denial of appropriate legal representation, prolonged isolation, poor prison conditions, social and economic exclusion, and even extra-judicial killings.²

Similarly, progress towards democratisation appears to have stalled. While piecemeal reforms have allowed opposition party representation within the National Assembly, improved state funding for legal political parties, and even competition for the office of president, the reality of legal and political structures obstructs any real possibility for power-sharing, let alone the transfer of power. Indeed, power has become ever more concentrated in the hands of the president himself, and his close circle of friends, family and advisers. In September 2001 he even felt sufficiently comfortable with his grasp over the system that he put forward a programme outlining his plans for a fourth, constitutionally illegal, term of office.

Critics of the regime, both within and outside Tunisia, have repeatedly questioned why, given the terms of the Association Agreement, the EU has not been more vocal in its condemnation of their clear violation by the Tunisian government. Indeed, the European Parliament has proved remarkably resilient to pressures from INGOs and Tunisian NGOs to rebuke the Tunisian regime or, preferably, to apply sanctions against it. This article attempts to provide an answer to this question by examining the regime's defence of its actions and the EU's response to that defence. It examines the issue of human rights in Tunisia within the context of Tunisia's

² See for example, *Human Rights Watch Annual Report on Tunisia 1999*, available on the web at <http://homepage.ntlworld.com/chrtunisia/reports/hrw1999.htm>.

political development, most particularly since the constitutional coup of 1987 that led the current president, Zine el Abidine Ben Ali, to take office. The paper highlights the dilemmas which the EU faces in applying judgement against regimes of SMPs, as well as the contradictions at the heart of the EU position. The regime's defence lies in three arguments: that it has taken a proactive role itself in promoting the culture and institutions that defend human rights and that these take time to take root in developing political societies; that the definition of human rights needs to include economic and social rights that may have to take sequential priority in countries at risk of political and economic destabilisation; and that the international human rights community is either deliberately or unwittingly intervening in Tunisia's domestic politics, which remain the sovereign preserve of the Tunisian state. All these arguments, and the counter-arguments posed by human rights organisations, pose significant dilemmas for the EU which have not been addressed by the Barcelona framework.

2. Tunisia under Bourguiba

The Bourguibist era, from independence in 1956 until his removal from office in 1987, was one dominated by the processes and problems of state-building. For our purposes, it is important to briefly reflect back upon this earlier period for a number of reasons, one of which stands head and shoulders above the rest. Bourguiba presided over the establishment of a single-party state which, despite its rhetoric, was devoid of genuine democratic structures and which promoted a political culture in which consensus around the politics and machinery of the state was elevated to the position of *the* prime national political virtue. Challengers to that orchestrated consensus were considered to be threats to both national security and the state-building process and were subsequently eliminated by either co-optational or repressive measures. Within the ruling party different trends emerged; a leftist or socialist grouping which lost its momentum after the decline of Ahmed Ben Salah; a liberal social-democratic trend represented by disaffected individuals within the party élite; and a bureaucratic party "old guard" that defended its privileges at all costs, resisting political reforms or economic rationalisations that might have damaged its capacity for distributing patronage. Competition between these trends was limited by

Bourguiba's personal refusal to elevate any individual who might represent a particular trend to the position of appointed successor. When individuals sought to challenge Bourguiba's personal political domination or that of the ruling Neo-Destour/PSD party, they were forced to do so from exile (such as Ahmed Mestiri – founder of the *Mouvement des Démocrates Socialistes*) or to risk imprisonment and even assassination.

National organisations, such as the main trade unions, faced similar constraints. Union leaders, like Habib Achour, who confronted the regime over its economic failures, found themselves replaced, harassed and even imprisoned. When they tried to develop associational identities and agendas that placed them at odds with those of the ruling party, they were rapidly disempowered. In instances (such as the January 1978 riots) when union members took to the streets to demonstrate in favour of their leaders, they found themselves under attack from riot police and even the army. In that case, the regime went so far as to declare a state of emergency and to subsequently sentence Achour and 30 of his UGTT colleagues to harsh prison terms.

In sum, the nature of Bourguiba's rule frustrated efforts by individuals and associations to develop a fully-fledged civil society. It also established the police and military as tools by which the regime could use coercive measures to contain political challenges. Military tribunals and a state security court (established in 1968) were used by the regime to by-pass the "independent" judiciary and the list of "political crimes" became progressively longer, with the prisons being filled with Ba'thists, leftists, liberals, unionists and eventually Islamists.

The final years of Bourguiba's presidency were marked by an escalation of the tensions between state and civil society. Efforts to introduce austerity measures, including a hike in the price of bread, brought a week of rioting through much of the country. Economic crisis and political alienation combined to lend support to a growing Islamist movement that had already been fomenting disturbances throughout the early eighties. For Bourguiba, Islamism was an absolute anathema, and he proved to be ruthless in his efforts to eradicate it from the Tunisian political arena. For the third time in six years, the army was brought in to quell the riots. Opposition newspapers were closed, union leaders were arrested and Bourguiba began a near-rabid pursuit of the Islamist *Mouvement de la Tendance*

Islamique (MTI). The opposition began finally to coalesce around the two issues on which they all – leftists, liberals and Islamists, could agree; the need for political reforms and the defence of human rights.

In 1986 and 1987, the campaign against the Islamists intensified, with a series of mass arrests and show trials, leading to long-term imprisonments and – in some cases – to the death penalty. Bourguiba, determined to wipe out the Islamist challenge once and for all, sought to increase the number of execution orders, but his ministers – most prominent of whom was the prime minister, Zine el-Abidine Ben Ali, sought to restrain him for fear of the public response to such disproportionate measures. On 6th November 1987, Bourguiba was removed from office in a coup d'état, and Ben Ali took his place, claiming that the constitution required that Bourguiba, who had been declared mentally unfit to hold office by a group of doctors, be replaced.

3. Political reform under Ben Ali

It was clear to Ben Ali that Bourguiba had gone too far in his imposition of the state upon society. The national consensus had effectively disintegrated and the state itself had become the common enemy. Ben Ali realised, therefore, that to reconstruct the national consensus he would have to promise political reforms that would restore the balance to the state-civil society relationship. He consequently immediately abolished the presidency-for-life, and committed his regime to the restoration of constitutional government and the revision of that government to accommodate political pluralism, democratic government and respect for human and political rights. Prominent political prisoners were released, exiled opposition figures were invited to return, press rules were relaxed, amnesties were granted to thousands of other prisoners and suggestions were made that the state security court would be abolished.

Political reform was to proceed along a number of paths. Firstly, the PSD itself was to be reformed to broaden its popular base and revive internal democratic structures. Secondly, a national dialogue was initiated with the still-illegal opposition parties (including the Islamists) to revive the national consensus and determine the new direction for the state. Finally electoral system

reform would introduce political pluralism and democracy into government.

Nearly fifteen years later, we can assess the results of the reforms subsequently undertaken. The results are profoundly discouraging since early optimism that Tunisia would democratise has turned into the disenchanted realisation that Ben Ali's Tunisia is becoming both more authoritarian than its predecessor and more capable of imposing that authoritarianism.

The PSD was renamed the *Rassemblement Constitutionnel Démocratique* (RCD), reflecting an abandonment of previous socialist commitments and a supposed new affinity to democratic practices. The sidelining of the older generation of party die-hards opened new career paths for an ambitious younger generation that held no emotional attachment to the Bourguibist legacy and could adapt itself to the modern economic outlook of the Ben Ali regime. A massive recruitment drive based on promises of internal reform did succeed in enlarging and reviving the party, but manipulation of the party structures also subordinated it to the presidency. The introduction of multi-party politics has served to contain the political hegemony of the party, transferring that attribute to the president and his immediate circle.

The national dialogue resulted in the 1988 National Pact, a document which committed all the agents of government and civil society to a common vision of a democratic, constitutional political system. It served to prevent the opposition from taking advantage of the economic crisis or the initial vulnerability of the new regime, co-opting them into a common vision that was then entrusted to the state for implementation. Those parties that pursued a vision in any way different from the one claimed by Ben Ali, notably the Islamists, were deemed to have fallen outside the consensus and to be dangerously divisive. Thus the MTI did not join the list of political parties legalised in 1988. Since it was the only organisation that could genuinely claim any mass popular support, the National Pact had effectively served to legitimise an order in which the only opposition allowed was that which presented no opposition.

Electoral reform has been equally disappointing, although the government can justifiably claim that Ben Ali's regime has seen the first introduction of multi-party politics into Tunisian political life post-independence. The legalised opposition parties are weak and largely ineffective due to a number of factors. Firstly, they either

have their roots in the now largely debunked ideologies of communism and socialism or in the personal power-bases of individuals who withdrew from the Neo-Destour/PSD at some time during the Bourguiba era. They can often draw on only regionalised support, and their credibility had been seriously damaged by a tendency on the part of their leading figures to accept posts within the RCD government in order to advance their personal ambitions. They present no real ideological or practical alternatives to the government and are so financially weak that they could not communicate any such platforms to the mass of the population even if they did have. The government has introduced an element of state funding for legal opposition parties that does help them to gain access to the media and to develop their (weak) organisational structures, but equally makes them indebted to, and dependent on, the government for their survival. At times, the opposition parties have even appeared ridiculous, tearing themselves apart over internal divisions that amount to little more than competition for places on party electoral lists. In the 1999 national elections, two parties offered candidates for the presidential elections (Mohamed Bel-Haj Amor of the *Parti de l'Unité Populaire* and Abderrahmane Tlili of the *Union des Démocrates Unionistes*) but neither offered a political agenda that differed from Ben Ali's. Their claim that standing for the presidency when they clearly couldn't win was part of the strategy of putting pressure on the regime to reform rather collapsed when Tlili suggested that he couldn't do the job any better than Ben Ali.

Piece-meal reforms to the electoral system have failed to challenge RCD dominance, although they have allowed for a minority opposition voice in the legislature. The effect of this is marginal since power rests principally with the presidency, and opposition representation in parliament has been reduced to a co-opted and rubber-stamping role. The fact that the regime has "reserved" a minority proportion of seats for the opposition is indicative of these weaknesses although the regime would like to portray it as evidence of a commitment to plurality. In municipal elections the opposition parties have only been able to field candidates for a small percentage of seats, due to both financial and organisation constraints as well as a lack of a national support base. Thus the RCD continues to be the distributor of state patronage around the country and beyond the confines of urban centres like Tunis.

The Islamists, meanwhile, who were the only political grouping

able to mobilise a mass popular base, were refused legal status on the basis that their Islamic platform was potentially divisive through its mixing of religion with politics. Despite repeated proclamations that an Islamic party would be committed to democracy, the government decided that this represented mere opportunism on the part of the Islamists. Islamist candidates nonetheless stood as independent candidates in the 1989 elections, winning at least 13 per cent³ of the votes. Frustrations over their failure to have a clear electoral success translated into any official recognition fuelled a militant wing of the Islamist movement, just as events in neighbouring Algeria were serving to strengthen regime (and popular) opposition to allowing Islamists a political role. The Iraqi invasion of Kuwait and subsequent American-led war against Iraq led Islamist leaders like Rachid Ghannouchi to fiercely defend Iraq while bitterly railing against the Saudi and Kuwaiti regimes for consorting with infidel armies against a Muslim brother state. The Tunisian regime, aware that it might too become a target for such criticism and conscious also that Gulf investment finances were at risk, used the occasion to turn against the Islamists, arresting and imprisoning both leading figures and suspected members of the Islamist movement, now renamed *Nahda*, by the hundreds. The regime claimed that the Islamists were responsible for a number of violent attacks and demonstrations and that they planned a violent coup that would install an Islamic government. The Islamists and their supporters responded by accusing the government of taking the opportunity to demolish the only real opposition in Tunisia. They claimed that Islamist prisoners were tortured, that trials were held in secret, that prisoners had no access to appropriate legal support, that verdicts were politically motivated, and that the regime abused the legal system in order to secure convictions. By 1993 Amnesty International claimed that there were around 8,000 political detainees in Tunisia, while Islamists put the figure closer to 30,000.

³ The Islamist party, which had by then renamed itself as *Nahda* has claimed that it actually won closer to 20 per cent of the votes but that this was disguised by electoral fraud on the part of the regime. The regime meanwhile won all 141 seats, while the legal opposition managed to win less than 5 per cent of the total votes.

The attack on the Islamists was accompanied by a new wave of media repression. The press had enjoyed a honeymoon with Ben Ali until this time, with an easing of press restrictions and an apparent rejection of the sycophancy that had marked media coverage of the presidency under Bourguiba. In 1991, however, newspapers were once again seized, journalists harassed (or in the case of foreign journalists expelled), newspaper offices were attacked, searched and closed, and accreditation and passports were withdrawn from those who dared criticise the government. This feature of the country has remained true until this day. Although the regime has made a particular effort in recent years to stress its desire to see a more professional and less acquiescent press in Tunisia, amending the press code to that effect (at least to some extent), the reality of its actions has led to stringent self-censorship on the part of the media. International journalist's organisations such as the Committee to Protect Journalists have "named and shamed" the regime, which nonetheless continues to argue that the sheer number of publications available in Tunis, and the international origin of many of those publications, demonstrates a greater openness to the press than the government is credited with. The issue has become more sensitive still since the attempted assassination of the journalist, Riad ben Fahdel, in May 2000, just days after he published an article critical of the president. A still more recent example is the harassment by the regime of the human rights activist, Sihem Bensedrine, who took part in an al-Jazeera television programme in which she highlighted human rights abuses by the Tunisian regime. She subsequently had her telephone tampered with, received threatening and obscene calls, and was detained by the police for a number of days. She still faces trial on defamation charges. The regime subsequently organised a televised discussion on issues of democracy, human rights, press freedom and the role of the judiciary. This was presented as a watershed in how the state television will cover political issues, but the fact remains that genuinely independent journalists are easy prey for the regime.

Once the Islamists had been forced into deep cover by the brutal wave of repression, the regime appeared to turn on the secular opposition. Given the relative docility of that group, many observers have been hard pushed to explain this feature of the regime. It may lie partly in the fact that a number of the more prominent liberal opposition figures have played significant roles in the development

of the human rights discourse in Tunisia. Some, like Ahmed Mestiri, Moncef Marzouki, Khemais Ksila and Mohamed Moadda of the MDS have played leading roles in the *Ligue Tunisienne des Droits de l'Homme* and more lately in the Tunisian National Council for Liberty. Individuals like these have become the vanguard of struggles to get the regime to honour its commitments to democracy. Like many others, they have all been repeatedly arrested, detained, tried and imprisoned on charges such as belonging to an illegal organisation, defamation, working for a foreign (Libyan) government etc. Their crimes have been to publicise the human rights abuses within Tunisia and to publicly criticise the regime for them, and to call upon it to implement the genuine political reforms that were promised in 1987 that would lead to democratisation and the rule of law. Given the weakness of established political opposition parties, and their inability to make any significant dent in the regime's control over the political arena, such individuals have challenged the regime through human rights and civil liberties organisations. These have the benefit of drawing support from across the political spectrum, putting Islamists, liberals and communists into common cause. Moreover, they draw greater international attention and support. Finally, they engage in a discourse which the regime is hard-pushed to de-legitimise. Indeed, the regime claims that it too stands for democratisation, pluralism and human rights so its efforts to discredit or undermine these organisations are that much harder to sustain. That has not, however, meant that it has given up trying!

In 1992 the regime tried to use the then-new Law of Associations to control the membership of the LTDH. Among other things, this would have prevented members of political parties from joining the organisation, depriving it of its political leadership. Although the government was in that instance forced to back down, the LTDH leadership was eventually replaced by a more moderate group which felt that they could only continue their work defending human rights if they lowered the level of confrontation with the regime. The more political personalities refocused their attention on the *Comité National pour la Défense des Prisonniers d'Opinion* (CNDPO) formed by Moncef Marzouki and later the National Council for Liberty in Tunisia (CNLT), formed in 1998. The organisation nonetheless soon found itself once more at odds with the regime. The Fifth Congress of the LTDH, held in October 2000, resulted in the election of a more independent leadership. In December, four LTDH members

with links to the government challenged the validity of the Congress election results, a challenge that was upheld in February 2001 by the second chamber of the Court of first instance. The court declared that a new Congress should be held at which a new executive committee should be elected and that the LTDH was to be placed under judicial administration. The offices of the League have been closed down. Simultaneously the members of the now-dissolved LTDH leadership have been harassed, beaten, threatened, arrested and detained. Likewise, members of the unrecognised CNLT have been arrested, tried and sentenced for membership of an illegal organisation. Its spokesman, Moncef Marzouki, has for example been sentenced to one year imprisonment for allegedly "spreading false information" and "maintaining an unauthorised association". The CNLT offices and the homes of its members have been surrounded by police a number of times. Meetings have been banned, and individuals have been physically prevented from attending them.

Under particular attack from the regime have been lawyers who have defended what they consider to be political prisoners. Some, like Najib Hosni, have been imprisoned under charges of unauthorised legal practices (read, defending Islamists). Others, like Naziha Boudhib, claim they have been physically assaulted by security agents. Nejib Hosni was banned by the courts from practising law and, when he ignored the ruling, was imprisoned. Anouar Kousri, a vice-president of the LTDH, found himself under surveillance when he defended a young man who subsequently died in police custody.

Not surprisingly the Tunisian regime is drawing ever-stronger criticism for its performance in the human rights domain. Amnesty International still claims that there are over a thousand political prisoners in Tunisia, subject to "cruel, inhuman and degrading conditions"⁴ that regularly include torture. Even when released, they are subjected to routine and arbitrary measures that prevent them from working or earning a living, from moving freely within or out of the country. The courts clearly fail to protect the human rights of

⁴ Amnesty International, *The Authorities Must Put an End to Widespread Human Rights Violations*, Statement issued on the occasion of the opening of the Mediterranean Games in Tunis on 2nd September 2001.

individuals and the security apparatus appears to be beyond the law and subject to no public accountability whatsoever.⁵

4. The case for the regime

The Tunisian government does not recognise the dismal picture drawn by the international human rights organisations. Instead, it organises its defence along four lines. Firstly, it has itself acknowledged that defending the human rights of its citizens is one of the primary obligations of the state. To this end, it has introduced a number of measures and institutions designed to advance the observance of human rights by the state. Secondly, the regime has been at pains to advance a broad definition of human rights that includes economic and social rights. When their attainment for the majority of citizens has been at the expense of the political rights of a few “troublesome” or “subversive” individuals, then the regime has claimed that this is a legitimate, even necessary, price to pay. Thirdly, the regime has argued that the international human rights organisations have fallen victim to the political machinations of the opposition in Tunisia, not least the Islamist opposition, who seek to pull down the regime and who make false accusations that draw international criticism as part of their strategy. Finally, the regime has argued that its own domestic politics are really none of anyone else’s business. When the EU in particular has been drawn into the debate, the Tunisian government has strongly rejected its claim to a right to intervene.

4.1 *The regime defends human rights*

The Tunisian regime can certainly point to the long list of measures that it has introduced to advance the status of human rights in its list of priorities. On the official Tunisian web site,⁶ human rights are listed at the top of the agenda, with a statement

⁵ For more information on human rights abuses in Tunisia see <http://web.amnesty.org/ai.nst>; (Amnesty International webpage); <http://homepage.ntlworld.com/chrtunisia/reports> (Human Rights Watch webpage); http://www.state.gov/www/global/human_rights (State Department Country reports on Human Rights).

⁶ www.Tunisiaonline.com

to that effect on the very first page, next to the commitment to democratic forms of government. A dedicated page on human rights lists twelve realms in which the state has taken action to promote human rights, ranging from civil and political rights, through the spectrum of economic and social rights, to its relations with human rights organisations and international conventions. In terms of civil and political rights, one of the first actions taken by Ben Ali as president in 1987 was to abolish the State Security and Emergency Courts, as well as the State Prosecutor's Office. He also created a Constitutional Council to review constitutional matters and make recommendations. A 1998 amendment to the relevant act made the decisions of this body binding on powers and authorities. In 1989, and in line with the ratification of the United Nations Convention Against Torture, forced labour was abolished, as were rehabilitative and civil labour in 1995. The system of administrative justice was reformed in 1995 and in 1987 and 1993 amendments were made to the penal procedures to improve the system of penal custody and preventive detention. The period for which a detainee could be held was reduced to three days, renewable once. In 2000 the President announced that the administration of penitentiary and re-education centres would move to the Ministry of Justice, together with the establishment of a new judicial framework relating to custody and preventive custody ensuring the detainee judicial protection

More proactive activities have included the creation of a new post, that of Minister-Delegate to the Prime Minister in Charge of Human Rights, Communications and Relations with the Chamber of Deputies. Ben Ali also established a Higher Committee for Human Rights and Fundamental Liberties in 1991, which makes suggestions for the improvement of human rights observance in the country.⁷ The president of this committee presents an annual report to Ben Ali on the situation in the country, with recommendations. Human Rights Units have been established in the Ministries of Justice, Interior and Foreign Affairs (in 1992), and a National Committee

⁷ Human rights activists have claimed that the Higher Committee is little more than a mouthpiece for the regime, constantly portraying a rosy picture of the situation in Tunisia and only intervening in individual cases to negotiate between the authorities and prisoners.

for Education in Human Rights was established (in 1996) to disseminate information about human rights, the idea being that the culture of human rights has to be established throughout the country before the fact. In 1992 a new Center for Juridical and Judicial Studies was created, and in 1996 a National School for the Prison and Rehabilitation Services was set up to provide training in human rights. In 1997, the government went as far as to create a designated Chair in Human Rights at the University of Tunis. Finally, it has authorised the publication of a number of books by the Higher Committee and National Committee to help in the education process.

The regime has furthermore repeatedly committed itself to international treaties and agreements that stipulate the protection of human rights, such as the Constitutive Act of the African Union (adopted by African states on July 11th 2000). It has participated fully in the international human rights debate, hosting major conferences such as the 1992 UNESCO First International Forum on "Education for Democracy", the 1992 United Nations World Conference on Human Rights, and the 1993 Arab Conference on "Education in the Field of Human Rights".

Since Ben Ali's accession to power, the Press Code has been amended three times, most recently in May 2001, with a reduction in the number of possible press offences, new press registration procedures, and protection from defamation by the press. It has also been stipulated that suspension of publication can only occur subject to proper judicial procedures. The government has also introduced other measures, which it claims have improved the legislative, structural and technical aspects of media communication in Tunisia. Ben Ali himself has repeatedly called on the press to be less servile and to promote genuine debate within the country.

The regime has further pointed out that opposition parties were only legalised under the current president, and that their representation in parliament now amount to a guaranteed twenty per cent of the seats despite their poor showing in the polls. Sixty electoral districts now have plural representation at the municipal level, with 243 opposition council members serving across the country. Women account for 12 per cent of the total members of the national parliament and twenty per cent of the slates of the RCD in the last election were allocated to women. The current regime introduced a special ministerial post devoted to women's needs and introduced

women to the council for the first time. In the last national elections, the opposition fielded candidates for the presidency for the first time, and Ben Ali has limited the presidential office to three consecutive terms. Opposition members of parliament have been invited to serve in cabinet and political parties receive a state subsidy to help them overcome the handicaps of their small size and organisational weaknesses.

In sum, the regime is clearly heavily engaged in the human rights discourse, (to the extent that critics have said that the country has a human rights discourse, but no human rights). Critics might point out that the state has tried to establish a monopoly over that discourse, appropriating for itself the right to define what constitute human rights, to educate the population in that definition, and then to determine the pace and scope of the implementation of its commitments. If all of these tasks fall to the state, then what role is left for independent human rights organisations or even wider civil society organisations?

4.2 *Defining human rights*

A key aspect of this defence is the definition of democracy, political pluralism and human rights, which refers first and foremost to the notion of respect by the opposition for the rule of law. In an interview in June 2001 Ben Ali said:

“It should be recalled that democracy is a system which encompasses rules and mechanisms aimed at organising public life with all its components in order to prevent anarchy. Equally no democracy is possible without the rule of law which applies to all without exception...I wish to recall in the same context, that the right to be different and to set up parties and organisations is guaranteed but it could not be consecrated if it is in anyway violated.”⁸

For Ben Ali, the political rights of individuals and organisations only exist as long as they acknowledge their obligations to the rule of law *as determined by the state (re: his own regime)*. He claims that the government is making steady progress towards democratisation.

⁸ *Tunisia News*, 9 June 2001, p.1.

Political activity is only legitimate if it contributes towards this steady progress, the pace of which is determined by the regime with an eye towards preserving stability throughout the period of political and economic transition. Any political activity that challenges this stability, by undermining the regime or its interpretation of the law, is considered to be illegitimate and threatening to society. Of particular concern are those activities which have the potential or actual capacity for violence, a trait that the regime has consistently attributed to the Islamist movement. Violence and subversion are threatening to all of society and are therefore not considered to be political crimes. For example, in an interview with *Middle East Policy*⁹, Ben Ali stated the following:

“Let us be clear about the fact that there are no political prisoners in Tunisia. All those in prison are there for common law crimes. They have been judged by the ordinary courts in accordance with ordinary procedures and in application of the law, and have been found guilty of established actions involving in most cases terrorism or aggravated violence, or related to the preparation of acts of violence directed at overthrowing the republican regime”.

This interpretation of democracy and political pluralism is enshrined in the National Pact itself, to which the legal opposition are themselves bound. The pact says:

“It is the responsibility of the state to guarantee other fundamental liberties such as the freedom of assembly and freedom to set up associations and political parties; provided that these freedoms are exercised within the law, they may be limited only by the requirements of democratic society and public order, and by the rights and freedoms of others and the requirement of non-allegiance to any foreign party.”¹⁰

The pact goes on to assert that protecting these freedoms entails the prohibition of all forms of extremism, of any efforts to entwine

⁹ *Middle East Policy*, Vol. VI, No.2, October 1998, p.186.

¹⁰ *The National Pact: November 7th, 1988*, Tunisian External Communications Agency, Tunis, October 1994, pp.14-15.

religion and politics, and of any efforts on the part of political parties, associations or other organisations to interfere with or replace the activities of the state institutions. Since the state itself is supposedly the product of periodic and free elections, its own actions are an expression of the will of the majority (although protecting the rights of minorities) and are therefore not subject to challenges.

The second aspect of the definition of human rights relates to what the regime states is the major task of the government, to ensure the economic and social development of the country. On the official web site mentioned earlier, the list of activities undertaken by the government to improve the human rights situation included actions in spheres not normally associated with human rights; education, health, social welfare, and better provision for women, the elderly, children and the handicapped. When Ben Ali took over from Bourguiba the country was clearly in an economic shambles, with the gains of early independence having been eroded through wasteful state management, interest on excessive borrowing, the decline in oil prices and the consequent drop in demand for Tunisian migrant labour. Since then a succession of development plans have been implemented that seek to balance the necessary restructuring of the economy with adequate and targeted social provision to protect the interests of the most vulnerable sections of the population. This has not been an easy juggling act but by and large the regime has successfully reformed the economy to enhance its international trade profile, restore fiscal balance, contain inflation and reduce the role and size of the public sector. There have of course been costs for society – such as unemployment, rising income taxes, demands for private contributions to educational and health costs, and a squeeze on the housing market. For the most part these have been borne by the relatively large middle classes, with targeted social provision protecting the poor from the effects of subsidy reductions. The reforms are not therefore universally popular, although there is a widespread recognition that things could not have continued as they were and that there are few real alternatives to the present strategy. This emphasis on the long-term developmental benefits of economic restructuring has been the cornerstone of the present regime's appeals for legitimacy. However, development has been more widely defined to include social development, such as the advancement of the rights of, and provision for, vulnerable groups in society – women, children, the elderly and the handicapped. Ben Ali's government

has repeatedly stressed that genuine economic development is only possible if it takes place in tandem with progressive commitments to advance the conditions of ALL the country's citizens, with the ultimate goal being a modern, secular, democratic society. There is a political message here – that democracy is only possible when society has been sufficiently (re)educated to cast off “regressive”, traditional, conservative, or religious attitudes and norms that serve only to perpetuate divisions, intolerance and inequalities. Thus the regime defends itself from Islamist challenges!

Those who challenge the state, as it tries to move society and economy forward in this way, are considered to be challenging the economic and social interests of society as a whole, threatening to hold back or even reverse the progress made under the current regime. Thus, it can be argued, while they stamp and stomp about their political and human rights being abused, they are in effect opposing the advancement of a much broader set of “rights” for a whole society in an effort to improve their individual rights. Moreover, they challenge the notion of a sequential ordering of rights. For Ben Ali, full political rights are a luxury which can only be enjoyed once society is sufficiently advanced (economically and socially) as to be able to absorb the potentially disruptive effects of political competition without destabilisation. His interpretation has found some sympathy with Tunisians and Europeans who look nervously at the Algerian experience in which democratisation moves that empowered Islamists were suddenly reversed by a much-threatened secular army, resulting in prolonged and bloody civil war.

4.3 *International organisations as tools of the opposition*

This argument seeks to discredit those who use the human rights discourse as a way to challenge the legitimacy of the regime itself. They are portrayed as dangerous and dishonest, as being more concerned with their individual rights than with society's interests as a whole. In Ben Ali's own words, they are: “*professional liemongers and lovers of speeches, press communiqués and salon professionals*”.¹¹

¹¹ Speech given on 7 November 1995, quoted in Tunisian Information Bureau, *Focus on Tunisia*, No.11, 1995, p.2.

They are frequently accused of working for foreign powers – for example, Mohamed Mouadda was imprisoned for allegedly conspiring with the Libyan government. In May 2001, the President denounced the “use of human rights as a pretext, particularly to feed malicious smear campaigns...by some who have mortgaged their conscience to serve certain quarters outside their country”.¹² Thus, international organisations such as Amnesty International or Human Rights Watch, become the unwitting dupes of both internal and external political opposition. By constantly pointing out the failings of the regime, and allegedly exaggerating them on the basis of “dubious” evidence supplied by politically-motivated individuals, they are undermining the legitimate efforts of the regime to advance the human rights agenda in a sustainable way. The Islamists are considered to particularly guilty, feeding on the democratic concerns of the liberal chattering classes to win rights which they will ultimately use to seize power and deny others those same rights.

4.4 International intervention in domestic affairs

Not surprisingly then, the regime has objected strongly to the efforts of Western European governments to provide refuge for Islamist opposition figures, and their repeated “official” criticism of the government’s record on human rights. The president has complained that Britain, France and the United States have “given asylum to the enemies of freedom and democracy”¹³ even as they have applied double standards by failing to sufficiently criticise the Israeli abuse of Palestinian human rights while over-stating the case against Tunisia:

“As happens in any other human society, nobody could state that in Tunisia there are no excesses or cases of abuse of power. But these are fairly rare, isolated cases which we have always unhesitatingly curbed by legal means.”¹⁴

The Tunisian Government has been particularly stung by the harsh statements that have been issued by the European Parliament.

¹² *Tunisia Online News Update*, www.tunisiaonline.com, 12 May 2001.

¹³ Interview in *Le Figaro*, 2 August 1994.

¹⁴ *Tunisia Online News Update*, www.tunisiaonline.com, 12 May 2001.

These have been in response to repeated pleas for intervention from international and Tunisian human rights workers and are grounded in the respect for democratic principles and fundamental liberties that are supposedly enshrined in the Association Agreement between the EU and Tunisia. Organisations like Amnesty International have been eager to promote this aspect of Euro-Med relations to a level comparable with European interest in the economic and security aspects of the agreements.¹⁵

In 1996, the EU harshly reprimanded the government when opposition leader Mohamed Mouadda, was imprisoned after publishing an open letter in which he condemned the deterioration of the human rights situation and civil liberties during Ben Ali's leadership. The strength of international pressure on Tunisia, which at the time was newly embarking upon its Association Agreement with Europe, sufficed in that instance to see Mouadda released after serving fifteen months of an eleven year sentence. (Mouadda was nonetheless subjected to house arrest, harassment, a ban on participating in political activities, and denied access to foreign visitors, eventually resorting to a hunger strike that left him in hospital. His continued calls for greater political freedoms led to his re-arrest and return to jail in June 2001). Although he demurred in Mouadda's initial early release, Ben Ali made it clear to his EU partners in a major speech in 1998 that "it is necessary that all parties respect the social and cultural specificities of one another" and that they recognise the need for "gradualism and state-by-stage progression" in the transition to democracy.¹⁶ Similarly, in 1995 he said:

"We respect the nobility of activism and we are attached to constructive dialogue, within the framework of respect for states' sovereignty and their national choices, as much as we reject any form of deviation which harms the very essence of a humanitarian issue which concerns the entire mankind, that of human rights."¹⁷

¹⁵ See, for example, the public statement issued by Amnesty International on the eve of the Euro-Mediterranean meeting in Marseille in November 2000.

¹⁶ *North Africa Business Monitor*: March 1998, p.6.

¹⁷ Speech given on 7 November 1995, quoted in Tunisian Information Bureau, *Focus on Tunisia*, No.11, 1995, p.2.

In December 2000, the European Parliament passed a further two resolutions alerting its member governments to abuses of human rights in Tunisia and urgently demanding a meeting of the European Union-Tunisian Association Council to discuss the situation. In that instance a satisfactory response from Tunisia was less forth-coming. If anything the opposite was the case when, in January 2001, the regime expelled Me Eric Plouvier, who had been commissioned by the Observer to the Euro-Mediterranean Human Rights Network to observe the trial of the LTDH. The expulsion was a clear message that the EU's interference in Tunisian domestic affairs was unwelcome. In September 2001 Amnesty International complained that two of its own delegates, visiting Tunisia to monitor the appeal hearings of veteran human rights activist Moncef Marzouki and trade unionist Lotfi Idoudi, had been apprehended and assaulted by plain-clothes policemen. The willingness of the security services to take active steps to impede international observers suggests that the failure of the EU to place active sanctions against the regime has been interpreted as a "green light" to resist intervention by human rights organisations.

5. Questions that need to be answered

Herein lies the dilemma for the EU in its dealings with Tunisia. The EU is committed, for both normative and modernisationist purposes, to pushing the human rights agenda in its partner countries. Yet so far it has failed to take action against those partner countries, like Tunisia, which have not lived up to their own commitments under the Barcelona Declaration and in the terms of Association Agreements.

The reasons for this are manifold. The EU recognises, indeed sympathises with, the need to maintain political stability through the difficult period of economic transition. It is clearly a delicate time for such governments, which are after all applying the prescriptions set down by the more advanced economies. This means accepting that political democratisation may have to be delayed, or at least very gradually introduced, in order to contain resistance to economic reforms and prevent socio-economic "pain" from translating into political disruption. A sub-text is that the EU recognises full well that real democratisation may yet offer Islamists a route to

power.¹⁸ This is seen as threatening to European interests, as well as offering the longer-term reversal of whatever political liberalisation gains have been made in the MENA region. The EU finds itself forced to acknowledge that full-scale democratisation may be desirable in principle but may be damaging to its own interests in the short-medium term. Thus it is all too easy to accept the argument that gradual implementation with a long-term horizon is both more practical and desirable, even if that relieves authoritarian regimes of the pressure to decentralise or share power. Equally, that some sequencing of human rights delivery is inevitable, even in the best of cases.

This concession to self-interest on the part of the EU only serves to highlight the double standards applied when it comes to human rights issues, at least in the eyes of the Arab and Islamic worlds. The argument goes something like this: Israeli human rights abuses in the Occupied West Bank, Gaza Strip and Jerusalem are far more regular and heinous than the much more infrequent abuses within countries like Tunisia. After all, the current *Intifada* saw over 700 Palestinians killed in the first year, including women and children. Yet the international community does not sanction Israel. Instead it relegates the problem to a bilateral issue for negotiation between Israel and the far weaker Palestinians. EU policy towards SMPs is equally hypocritical. They speak with a loud voice when it comes to designing Association Agreements, then fail to insist on the implementation of democratisation and human rights when their own economic interests are threatened. The EU asserts that cultural variations are irrelevant (offering ammunition for critics of cultural imperialism) and yet it supports an effective regional variation in the level of political and human rights which it is prepared to actively support. It appears that the normative aspects of EU human rights policies take a very firm second-place to practical and self-interested perceptions of how political and human rights relate to economic development, reducing the overall credibility of the EU's position.

¹⁸ Annette Jünemann has provided a very convincing argument to this effect in "Support for Democracy or Fear of Islamism. Europe and Algeria" in Kai Hafez (Ed), *The Islamic World and the West: An Introduction to Political Cultures and International Relations*, (Boston: Brill, 2000).

Political conditionality can be seen as having two facets. Negative conditionality refers to the imposing of sanctions, or punishments, on regimes that fail to meet the required standards. Clearly, the EU has been unwilling to bear the costs to itself of such negative conditionality. Positive conditionality, on the other hands, implies taking measures to encourage or reward success in meeting the standards required. This take the form of, for example, financial grants for education programmes, conferences, civil society organisations and government programmes that improve political and human rights. In countries like Tunisia, however, where the regime has tried to silence and dis-empower independent political opposition and human rights groups, this can result in the financial reinforcement of state machinery rather than in an improved dialogue between it and civil society. If the EU tries to support independent groups, it incurs the wrath and obstructive manoeuvrings of the regime. The Barcelona formula contains a basic design fault in that it relies on the willingness of non-democratic regimes to introduce new political structures that will reduce their own capacities, yet provides no real incentive for them to do so and includes no real mechanism for sanctioning them if they don't.

The EU may need to rethink some of its own basic assumptions. Is it appropriate to abandon a normative agenda if the bottom line is that your member states are unwilling to assert its supremacy over self-interest? If one accepts the argument that political stability must take priority at the present time, is it necessary to consider which rights should take priority? Are negative rights (freedom from...) more important in the immediate term than positive rights (freedom to...) and should the EU settle for good performance with regards to the former rather than pushing unsuccessfully for better performance with regards to the latter? One could argue that a more limited rights agenda would be more successful and more credible. Regimes could respond without losing their own power over society, maintaining stability and developing a phased response to domestic political demands.

If the normative agenda is considered to be paramount, then the EU needs to establish the price that it is prepared to pay in order to see that agenda successfully implemented. Economic sanctions contain an inherent bias against peoples rather than regimes, so it is hard to see how they might help in this instance. It is equally hard to see how the EU could advance its contributions to the civil

societies of SMP without the co-operation of regimes, or rather in the face of regime hostility.

Equally the EU needs to clarify its position towards political Islam and Islamist movements. Are they to be a part of the civil societies that are supported by the EU in its efforts to encourage regional democratisation? Are they to be excluded on the grounds that the EU has no faith in their commitment to democracy and fears their influence on our domestic Muslim populations? The first strategy carries risks, including the likelihood that regional regimes will be profoundly alienated, while the second strategy completely demolishes the credibility of our own commitment to democracy and pluralism.

6. Conclusion

These are complex questions, but it would be a mistake to delay their serious consideration and resolution indefinitely. The Tunisian case is a clear example of a regime consolidating its authoritarian hold over society and progressively eroding the capacity of civil society to defend its political and human rights, while simultaneously enjoying the financial support of the EU through an Association Agreement. Not only is the current strategy self-defeating, it also contains the seeds of future popular resentment against the EU for its collaboration in economic and political processes that benefit the few rather than the masses. This is a harsh critique, but the EU should not under-estimate the difference between its own view of its intentions and how they are perceived by the recipient populations in SMPs. The sooner that the ambiguities and inconsistencies in EU human rights policies are recognised and resolved, the better for both sides of the Mediterranean.

HUMAN RIGHTS, POLITICAL EXPEDIENCY AND THE WAR ON TERRORISM: IMPLICATIONS FOR MOROCCO

TOM PIERRE NAJEM

Over the course of the last decade, the issue of human rights has become the focus of increasing attention across the developing world. This is almost certainly attributable to the increasing globalisation of the world economy and the overwhelming predominance of the major Western powers, particularly since the dissolution of the Soviet Union in the early 1990s. Without denying that there have been some positive developments with respect to human rights, the actual nature of the globalisation process, as it relates to these developments, is more complex and more tenuous than many observers seem to believe. In effect, I feel that the evidence from most developing countries, suggests that the human rights issue, and, indeed, the whole political liberalisation agenda, has been consistently subject to a principle that might best be described as political expediency. Both Western and regional actors have been quite happy to advance a reform agenda when doing so supports, or at least does not impinge significantly, on important economic and security-related interests. But, when these crucial interests have been threatened, the different actors have almost always responded by downplaying or even reversing this component of the globalisation process. I would further suggest that, in the aftermath of the September 11th terrorist attacks on the United States, it seems highly probable that political liberalisation, and perhaps human rights particularly, will be subordinated to security concerns for the foreseeable future. My purpose in this paper is twofold. First, I wish to make some general observations about how political expediency has helped to shape the globalisation dynamic, particularly with respect to the human rights issue. Second, I will examine how the concept of political expediency is useful for understanding recent developments and the present state of affairs with respect to Morocco. I have chosen Morocco as a case study because it has been deeply engaged in the globalisation process and because the issue of human rights has been a prominent feature of the political discourse there in

recent years, particularly since the accession of Mohammad VI to the throne in July 1999.

Introduction

Over the course of the last decade, the issue of human rights has become the focus of increasing attention across the developing world. This is almost certainly attributable to the increasing globalisation of the world economy and the overwhelming predominance of the major Western powers, particularly since the dissolution of the Soviet Union in the early 1990s. In the post-Cold War global system, developing countries have found that it is no longer possible to establish healthy trade relations with, and to attract massive development aid from, the major economic powers simply by adopting the appropriate rightist or leftist political stance. On the contrary, countries that wish to be competitive in the global economy have increasingly had to take significant pains to ensure potential aid donors and investors that they have sound economic potential and are politically secure in the long-term.

In effect, the major developed economies, along with powerful non-governmental organisations such as the World Bank, the IMF, Amnesty International and many others, have been able to dictate a global agenda in which development capital, trade, and other prerequisites for effective development have become more and more heavily contingent on economic and political conditions which correspond with Western ideals and standards. While the desired economic liberalisation produces considerable hardship in the short term, and is seen by some to be essentially a necessary prerequisite for the exploitation of the developing world by the more advanced capitalist economies of the West, the political liberalisation is supposed to produce long-term benefits that will significantly improve quality of life across the developing world. In short, it is held that, while Western economic pressure may be self-serving, it is also being used to encourage the gradual evolution of more representative and more accountable government and, in the more immediate term, to secure for the people of the developing world a whole host of basic human rights of the kind that are now largely absent and that people in the West take for granted, such as: freedom of speech and expression;

freedom from arbitrary imprisonment; freedom of religious belief; and freedom of assembly, to name only a few.¹

The advocates of the globalisation process would argue that some of its potential benefits are already becoming apparent, in practice, in many developing countries. For example, primarily as a result of Western policies, such as predicating development aid on improvements with respect to human rights, the issue of human rights is now at least on the agenda in practically every developing country, improvements are being made in many countries and there has been a proliferation of non-governmental organisations and civil society groups committed to monitoring developments and furthering the cause of increased human rights.² To cite one specific example, the European Union, through the Barcelona Process, has integrated an extensive human rights component into its economic relations with Southern Mediterranean countries such as Morocco, Tunisia, Egypt, Israel, Lebanon, etc., and it is claimed that this policy has helped to promote the human rights agenda in these countries.³

¹ For an assessment of the human rights policies of international actors, see the following:

J. Donnelly, "Human Rights and International Organizations: States, Sovereignty, and the International Community", in F. Kratochwil and E. Mansfield (eds.) *International Organization; a Reader*. (New York: Harper Collins, 1994), p. 202-219; J. Donnelly, *Universal Human Rights in Theory and in Practice* (London: Cornell University Press, 1989); T.G. Farer and F. Gaer, "The UN and Human Rights: At the End of the Beginning", in A. Roberts and B. Kingsbury (eds.) *United Nations, Divided World: The UN's Roles in International Relations* (Oxford: Clarendon Press, 1993), 240-296; R. W. McElroy, *Morality and American Foreign Policy: The Role of Ethics in International Affairs* (Princeton: Princeton University Press, 1992); K. Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* Basingstoke: Macmillan, 1998; K. Sikkink, "The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe", in J. Goldstein and R. O. Keohane (eds.) *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (London: Cornell University Press, 1993), pp.139-170; R. Vincent, *Foreign Policy and Human Rights: Issues and Response* (Cambridge: Cambridge University Press, 1986).

² K. Mills, *op.cit.*, Janusz Symonides, "Globalization and Human Rights" *Mediterranean Journal of Human Rights*, Vol. 4 (Double Issue), 145-163.

³ See Laura Feliu, "Human Rights and the Barcelona Process", in Fulvio Attinà and Stelios Stavridis (eds), *The Barcelona Process and Euro-Mediterranean Issues From Stuttgart to Marseille*, (Milan: Università di Catania), 2001, pp.67-95; "The European Union and Human Rights in the World", *Bulletin of the European Union*, Supplement 3, 1995. Luxembourg, 1996; R. Hollis, "Europe and the Middle East: Power by

However, without denying that there have been some positive developments with respect to human rights, I will argue in the course of this paper, that the actual nature of the globalisation process, as it relates to these developments, is more complex and more tenuous than many Western governments and Western scholars seem to believe. In effect, I feel that the evidence from most developing countries, at least those in the MENA region, suggests that the human rights issue, and, indeed, the whole political liberalisation agenda, has been consistently subject to a principle which might best be described as political expediency. That is to say, both Western and regional actors have been quite happy to advance a reform agenda when doing so supports, or at least does not impinge significantly, on important economic and security-related interests, but, when these crucial interests have been threatened, the different actors have almost always responded by downplaying or even reversing this component of the globalisation process. I would further suggest that, in the aftermath of the September 11th terrorist attacks on the United States, it seems highly probable that political liberalisation, and perhaps human rights particularly, will be subordinated to security concerns for the foreseeable future.

My purpose in this paper is twofold. First, I wish to make some general observations about how political expediency has helped to shape the globalisation dynamic, particularly with respect to the human rights issue. Second, I will examine how the concept of political expediency is useful for understanding recent developments and the present state of affairs with respect to one country in the MENA region. I have chosen Morocco as a case study because it has been deeply engaged in the globalisation process and because the issue of human rights has been a prominent feature of the political discourse there in recent years, particularly since the accession of Mohammad VI to the throne in July 1999.⁴

Stealth?" *International Affairs* 73, no.1 (1997), 15-29. Also see E. Murphy, "Human Rights in Tunisia: Dilemmas for the European Union" (in this edition of the *Mediterranean Journal of Human Rights*).

⁴ T.P. Najem, *Human Rights Development in Morocco: A New Era? Mediterranean Journal of Human Rights*, 4 (Double Issue), 87-103.

The paper is divided into three sections. In Section One, I will explain the concept of political expediency as it relates to the globalisation process, and consider, in general terms, how a complex of political, ideological, economic and security interests have structured a pattern wherein both major global actors and regional actors in the MENA context sometimes promote and sometimes curtail human rights reforms in accordance with prevailing circumstances. In Section Two, I will proceed to consider the more specific interests which have shaped the way that the human rights agenda has been pursued with respect to Morocco. Finally, in Section Three, I will look at a considerable number of recent developments relating to human rights in Morocco in order to help demonstrate the way that the regime, with qualified Western acquiescence, has selectively endorsed and restricted human rights as part of an overall strategy to secure its long-term interest in maintaining power.

1. General Observations on Human Rights and Political Expediency

1.1 Political Expediency and Global Actors

The concept of political expediency, as it relates to the promotion of human rights in the developing world, is strongly interwoven with tensions that are intrinsic to the larger globalisation process. It must be recognised that the globalisation process is primarily driven by economic imperatives and this fact necessarily has important implications with respect to any political programme which is enacted as part of the process. Major world governments, and Western economic policy makers and scholars have tended to emphasise that the necessary economic liberalisation is likely to be most beneficial for developing countries if it is accompanied by the sort of political liberalisation which would promote a broadly Western ethos of rule of law, freedom of decision-making, and broad-based political stability with in built checks and balances and moderated interaction among competing interest groups. Consequently, there has been a conventional assumption

that economic globalisation and democratisation are not incompatible, but actually go hand in hand.⁵

However, this perspective overlooks the existence of a real tension between the economic aims of globalisation and its stated political aims. In short, political change in a society, if it is too rapid or too violent, can disrupt the stability of a society to the extent that it is difficult, if not impossible, to have favourable economic relations with that society for a considerable period of time. Therefore, it would be more accurate to say that economic globalisation and political liberalisation go hand in hand only if the political liberalisation can be carefully managed to ensure enough stability in a society that profitable economic interaction is possible. Global powers may be sincerely committed to democratisation and improvements with respect to human rights on humanitarian and ideological grounds, but their principal economic interests dictate that these changes must take place in the context of gradual social evolution rather than rapid and disruptive revolution.⁶

A closely related point, which is at least as significant as the economic implications of potential instability, is the threat to both global economic interests and global security interests that is posed by opening up political processes in developing countries where the primary opposition elements are apparently anti-Western, anti-globalisation, and perhaps even anti-democratic. Whatever the faults of the existing governments in the MENA region may be, they are generally pro-Western and somewhat favourably disposed to the globalisation process. The principal elements of opposition in most of these countries are Islamist, anti-Western and staunch opponents of globalisation. Obviously, if the political liberalisation emanating from the globalisation process effectively serves only to open the political process to these elements, the policy becomes self-defeating from the Western point of view.

⁵ For a discussion of this, see the first chapter of T.P.Najem and M. Hetherington (eds.) *Good Governance in the Oil Monarchies* (Curzon, 2002).

⁶ See the following publication for a variance of arguments dealing with this issue. H. Hakimian (ed.) *The State and Global Change* (ed.) (Curzon 2001). As well, see E. Murphy, *Economic and Political Change in Tunisia* (Macmillan, 1999) for a look at some of the contradictions in economic and political liberalisation.

For these reasons, the major global actors have found it necessary to tread a very fine line with respect to promoting political liberalisation and human rights as part of the globalisation process. While it is expedient to promote reforms for a number of reasons, it is always essential to insure that the reforms do not run out of control and jeopardise vital economic and security-related interests. Broadly speaking, the political expediency of human rights reform rests on two interests: 1) the possibility that improvements in human rights may have certain benefits in terms of making developing economies more compatible with developed economies; and 2) the fact that the human rights agenda serves to provide an ideological justification for some of the more exploitative aspects of the globalisation process. Both of these interests can be formidable, especially when developed economies are strong, when a given developing country is reasonably stable and when there are no compelling security reasons to tighten control of a given political system. However, if these circumstances do not hold, then a liberalising agenda becomes inexpedient and global actors tend to downplay their emphasis on human rights improvements, or even, in extreme circumstances, to encourage developing countries to use any and all available means to actively suppress opposition elements.⁷

It is probably worth noting at this point that the September 11th terrorist attacks on the United States, coupled with the global economic downturn that the attacks exacerbated, have led to a global climate that is much less certain than that of the past decade or so. There are two schools of thought about the implications of this state of affairs with respect to the continuing promotion of human rights in the developing world. The first school of thought holds that increasing political liberalisation and human rights should be vigorously encouraged in order to provide an alternative, in the context of developing societies, to ideological extremists like the Islamist terror movements. The rationale underlying this is the assumption that these movements have only been able to attract

⁷ For a discussion of this in the Algerian context, see Annette Jünemann "Support for Democracy or Fear of Islamism. Europe and Algeria" in Kai Hafez (Ed), *The Islamic World and the West: An Introduction to Political Cultures and International Relations*, (Boston: Brill, 2000).

mass support because the governments of societies in the MENA region are so oppressive and so closed at present that people have no viable alternative opposition which they can support in order to address their grievances. The second school of thought holds that the only way to promote security in the long term is to provide strong support for existing pro-Western regimes, and to focus on eliminating extremist elements and hostile regimes that support them. The indications, at present, are that the second school of thought has become dominant with respect to defining the foreign policies of most of the major global actors. Hence, it seems highly probable that the promotion of political liberalisation and improvements in human rights will be a very low priority for the foreseeable future.⁸

1.2 Political Expediency and Regional Actors

In the context of the MENA region, political expediency relates to the promotion of human rights on two distinct levels: 1) a given regime's interaction with the international community; and 2) a regime's ability to defend its dominant position within the domestic setting. With respect to the first level, the expediency of promoting a certain amount of political liberalisation and human rights reform is fairly easy to understand. Policies that are in line with apparent global preference help to create a favourable international profile for the regime, to attract foreign aid and investment, to promote trade relations and political and economic partnerships, etc. Conversely, a refusal to initiate reforms can hurt the regime's standing in the international community and can make it difficult not only to pursue economic development but also to meet important foreign policy objectives.

With respect to the second level, the expediency of a reform agenda is more complex. Generally speaking, it must be assumed that existing regimes have a strong interest in defending their dominant position in the domestic setting to the greatest possible extent. Obviously, truly substantive human rights reforms would significantly lessen their coercive capabilities both with respect to

⁸ Indeed, at the time of writing, governments in the MENA region have increased their crackdown on Islamist (as well as non-Islamist) movements.

dealing with potential opposition elements and with respect to generating an atmosphere in which people are reluctant to openly question or challenge regime policy. It must be observed that, for this reason, most MENA regimes have been very careful, on the whole, to introduce human rights reforms in a selective and conditional fashion. However, there is considerable domestic political expediency attached to introducing tentative human rights reforms.⁹ There are at least four ways in which existing regimes stand to derive some benefit from a reform agenda.

The first potential benefit is ideological. Introducing human rights reforms helps the regime to bolster its legitimacy by distinguishing itself from past abuses and oppressive policies. Thus, a regime with a reform agenda is able to represent itself as progressive and to present to the public at least the possibility that future, and perhaps more substantive, reforms are possible within the existing system.

A second way that introducing human rights reforms can be domestically useful for the existing regime is that the concentration of public attention on this area can sometimes serve as a distraction from, or compensation for, problems in other areas, perhaps most especially in the economic sphere. Many of the regimes in the MENA region have chronic economic problems such as recessions or low growth rates, mounting debt, unemployment, an inability to sustain traditional subsidies, etc., etc. The reform agenda both distracts from these problems and gives people at least some reason to feel good about the direction their society seems to be moving in.

The third potential benefit of human rights reforms is closely related to the second benefit, and has to do with reducing tension in the society by allowing a sort of controlled venting of public dissatisfaction. Reforms which allow for greater freedom of expression, some freedom of assembly and demonstration, etc., can help to ease tendencies towards more dramatic and damaging forms of opposition to the regime.

Finally, the fourth reason that regimes might find it useful to introduce reforms is that doing so allows them to exercise a degree of control over the reform process. It should be remembered that, in the era of globalised communications and increasing worldwide

⁹ T.P.Najem and M. Hetherington (eds.) *op.cit.*; T.P. Najem, *op.cit.*

education, the principles of basic human rights have a wider trans-cultural currency than ever before. Whether or not MENA regimes are genuinely interested in pursuing human rights reforms, there are forces within as well as outside their societies that are pushing for changes. By ostensibly taking the initiative on the human rights issue, the regimes are able to weigh into the human rights debate, establish the parameters of the reform process and help to define the institutional and organisational frameworks through which the reforms are implemented and monitored.

2. Human Rights and Political Expediency in the Moroccan Context

Although the introduction of human rights reforms was an issue under King Hassan II (1961-1999) particularly during the latter years of his reign,¹⁰ a developed human rights agenda did not become a significant feature of the Moroccan political context until very recently. Indeed, just a few years ago, the regime was heavily criticised for its human rights record by a number of international commentators. For example, in an article in *Middle East International* in the summer of 1997, Reinhold Leenders outlined the recent history of Morocco's human rights violations, including the torture and execution of political prisoners and the "disappearance" of about 600 political opponents. He also commented on the brutal treatment being given to members of the growing *Association des Chomeurs Diplomes* (Association of Unemployed Graduates).¹¹ In June of 1997, the Geneva-based International Labour Organisation placed Morocco in the suspect company of Burma, Iran, Nigeria and Sudan for violating fundamental international labour standards and interfering in union activities.¹² The renowned novelist, and long-time resident of Tangiers, Paul Bowles observed: "You never know who's listening. Everyone's

¹⁰ This was largely in response to European pressure. See Paul J. Magnarella, *Middle East and North Africa: Governance, Democratization, and Human Rights*. (Aldershot: Ashgate, 1999).

¹¹ Brian Edwards, "The Obscure Language of Survival" *One World News Service* 9/29/97.

¹² *Ibid.*

suspected of being a spy. It's a police state, and very heavily policed, rather like Iran under the Shah."¹³

However, since the death of Hassan II and the accession of his son, Mohammad VI, in July of 1999, human rights have become a very important and highly visible subject in Morocco. The Moroccan government has been quite vocal about the issue, both in the domestic forum and internationally, and, almost certainly in keeping with the regime's wishes, a number of positive developments have received considerable attention from the international media. Among a considerable number of other initiatives that might be cited, the regime has made efforts: to extend the range of personal freedoms and to consolidate the rule of law; to amend press laws to allow greater freedom; to release political prisoners, allow the return of exiles and compensate the families of victims of past repression; to introduce measures designed to educate the population about human rights and to foster the development of a culture of human rights; and to establish co-operative relationships with international human rights organisations and host international human rights conferences.¹⁴

While the new King's reform agenda has been encouraged and warmly received by major global governments, aid organisations and international human rights advocates, two major problems must be recognised. The first is that the nature and scope of the reforms introduced have been carefully limited. A number of very significant issues are clearly not on the reform agenda, and, indeed, are not even open to discussion. Above all, the dominant role of the monarchy is not subject to question or challenge of any kind in the media or, indeed, in any context. Other issues which are strictly outside the sphere of permissible criticism include the continuing dispute over the Western Sahara and the regime's handling of Morocco's Islamist opposition. In addition, there are a number of other areas, such as open criticism of government ministers and the introduction of women's rights, in which reform has been strictly limited. The second problem is that, although there was considerable movement with respect to improving the human rights situation for the first year or

¹³ *Ibid.*

¹⁴ The regime has also gone out of its way to publicise these improvements.

so of Mohammad's reign, this period was followed by a significant crackdown on human rights activists and media elements that the regime perceived to have exceeded its carefully defined boundaries of acceptable criticism.¹⁵

Given these two important problems, it is clear that one must examine carefully exactly what the regime's motives and objectives really were with respect to introducing the human rights reform agenda. I would argue that considering how the different aspects of political expediency correspond to the implementation of the reform process is the best way to understand recent human rights developments in Morocco. On the basis of what has and has not happened over the course of the last few years, it seems highly probable that the reform agenda was introduced not because the regime is genuinely committed to real and extensive improvements, but rather, because the regime perceived a number of compelling potential benefits to be gained from pursuing it— benefits which, far from contributing to liberalisation of the political process, would actually allow the monarchy to solidify its dominant position. To the extent that the policy has become inexpedient, that is, when it has resulted in any significant threats or challenges to the interests that the regime introduced the policy to protect, the reforms have been either curtailed or reversed outright.

I will now proceed to identify the key interests that I feel contributed strongly to the genesis of the Moroccan regime's human rights reform policy. As I explained in Section One, in the course of looking at more general interests which have made it periodically expedient to introduce human rights reforms in MENA countries, these key interests emanate both from the international community and from the domestic setting.

The active influence of the international community undoubtedly played a quite considerable role in shaping the Moroccan reform agenda. Morocco's long-term economic interests are strongly tied to development assistance from and increasing trade relations with the European Union, a fact which has given the Europeans considerable ability to pressure Morocco into introducing both

¹⁵ In particular, criticism against the individual minister's led to the banning of newspapers.

economic and political reforms. Through the Barcelona Process, the European Union has established at least the principle that increased trade relations and development aid should be linked with improvements in human rights, the application of rule of law, and other democratic reforms. The extent to which this principle has actually been applied in practice is unclear, but the fact that major potential economic partners had expressed and documented such preferences clearly provided motivation for the Moroccan regime to introduce a reform agenda. This was especially the case given Morocco's need to ensure that its competitors in the Southern Mediterranean region (particularly Tunisia) would not be able to gain a significant advantage in future relations by being more responsive to European concerns.¹⁶

Within the domestic context, the regime stood to derive considerable benefits in all four of the areas I identified in Section One. From an ideological perspective, the establishment of human rights as an important priority certainly helped Mohammad VI to move out of his father's shadow, to add to the popular legitimacy of his regime, and to represent himself on the international stage as one of a new young generation of dynamic, progressive Arab leaders. In addition, the ostensible change in the ideological orientation of the regime from one of a religiously and patrimonially-based authoritarianism to something gradually approaching a more responsive constitutional monarchy had a number of more tangible political benefits in terms of helping the monarch to clear out his father's old guard and replace them with his own favoured personnel. To look at the most significant of many possible examples, it might be observed that the dismissal of Driss Basri from the Interior Ministry, which greatly encouraged many supporters of the human rights agenda, was almost certainly not solely motivated by his association with repressive policies implemented under Hassan II. In effect, the fact that Basri's dismissal contributed to the King's image as a human rights advocate was probably an added bonus of a political move that he would likely have considered desirable in any case, in order to eliminate a potential rival and to secure his

¹⁶ See: Laura Feliu, *op.cit.*; R. Hollis, *op.cit.*; E. Murphy, *op.cit.*

own dominant position in the Moroccan political system from a very early stage in his reign.¹⁷

Another advantage of the new monarch's emphasis on human rights is that it has undoubtedly helped to distract from some of Morocco's ongoing problems, particularly the struggling economy. At the time of Mohammad VI's accession to the throne, the economy was in the midst of a continuing recession, exacerbated by a two year drought that had a devastating effect on Morocco's important agricultural sector. More generally, the Moroccan economy has a number of long-term problems associated with chronic debt and the demanding imperatives of structural adjustment. While progress in resolving these difficulties has been tentative at best, it has been useful for the regime to be able to highlight human rights as an area where the country clearly does seem to making significant strides.¹⁸

With respect to allowing limited freedom of expression as a way of easing political tension in the society, it should be recognised that this has been a longstanding feature of the Moroccan political context. Even under Hassan II, it should be noted that Morocco had a very active press, which, judged by Middle Eastern standards, was reasonably independent of government control, as long as certain critical topics were avoided. Upon taking power, Mohammad VI made a point of expressing a desire to create a broader scope for free expression in Moroccan society, but, as I will explain in the next section, what this amounted to in practice was effectively a careful extension of the number of areas about which the regime is prepared to tolerate some articulation of popular grievances.

Finally, the human rights policy was also probably a necessary response to the development within Morocco of a considerable concern about human rights issues among some segments of the general population. This is partly a result of the more passive impact of globalisation, that is, the transmission of Western cultural values

¹⁷ The sacking of the much feared Minister of the Interior, was much commented on in the Moroccan media.

¹⁸ The Moroccan economy is still largely dependent on agriculture, where nearly half the populations is still employed, thereby leaving the economy extremely vulnerable to drought conditions.

into the Moroccan context. This transmission has inevitably followed in the wake of greater economic integration, but, to an even greater extent, it almost certainly related to the late twentieth century revolution in electronic communications. Unlike a number of other developing countries in the Arab and Islamic worlds, satellite communications and the Internet have not been significantly restricted in Morocco, and this has undoubtedly had a great impact on popular values and expectations. The growing calls among segments of the population for greater rights in some areas is also probably related to developments more indigenous to the Moroccan context. Greater political awareness is a classic feature of societies that have been pursuing the kind of educational and economic development agendas that have been features of Moroccan policy for some time now. In any case, however one accounts for the origin of the increasing awareness of, and concern about, human rights issues, this is clearly a development that the Moroccan government had to respond to in some way. It might be observed that, given the current international circumstances outlined above (i.e., with respect to the importance of improving Morocco's international profile and image in order to attract aid and investment, to develop trade relations, etc.) a policy of greater accommodation in this area was probably a more viable option than the forceful coercive policy that might have been adopted in other circumstances. In addition, it should be recognised that the regime stood to benefit from taking the initiative in promoting human rights reforms, rather than opposing them. By becoming engaged in the process, the regime has been able, to a great extent, to dictate the nature and scope of the reforms, and has also been able to exert considerable influence in terms of shaping the institutional and organisational frameworks through which the reforms have been implemented and monitored.

3. Recent Human Rights Developments in Morocco

In the course of this section, I will look at recent developments relating to human rights in Morocco in order to provide some sense of the purposively limited nature and extent of the reforms undertaken in six areas: 1) the political process and rule of law; 2) freedom of expression and the press; 3) political prisoners, exiles and the Islamist opposition; 4) human rights education; 5) contact and co-operation with international human rights organisations; and

6) women's rights. Essentially, it should be clear that most of the regime's initiatives in these areas have been self-serving and very much in keeping with the interests corresponding to the principle of political expediency that I outlined in Section Two.

3.1 *The Political Process and the Rule of Law*

It should be observed briefly that there were a considerable number of positive developments over the last few years of King Hassan's reign with respect to the easing of censorship and the opening of the political process generally. In 1998, for the first time, the monarch allowed the opposition parties to form a government under the leadership of Abderrahmane Yousoufi, leader of the socialist party and one-time human rights attorney. Under the new political arrangement, termed *alternance*, the monarch and his allies agreed to form a partnership with respect to governing Morocco.¹⁹ I think it is important to note in this context that many observers of the Moroccan scene tend to view the *alternance* arrangement with a degree of cynicism. The existence of an "opposition" government had the advantage of allowing the monarchy to disassociate itself from responsibility for some of Morocco's ongoing problems, particularly in the economic sphere. Of course, behind the scenes, the monarchy remained the dominant partner in the government, controlling all of the key ministries, including the interior ministry, and defining the major points of policy. However, the traditional opposition elements were allocated a number of important ministries, and were allowed to pursue their own policies so long as these were not greatly contrary to wishes of the King or his more powerful allies. These policies included some progress on the development of human rights, such as an easing of censorship, the release of political prisoners and some measures taken to improve the plight of workers.

After the accession of Mohammad VI, these policies were continued, and a number of further significant developments occurred that seemed likely to improve human rights in the country. To begin with, even before his accession, the new King made an effort to develop an identity as a man concerned with humanitarian

¹⁹ For details about this system, see Remy Leveau, "Morocco at a Crossroads" *Mediterranean Politics*.

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

The government's Human Rights Minister, Mohammad Aujjar, has gone as far as claiming publicly that the changes could be described as a "white revolution" and that they were being conducted on a new concept of "authority at the service of the people" which has been developed by the sovereign.²⁰ These claims certainly exaggerated both the real scope of the changes and the extent of the government's commitment to substantive change, but a public statement of this kind once again served to highlight the change of direction initiated by the King, and to portray him as a progressive and modernising ruler, both to his people and to the outside world.

3.2 Freedom of Expression and the Press

As I noted previously, Morocco has traditionally had a very active and somewhat unrestricted press by Middle Eastern standards, albeit

²⁰ Arabic News 6/28/00.

this was always subject to the condition that certain critical topics were avoided. Mohammad VI, upon acceding to the throne, expressed his desire to allow for greater freedom of expression, particularly with respect to the Moroccan press, and there are indications that at least some measures were taken to revise the press laws in accordance with this objective. For example, the Journalists' Protection Committee indicated that the accession of King Mohammad had a positive impact on freedom of the press, noting that the King had taken measures to broaden the easing of censorship initiated under his father in 1998. The general climate of openness allowed the Moroccan press to report on a range of sensitive issues such as joblessness, human rights, and, to some extent, corruption.²¹ Early in the summer of 2000, in a discussion with members of the Arab journalists' union in Cairo, the Communication Minister, Larbi Messari, gave assurances that press laws in Morocco would soon be revised to cancel prison penalties for crimes related to publishing, and to shift some of the authority concerning press oversight from the executive to the judiciary. He indicated that the revised laws were being drafted and would be sent to Parliament once the cabinet approved them, and also suggested that further legislation allowing for privately run television and radio stations was being developed.

However, the extent of positive developments in this area should not be exaggerated. Journalists have continued, on the whole, to avoid reporting on subjects that might be embarrassing to the government, and a whole range of issues, including criticism of the monarchy, the Western Sahara, and Moroccan Islamism are still classifiable as forbidden areas. Partly, this is a result of a long-standing cultural practice of self-censorship, which is not likely to disappear anytime in the near future, and partly it is the result of active measures taken by the government to clamp down on reporting in some areas. For example, in May 2000, the international press watch-dog RSF (*Reporters Sans Frontieres*) launched an appeal directly to the King about lack of press freedoms, citing the censorship of seven Moroccan and foreign newspapers, and the treatment of two journalists who were threatened with prison sentences and forbidden to practice their profession (the latter penalty apparently

²¹ Arabic News 6/9/00.

being a first in Moroccan history). There have been a number of specific incidents that have indicated that the Moroccan government is still prepared to pounce on any press elements who report on areas that they deem to be off-limits. To cite only a few of many possible examples: On 5 February 2000, two French-language weeklies were seized by police for having reproduced, partially or wholly, the text of a memorandum from the controversial Islamist leader Sheikh Abdelssalam Yassine, which was highly critical of the former monarch. On 15 February 2000, an issue of *Jeune Afrique-L'Intelligent* was banned for containing text from a dissident Moroccan intellectual who questioned the capacity of King Mohammad to bring about real reforms and to punish those who violated human rights under the reign of his father. On 15 April 2000, the weeklies *Le Journal* and *Assahifa*, both printed in France, were forbidden entry into Morocco because the previous issue of *Le Journal* had published an interview with the president of the Western Saharan Polisario Front. A number of subsequent editions of *Le Journal*, *Assahifa*, and other newspapers have been banned for political reasons.²²

3.3 *Political Prisoners, Exiles and the Islamist Opposition*

One area where there have undoubtedly been a considerable number of significant developments involves the release of prominent political prisoners, decisions concerning the return of political exiles, and, probably most significantly, the establishment of an independent commission to compensate the past victims of arbitrary imprisonment and/or their families. With respect to the release of political prisoners, there were obviously developments of considerable significance. Between his accession to the throne in July of 1999 and March of 2000, King Mohammad released some 10,000 prisoners all tolled. Concerning the return of some political exiles, there were two particularly significant developments. The first was the announcement in late 1999 that the prominent Marxist-Leninist dissident Abraham Serfaty would be allowed to return to Morocco. The second was the announcement that the family of Mehdi Ben Barka would be allowed to return. Ben Barka

²² RSF (Reporters Sans Frontieres) 4/16/00.

was an opponent of Hassan II's rule who disappeared in mysterious circumstances in 1965, amid widespread speculation that the regime had him captured and executed.²³

Another significant development in this area involved one of Mohammad VI's very first actions as King, the setting up of an independent commission for compensating the past victims and/or families of arbitrary imprisonment by the regime. From its inception in August of 1999 until the last deadline for receiving complaints in January of 2000, the commission handled nearly six thousand complaints related to political events, trades union cases and financial compensation for persons secretly detained or killed for their political views since Moroccan independence in 1956. Early reports indicated that 68 cases had been settled, with compensations that ranged between \$100,000 and \$250,000 for each claimant, coming to a total of around \$14 million. Regarding the subject of missing persons the non-governmental Moroccan Human Rights Organisation issued a statement indicating that they were encouraged by the monarch's frank admission and candid treatment concerning the history of abuse in this area, but observed that the independent commission suffers from a number of shortcomings, and does not, in itself, constitute an adequate policy for redressing the long-standing problems relating to political detentions, etc.²⁴

In addition to all of these developments, it is important to examine the regime's policy with respect to its Islamist opposition. One of the most significant early developments of Mohammad VI's reign was the release in the spring of 2000, of the Islamist leader, Sheikh Yassine, who had been under house arrest for ten years. At the time this was perceived by many human rights advocates as being quite important, in terms of demonstrating the government's commitment to its prisoner release policy, due to the fact that Yassine has for some time been the most vocal critic of the regime and has called for the creation of an Islamic state in Morocco. Despite Yassine's release, his Islamist movement, *Al Adl Wal Ihsan*, remained illegal and the regime continued to monitor both Yassine and his supporters very closely, making it clear that no significant anti-regime activity would

²³ Arabia On Line 02/06/00; Arabic News 05/18/00.

²⁴ Arabic News 06/22/00.

be tolerated. This point was pressed home starting on 10 December 2000, when the security forces arrested hundreds of the members and supporters of the Islamist movement in response to demonstrations in Rabat, Casablanca and other major cities calling for the legalisation of *Al Adl Wal Ihsan* and the lifting of a ban on its publications. Four members of Yassine's family, including his daughter Nadia, were among those arrested.

It should probably be noted, at this point, that, in the aftermath of the September 11th attacks on the United States, there is likely to be very little Western criticism of any further repressive measures the regime wishes to take against Islamist opposition elements for the foreseeable future. Indeed, any moderation on the part of the regime in the current circumstances is more likely to emanate from its own concern about alienating mass segments of the population that are broadly sympathetic to the Islamist cause. Ironically, it could conceivably be the case that the regime's Western partners will urge it to take greater repressive measures in this area than it would otherwise be willing to consider.

3.4 *Human Rights Education*

I already mentioned in the introductory section that a seminar on human rights in Cairo in the middle of October 2000, praised Morocco for the steps that the government has taken to introduce education on human rights into the schools. The policy this referred to was an ambitious project which targeted 5.5 million pupils in Moroccan primary and secondary schools over four years from 2001 to 2005. A pilot project was implemented in some schools, while the government took steps to begin training sessions for 4,000 teachers and education executives. A parallel initiative was introduced to eliminate racial and sexist stereotypes from school textbooks. The Moroccan government is ostensibly committed not only to the promotion of human rights education in the short and long-terms, but also to the long-term creation of a human rights culture in Morocco. Obviously, it remains to be seen just how feasible such a goal is given Morocco's existing cultural and political circumstances.²⁵

²⁵ Arabic News 10/17/00; Arabic News 9/11/00.

3.5 *Contacts and Co-operation with International Human Rights Organisations*

In order to help promote the development of human rights in Morocco, and to publicly demonstrate the regime's concern and commitment in this area, the government worked very hard over the first year of Mohammad VI's reign to establish contacts and co-operative links with a number of international human rights organisations, and it either sent representative to attend, or offered to host, a significant number of human rights conferences and meetings. I will briefly cite a few of the more prominent examples. To begin with a Mediterranean conference on human rights was held in Rabat at the end of October 2000, and co-sponsored by the Moroccan government and the North-South Centre of the European Council. The conference included a number of high-profile participants, including the former Portuguese president, Mario Soares and former Spanish premier Philippe Gonzales. Previously, in August 2000, Prime Minister Youssefi received a delegation from the Human Rights Watch to discuss womens' rights. In July 2000, the Moroccan Human Rights Ministry and the Swedish Human Rights Institute of Raul Willingbourg discussed co-operation in matters dealing with human rights promotion and training. Another important event, was the International Workshop on Human Rights in Geneva in March 2000, in which the UN High Commissioner for Human Rights, the former Irish president, Mary Robinson, praised Morocco's progress in the development of human rights. In addition, the Human Rights International Federation announced that it was considering holding its 34th World Congress in Morocco, in recognition of the recent progress being made by the regime. Finally, Amnesty International held a youth forum for the promotion of human rights awareness in Morocco over the summer of 2000.²⁶

Over the past year, however, the regime's relationships with international human rights advocates have come under increasing strain as the result of a number of perceived abuses, including, perhaps most significantly, steps taken to limit the activities of both domestic and international human rights organisations. To cite the

²⁶ Arabic News 07/08/00; 06/15/00; 03/24/00;03/23/00.

most significant example, thirty-six human rights advocates associated with the Moroccan Association of Human Rights (AMDH) were arrested at the end of last year for planning a gathering outside parliament calling for justice for victims of human rights violations. Despite vigorous protests from the Amnesty International and Human Rights Watch organisations, the regime has retained custody of the advocates and if a Moroccan appeal court does not overturn their conviction on charges of arranging an illegal demonstration, they face fines and an imminent jail sentence. Amnesty International recently released the following statement: "The beating by the security forces of dozens of people and the arrest of dozens more during demonstrations organised by human rights activists and political associations represent a serious affront to freedom of expression in Morocco." The statement added: "The Moroccan authorities were publicly calling on all sectors of society to work towards an improvement of the human rights situation in the country. The authorities need to match those words with actions."²⁷

3.6 *Womens' Rights*

One of the more controversial aspects of the Moroccan government's drive to develop human rights in Morocco concerned the proposed introduction of legislation to give women more rights, particularly in areas traditionally governed by Islamic family law. For example, the proposed legislation would ban polygamy, would raise the minimum legal age of marriage from 14 to 18, would allow women half their husband's wealth in the event of divorce or death, and would put the right to divorce in the hands of a judge rather than the husband. Obviously, all of these measures would be considered fairly minimal by Western standards, but in Morocco they immediately drew a great deal of criticism, particularly from Muslim theologians who argued that the plan would be against Islamic law. At one point, the Islamic movement was able to rally as many as 500,000 people for a mass demonstration in Casablanca against the proposed legislation. It is highly probably that the issue

²⁷ See the most recent reports on Morocco by Amnesty International and Human Rights Watch.

was being used as a pretext by the Islamists in order to demonstrate their potential influence over popular opinion to the government. The rally was timed to coincide with a government-organised rally staged in Rabat in support the womens' reform legislation, and this rally attracted only 40,000 supporters.

The regime's handling of this issue is interesting, because, of course, a considerable component of the Moroccan monarchy's traditional legitimacy is derived from the King's putative role as defender of the Islamic faith. With respect to women's issues, Mohammad VI managed to stay above the fray by letting the socialist government and the conservative elements argue the matter. Particularly in the context of the West's new war on terrorism (or more specifically on Islamic terrorism as many Muslims see it), it is certainly worth considering that it may prove more difficult for the King to detach himself from other issues which pertain to intense cleavages between the Western and Islamic cultural and political contexts.

Conclusion

In the course of this paper I have attempted to examine how a principle that might best be described as political expediency has helped to shape: 1) the policies of major Western countries and international organisations; and 2) the policies of regional actors in the MENA context, as these relate to the human rights reforms which have come to be widely viewed as a beneficial corollary of the globalisation process. In essence, I have argued that both major global actors and regional actors have tended to advance a reform agenda so long as it supported, or at least did not interfere with, their own political imperatives. When such vital interests have been challenged, the various actors have tended to downplay, or even reverse, their support for the reform process. After explaining the concept of political expediency as it relates to human rights reforms, and making some general observations about the role that political expediency has played in the globalisation dynamic, I proceeded to examine how these factors have affected the process of human rights reform in a single MENA country: Morocco.

In Section One, I considered how a complex of political, ideological, economic and security interests have structured a pattern wherein both major global actors and regional actors in the MENA context

sometimes promote and sometimes curtail human rights reforms in accordance with prevailing circumstances. In Section Two, I proceeded to consider the more specific interests which have shaped the way that the human rights agenda has been pursued in the Moroccan context. Finally, in Section Three, I cited a considerable number of recent developments relating to human rights in Morocco in order to help demonstrate the way that the regime, with qualified Western acquiescence, has selectively endorsed and restricted human rights as part of an overall strategy to secure its long-term interest in maintaining power.

LA PROTECTION DE LA LIBERTÉ RELIGIEUSE DES MINORITÉS EN ISRAËL

MOUSSA ABOU RAMADAN

How much importance is the freedom of religion given by the State of Israel? What, specifically, is the treatment which the legal system of the Jewish state metes out to religious, especially Moslem and Catholic, minorities? These are the central questions tackled in this article. Initially the meaning of religious freedom according to international charters is tackled. Then the focus shifts to the significance attributed to religious freedom by Israeli law, which sees it as a fundamental principle of the state of Israel. However effectively protecting this freedom also necessitates the protection of the minority groups to which individuals belong; especially when these minorities are not only religious minorities but also ethnic, linguistic or national minorities. The protection of the religious freedom of minorities in Israel becomes more problematic when certain specific, albeit fundamental, expressions of this freedom are at stake (examples include the right to adopt the religion of one's choice, the right to convert and the right to manifest one's religious affiliation). Through an analysis of those specific situations in which protecting the religious freedom of minorities creates conflicts with the religion of the majority, the prevailing tendency to favour the Jewish religion is documented. The author particularly denounces the ignorance of Islamic religious prescriptions displayed by Israeli court judgements. The article concludes with a detailed and historically informed analysis of the legal protection given to the Catholic minority.

Introduction

La relation de l'Etat juif avec les religions est complexe. Si Etat et religion sont intimement liés, il n'en demeure pas moins vrai que les différents courants du judaïsme ne bénéficient pas d'un

traitement légal égal¹. La relation de l'Etat hébreu avec les autres religions est encore plus complexe, notamment en ce qui concerne la liberté religieuse des confessions minoritaires.

La protection de la liberté religieuse des minorités en Israël² doit être analysée sous deux angles : premièrement, le régime de la liberté religieuse applicable à toutes les minorités (Section 1) et, deuxièmement, le régime de protection spécifique accordé aux catholiques (section2). En effet, ces derniers font l'objet de dispositions particulières issues des accords conclus entre la France et l'empire ottoman d'une part, et des récents accords conclus entre le Saint Siège et l'Etat d'Israël, d'autre part.

1. LE RÉGIMÉ GÉNÉRAL DE LA PROTECTION DE LA LIBERTÉ RELIGIEUSE DES MINORITÉS

La protection de la liberté religieuse des confessions minoritaires se manifeste d'abord par la reconnaissance de cette liberté (Par.1). Cette reconnaissance découle du principe de liberté religieuse que le droit israélien reconnaît à tous les citoyens israéliens *in personam*. Cependant, on ne peut véritablement appréhender la problématique soulevée par cette liberté religieuse qu'en étudiant les domaines qu'elle recouvre (Par.2).

1.1 La reconnaissance de la liberté religieuse

Si la Charte des Nations Unies ne mentionne pas expressément la liberté religieuse, en revanche, plusieurs autres instruments internationaux des Droits de l'Homme consacrent cette liberté. Ainsi par exemple, l'article 18 de la Déclaration universelle des droits dispose-t-il que

“Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction, seule ou en commun, tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.”

¹ BENSIMON (D.), *Religion et Etat en Israël*, Paris, L'Harmattan, 1992.

L'article 18 du Pacte international relatif aux droits civils et politiques ainsi que la Convention des droits des enfants, dans ses articles 2, 14, 20, 29, 30, reconnaissent également ce droit³. Mais c'est surtout la Déclaration sur l'élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion et la résolution 36/55 du 25 novembre 1981 de l'Assemblée générale des Nations Unies qui en représentent la reconnaissance la plus claire sur le plan universel.

Sur le plan régional, on citera, en particulier, l'article 9 de la Convention européenne des droits de l'homme, l'article 12 de la Convention américaine des droits de l'homme⁴ et l'article 8 de la Charte africaine des droits de l'homme et des peuples.⁵

L'expérience montre que les minorités ont un réel besoin de cette protection⁶. La doctrine a fondé sa position sur la question à partir des dispositions relatives aux droits de l'homme⁷ : la liberté religieuse des minorités ne diffère pas de la protection de la liberté religieuse des personnes prises individuellement. Ce qui diffère, c'est la manière d'exercer cette liberté. Pour les minorités qui ne sont pas uniquement

² Sur les différentes minorités en Israël voir : ABOU RAMADAN (M.), "La minorité palestinienne de l'Etat d'Israël", *L'Observateur des Nations Unies*, No.3, 1997, pp.139-176, pp.140-152.

³ D'autres textes internationaux contiennent des références à la religion voir TAHZIB (B.G.), *Freedom of Religion or Belief. Ensuring Effective International Legal Protection*, The Hague/Boston /London, Martinus Nijhoff Publishers, 1996.

⁴ *American Convention on Human Rights*, A.J.I.L., 1971, p. 679.

⁵ "La liberté de conscience, la profession et la pratique libre de la religion, sont garanties. Sous réserve de l'ordre public, nul ne peut être l'objet de mesures de contrainte visant à restreindre la manifestation de ces limites." texte in OUGUERGOUZ (F.), *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité*. PUF, Paris, 1993.

⁶ DINSTEIN(Y.), "Freedom of Religion and the Protection of Religious Minorities", *Israel Yearbook on Human Rights*, 1992, pp.155-179, pp.164-165.

⁷ GILBERT (G.), "Religious Minorities and Their Rights: A Problem of Approach", *International Journal on Minority and Group Rights*, 1997, pp.97-134; DUFFAR (J.), "La protection internationale des droits des minorités religieuses", *RDP*, 1995, pp.1495-1530;VELAERS(J.) et FOGLETS (M.C.) "L'appréhension du fait religieux par le droit. A propos des minorités religieuses", *R.T.D.H.*, 1997, pp.273-307; KARAGIANNIS (S.), "Les minorités religieuses et la Convention européenne des droits de l'homme", *L'Observateur des Nations Unies*, 1997, pp.83-104.

⁸ GILBERT (G.), *op.cit.*, pp.97-98.

des minorités religieuses, la protection consiste non seulement dans le respect des droits religieux mais également dans le libre développement de l'identité ethnique, linguistique ou nationale⁸. L'article 27 du Pacte des droits civils et politiques reconnaît *inter alia* le droit des personnes appartenant à des minorités religieuses de professer et de pratiquer leur propre religion. De même, ce droit est reconnu aux enfants appartenant aux minorités religieuses⁹. La Déclaration des droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques du 18 décembre 1992 contient aussi plusieurs dispositions visant à protéger les droits des minorités religieuses. L'article 1 enjoint les Etats à garantir la protection de l'identité religieuse. L'article 2 accorde le droit aux minorités de professer et de pratiquer leur religion et de participer à la vie religieuse. Est reconnu également par ce même article aux personnes appartenant aux minorités, le droit de prendre une part effective au niveau national et au niveau régional aux décisions qui les concernent. Est reconnu aussi aux membres des minorités religieuses le droit de créer des associations, ainsi que d'établir et de maintenir des contacts libres et pacifiques, aussi bien dans le pays où elles habitent qu'au-delà des frontières. La protection des minorités religieuses doit être conforme aussi bien à l'article 18 du Pacte des droits civils et politiques qu'à son article 27¹⁰. Comme l'a constaté le rapporteur spécial Capotorti

“Il y a sans aucun doute une relation particulièrement étroite entre l'article 18 du Pacte international relatif aux droits civils et politiques, concernant la liberté de pensée, de conscience et de religion, et l'article 27, dans la mesure où il concerne les minorités religieuses; et l'on pourrait même se demander si l'article 27, vu sous cet angle, ne fait pas double emploi par rapport à l'article 18. Dans l'optique propre de l'article 27, ce sont surtout les problèmes des communautés religieuses minoritaires qui doivent être pris en considération, en particulier les questions de l'établissement et du maintien d'institutions ou d'écoles

⁹ Article 30 de la Convention relative aux droits de l'enfant.

¹⁰ Voir TAHZIB (B.G.), *op.cit.*, p.262.

*religieuses, du régime des biens de ces communautés, du statut des ministres du culte et de la protection des rites et des lieux saints*¹¹.

Notons cependant que Nowak a une opinion différente sur cette question. Pour lui en effet, l'article 18(3) du Pacte des droits civils et politiques énumère des limitations, ce qui n'est pas le cas de l'article 27. L'article 27 a pour but d'accorder plus de droits aux minorités qu'au reste de la population. En comparant l'article 27 à l'article 18 il soutient ainsi que l'article 27 constitue une *lex specialis*. Il concède quand même que les droits des minorités peuvent être limités s'ils entrent en conflit avec d'autres droits du Pacte ou par des "Clauses générales de limitations"¹². Tout d'abord, il faut souligner que les droits accordés aux minorités ne sont pas des privilèges mais sont des droits ayant pour but de rétablir l'égalité réelle entre les minorités et la majorité puisque, par définition, les minorités se trouvent dans une position non dominante. De surcroît, où sont les "clauses générales de limitations"? Le Pacte des droits civils et politiques, contrairement à la Déclaration universelle des droits de l'homme, ne contient pas de clause générale de limitation. L'interprétation logique du lien entre les articles 27 et 18 conduit à la conclusion que les limitations sont, pour les aspects religieux, les mêmes que celles contenues dans l'article 18(3).

Contrairement au principe général d'égalité, la liberté de conscience est protégée au niveau législatif par l'article 83 du POIC de 1922 qui dispose que

"Toutes les personnes (en Israël) jouiront de la liberté absolue de conscience et de l'utilisation libre des toutes les formes de cultes, pour autant que l'ordre public et la morale sont respectés"

Durant l'époque mandataire, aucune disposition ne pouvait entrer en contradiction avec cet article. Mais depuis la création de l'Etat d'Israël, on a pu constater que les droits à la liberté religieuse et de conscience n'étaient juridiquement garantis que dans le cas où les

¹¹ CAPOTORTI (F.), *op.cit.*, par.227.

¹² NOWAK (M.), *U.N. Covenant on Civil and Political Rights CCPR, Commentary*, N.P Engel, Publisher, Kehl-Strasbourg. Arlington, 1993, p.500 et p.505.

lois de la Knesset ne leur portaient pas atteinte ou ne les atténuaient pas¹³. Par ailleurs, cette disposition ne concerne que la liberté de conscience et pas la liberté religieuse. Mais puisque que la Déclaration d'indépendance mentionne également la liberté religieuse, certains estiment que cette liberté découle de la dignité de l'homme. Ainsi cette liberté aurait-elle une valeur constitutionnelle.¹⁴

La jurisprudence israélienne a, dans de nombreux arrêts, reconnu la liberté religieuse et de conscience comme un principe fondamental. Le juge Zamir a, par exemple, récemment statué que

“La liberté de conscience a joui d'une reconnaissance de la Cour Suprême comme l'une des libertés fondamentales. Ainsi, le juge Barak a dit dans Bagatz 292 / 83, Nemaneey Har Habayt c. Le commandant régional de police de Jérusalem, P.D., 38(2), p449, p454: ‘Toute personne en Israël jouit de la liberté de conscience, de croyance, de religion et de culte. Cette liberté est garantie à toute personne dans tout régime démocratique éclairé, et donc elle est garantie à toute personne en Israël en tant que l'un des principes fondamentaux de l'Etat d'Israël sur lesquels l'Etat d'Israël est basé.’”

Dans l'arrêt Bagatz (650/88 *Le mouvement du judaïsme progressiste en Israël c Le ministre des affaires religieuses*, P.D., 42(3), p.377, p.381) le Président Shamgar a, quant à lui, estimé que

“La liberté de religion et de conscience est l'une des libertés fondamentales selon notre système juridique et constitue une partie intégrante de lui. Les expressions de cette liberté sont, bien sûr, pour l'essentiel, la liberté d'expression et la pratique religieuse.”

¹³ BERENZON(T.) “La liberté religieuse et de conscience dans l'Etat d'Israël”, *Iyunei Mishpat*, Vol.3, p.405 (en hébreu).

¹⁴ Voir la discussion de ce point et les différents points de vue de juges de la Cour Suprême: SOMER (H.), “Les droits non énumérés -sur la portée de la révolution constitutionnelle”, *Mishpatim*, 1997, pp.257-339, (en hébreu), pp.324-326. L'auteur de cet article est d'avis que la liberté religieuse n'est pas dérivée de la dignité de la personne humaine.

Au paragraphe 18 le Juge Zamir ajoute que:

“la liberté de culte est un droit fondamental. Il permet à toute personne musulmane aussi bien que juive, de pratiquer son culte envers Dieu dans la voie quelle veut. Cette liberté de culte n'est pas absolue, elle est limitée par le droit.”

Cette image d'une liberté religieuse protégée est cependant quelque peu ternie lorsque que l'on examine les domaines couverts par la liberté religieuse.

1.2 Les domaines de la liberté religieuse

En Israël la liberté religieuse pour les juifs orthodoxes est assez protégée et certains pensent même qu'elle l'est trop. Ce régime de faveur est en effet considéré par les Juifs laïcs et les Juifs religieux appartenant à d'autres courants orthodoxes comme une atteinte à la liberté de conscience. Ainsi par exemple, une partie des laïc conteste l'obligation de se marier selon la loi hébraïque. Plusieurs recours ont été intentés devant la Cour Suprême pour combattre cette hégémonie orthodoxe¹⁵. Sur certains points, le combat des minorités religieuses arabes rejoint le combat des mouvements juifs non orthodoxes : c'est le cas notamment du financement des institutions officielles religieuses orthodoxes dont ni les Arabes ni les juifs laïc ne bénéficient.

1.2.1. Le droit d'adopter une religion de son choix

Le droit israélien reconnaît le droit qu'à chaque citoyen israélien de pratiquer la religion de son choix ou bien de ne pas en avoir du tout¹⁶. Il n'y a jamais eu de la part de l'Etat, de tentatives visant à faire adopter la religion de la majorité aux minorités par la force ou la pression. La principale explication découle du fait que la religion

¹⁵ Israel Religious Action Center, *Religious Freedom and Pluralism in Israel: An International Civil Rights Perspective. Religion and State in Israel in Light of the Provisions of the International Covenant on Civil and Political Rights (1966)*, 1998.

¹⁶ Bagatz 3872/93, *Mitral c. Le Premier ministre et le ministre des affaires religieuses et autres*, PD 47(5) p.485, p.506.

juive n'est pas une religion valable pour toute l'humanité¹⁷, à la différence de l'islam et du christianisme. Cette religion impose même des restrictions et des limites aux personnes souhaitant entrer dans ses rangs.

L'article 13 de la loi sur l'adoption¹⁸, qui oblige les deux parents adoptifs à avoir la même religion, pourrait néanmoins aller contre cette tendance. Plusieurs membres du Comité pour l'élimination de toutes les formes de discriminations raciales se sont penchés sur cette disposition¹⁹. Pour Tahzib, elle est discriminatoire et devrait être abolie²⁰. Pour Ruth Lapidoth, elle découle de la volonté de respecter le pluralisme religieux et de préserver l'identité et la communauté religieuse²¹. Cette divergence n'est qu'un exemple parmi d'autres de ce conflit permanent entre égalité complète et préservation de l'identité religieuse. En effet, si l'égalité complète exige de ne pas tenir compte de la religion dans les relations entre l'individu et le pouvoir, en revanche, la préservation d'une identité religieuse met la religion au centre de cette relation.

1.2.2. *Le droit de manifester sa religion*

Dans certains domaines, la liberté religieuse de la minorité musulmane est protégée notamment là où les prescriptions religieuses juives et musulmanes sont identiques. Reste que, dans ces cas de figure, le but du législateur n'a pas été de protéger la minorité musulmane mais de protéger la religion juive. Cela ressort

¹⁷ Voir les affaires concernant la définition du juif où on a vu que la plupart des requérants voulaient s'inscrire en tant que juifs alors que les autorités israéliennes et la Cour Suprême en limitaient la portée:

¹⁸ S.H, 1981, p.293.

¹⁹ CERD/CSR.777-804 p.157. *Ibid.*, p. 160 par. 57 'Il en est question, dans le rapport de la loi relative à l'adoption d'enfants, suivant laquelle tant les parents que l'enfant adoptif doivent appartenir à la même religion. M.Aboul Nasr demande à ce propos ce qui se passe lorsque l'enfant est de mère ou de père inconnu et si, en pareil cas, l'adoption est refusée' *Ibid.*, p. 167 le représentant de l'Etat d'Israël dit que si la religion de l'enfant ou des parents de l'enfant n'est pas connue, elle n'entre pas en considération pour l'adoption. par. 100.

²⁰ TAHZIB (B.G.), *op. cit.*, p. 395.

²¹ LAPIDOTH (R.), "Freedom of Religion and Conscience in Israel", *The Catholic University of Law Review*, 1998, pp. 441-464; p. 456.

très clairement des débats tenus à la Knesset à l'occasion du vote de ces lois. Ce fut le cas par exemple lors du débat sur la loi d'interdiction de l'élevage des porcs en 1962²². Certains membres de la Knesset étaient contre cette loi car ils estimaient qu'elle pourrait, en imposant des comportements religieux par des voies législatives, créer un précédent dangereux. Face à eux, d'autres membres de la Knesset étaient en faveur de cette loi, soit pour des raisons religieuses puisque la religion juive interdit l'élevage du porc, soit pour des raisons nationales puisque, dans l'histoire du peuple juif, le porc tel qu'il a été utilisé par les Romains symbolisait l'humiliation du peuple juif. L'interdiction de l'élevage des porcs chez les Musulmans et les Druzes n'était évoquée qu'indirectement, pour appuyer les points de vue des tenants de l'interdiction. Cette protection oblique se manifeste également dans d'autres domaines de prescriptions alimentaires ainsi qu'en ce qui concerne le droit de se laisser pousser la barbe. Dans d'autres domaines, les minorités religieuses sont totalement ignorées. Il s'agit, d'une part, d'une protection accordée aux Juifs uniquement, comme c'est le cas par exemple pour la protection des Lieux Saints par des règlements de 1981 et, d'autre part, de la seule prise en compte de la protection de la religion juive dans des questions intéressant l'ensemble de la population. Dans certains domaines, l'Etat doit jouer un rôle d'arbitre entre les différentes minorités religieuses comme pour l'affaire des foulards par exemple. Enfin, dans le domaine de la réglementation des repos et des jours fériés, des gains politiques sont recherchés et il s'agit alors d'une protection motivée politiquement.

A) *Les prescriptions alimentaires*

L'accomplissement des rites et la pratique de la religion peuvent comprendre non seulement des actes cérémoniels mais aussi des coutumes telles que l'observation de prescriptions alimentaires. Puisque la liberté religieuse inclut la liberté de ne professer aucune religion ou conviction, on peut dire que l'imposition de certaines prescriptions alimentaires porte atteinte à cette liberté religieuse. La religion juive et la religion musulmane interdisent de manger du

²² D.K, Vol 33, 1962, p1370-1385, pp.1386-1392; pp.1397-1407; D.K., Vol 34, 1962, pp. 2823-2836.

porc. La religion juive prescrit de manger uniquement de la viande *casher*²³ et la religion musulmane voit dans ce qui est autorisé pour les juifs des aliments qui sont autorisés pour les Musulmans.²⁴ Mais la religion chrétienne ne connaît pas ce genre d'interdiction.

i) La question du porc

- Le principe

L'article 1 de la *loi sur l'interdiction de l'élevage des porcs* de 1962²⁵ interdit l'élevage, la possession et l'abattage des porcs. Celui qui enfreint cette loi est passible d'amende. Cette loi pose une restriction à l'égard des chrétiens palestiniens dont la religion ne connaît pas cette interdiction. Il s'agit d'une atteinte à leur liberté de commerce. Dans l'affaire *Halon*²⁶ un requérant chrétien possédait un lieu où il élevait des porcs à Kfar Yassif. Mais il devait pour égorger ses porcs les déplacer à Nazareth où se trouvait une maison d'abattage légal. Il souhaitait recevoir un ordre interdisant aux autorités de confisquer ses porcs quand il les transporterait à Nazareth. Selon le juge, la loi sur l'interdiction des élevages de porc interdisait de posséder des porcs, sauf dans neuf régions mentionnées dans l'annexe, et le terme possession incluait une possession pour une très courte durée et, en l'espèce, une possession pour amener les porcs à l'abattage.²⁷ La Cour a finalement refusé de statuer car, selon elle, il s'agissait d'un recours théorique imposant au préalable un recours aux tribunaux ordinaires.

- Les exceptions

L'article 2 de la loi règle les cas où les exceptions à l'interdiction sont possibles. La première exception vise à exclure certaines régions

²³ Une viande *cachère* est une viande qui doit être parmi la liste des viandes permises, comme le bœuf ou le mouton, et extraite d'un animal abattu rituellement et préparé d'une certaine manière. Voir KLEIN (C.), *Le caractère juif de l'Etat d'Israël*, Paris, Cujas, 1977, pp.131-132.

²⁴ Voir le Coran: Sourate de la Table servie, cinquième verset.

²⁵ S.H., 1962, p.106.

²⁶ Bagatz 176/64, *Halon c. Le responsable national pour le contrôle de l'exécution de la loi d'interdiction de l'élevage du porc*.

²⁷ *Ibid.*, p. 791.

de cette interdiction. La liste de ces régions figure en annexe. Il s'agit de régions dépourvues de population juive, où cohabitent exclusivement des Musulmans et des Chrétiens. Dans les régions où cohabitent Juifs, Musulmans et Chrétiens, comme Lod, Ramleh, Jaffa, Acre et Haïfa, il n'y a pas d'exemptions à cette interdiction. Ce qui confirme que la loi est avant tout destinée à protéger la liberté religieuse des Juifs et que les Musulmans ne bénéficient de cette protection qu'indirectement.

La deuxième exception concerne les institutions de recherche. La Cour Suprême²⁸ a considéré que les autorités n'avaient pas de pouvoir d'appréciation quant au fait qu'il s'agisse ou non d'institutions répondant à l'art 2(2) de la loi. Les règlements de 1963 relatifs à l'interdiction de l'élevage des porcs (possession et destruction) sont rédigés de telle façon qu'ils ne donnent aucun pouvoir d'appréciation et obligent les autorités à accorder ce genre d'autorisation lorsque l'organe répond d'une manière objective aux critères. Dans cette affaire le requérant a réussi à annuler la décision du contrôleur sur l'interdiction d'élevage des porcs

ii) La question de l'importation de la viande non *casher*

Pendant longtemps, l'importation de la viande en Israël était du ressort de l'Etat lui-même avant que le gouvernement israélien ne décide, le 8/9/92, de conférer cette tâche à des organes privés. Mais le gouvernement modifia finalement sa décision et décida qu'il continuerait à importer lui-même, estimant que cette question devait être réglée par une loi. En fait, le gouvernement craignait que le fait de laisser à des organes privés le soin d'importer de la viande non *casher* ne soulève des problèmes de coalition avec les partis religieux. Un recours fut intenté contre cette décision. La Cour Suprême²⁹ a décidé que le gouvernement ne pouvait se fonder sur des motifs religieux pour baser sa décision. Un projet de loi intitulé «Projet de loi pour l'importation de la viande de bœuf congelée», fut

²⁸ Bagatz 229/63, *L'institut de la recherche c. Le ministre de l'intérieur* PD18(III)p. 185

²⁹ Bagatz 3872/93, *Mitral c. Le Premier ministre et le ministre des affaires religieuses et autres*, PD, 47(5), p. 485.

présenté par le gouvernement en 1993³⁰. Dans ce projet de loi, l'arrêt Bagatz 3872/93 Mitral par lequel la Cour Suprême a décidé que la limitation de l'importation doit être réglementée par une loi est mentionné. Ce projet de loi soumet toute importation de viande congelée à une autorisation exclusive du gouvernement. Comme ce projet n'aboutit pas, un deuxième projet de loi fut présenté³¹. Par rapport au précédent, il donnait la faculté au Grand Rabbinat d'accorder des certificats de *cashrout* pour importer de la viande *casher*, tout en reconnaissant le droit du Ministre de l'Industrie et du Commerce à accorder des permis d'importation.

Le 15 mai 1994, la loi sur l'importation de la viande congelée fut adoptée à la Knesset³². Comme prévu dans le projet, cette loi accorde au Grand Rabbinat le droit de donner des certificats de *cashrout* permettant l'importation, alors qu'aucune autorité religieuse appartenant aux minorités religieuses ne dispose d'un tel pouvoir. Un projet de loi relatif à l'importation de la viande congelée (modification)³³ a étendu les champs d'interdiction de la loi de 1994 pour englober, non seulement la viande congelée, mais aussi la viande froide et ses dérivés. En plus de cette législation, des modifications successives ont été apportées par la loi fondamentale sur la liberté professionnelle.

La société Mitral a intenté un deuxième recours contre le gouvernement pour lui permettre d'importer de la viande non *casher*³⁴.

Dans cette affaire, le requérant prétend qu'en dépit du fait que cette loi ait été votée à la majorité absolue comme le requiert la Loi fondamentale sur la liberté professionnelle, elle est inconstitutionnelle car elle aurait du respecter aussi bien l'article 1 de cette loi professionnelle³⁵ que la *loi fondamentale sur la dignité de la personne et sa liberté*. Le juge Barak a estimé que les valeurs mentionnées dans l'article 4 sont celles de l'article 1 et 2, mais il rajouta qu'il n'était pas utile de statuer sur cette question car, selon lui, il n'y

³⁰ H.H., 2228, p.132.

³¹ H.H. 1994, 2243, p.206.

³² S.H., 1456, p.104.

³³ H.H., 1994, 2343, p.208.

³⁴ Bagatz 4676/94, Mitral c. TAK EL 96-3) 26

³⁵ Qui est identique à l'article 1 de la *loi fondamentale sur la dignité de la personne humaine et sa liberté*.

avait pas eu atteinte à la liberté professionnelle, ceci parce que contrairement à ce qui était prévu par le passé, il était désormais possible d'importer de la viande *casher* sans autorisation. Les requérants prétendaient qu'en tout état de cause cela portait atteinte à la loi fondamentale sur la dignité. Le juge Barak ajouta qu'il fallait interpréter une loi constitutionnelle comme faisant partie de tout le système constitutionnel.³⁶

Comment résoudre ce problème ?

“Il nous semble, dit-il, qu’une bonne interprétation est de donner une protection constitutionnelle à une loi exceptionnelle qui porte atteinte, non seulement à la liberté professionnelle, mais aux droits inclus dans la loi fondamentale sur la dignité de la personne et sa liberté, si trois conditions sont réunies: premièrement, l’atteinte aux autres droits de l’homme est une conséquence secondaire qui résulte d’une façon naturelle de l’atteinte à la liberté professionnelle. Deuxièmement, l’atteinte à la liberté professionnelle est l’atteinte principale et l’atteinte aux autres droits de l’homme est secondaire. Troisièmement, l’atteinte aux autres droits de l’homme en elle même n’est pas d’intensité réelle.” Et il poursuit : “Concernant l’atteinte à la liberté de conscience, il faut se rappeler que, celui qui veut, peut acquérir en Israël de la viande non casher. Il n’y a pas de contrainte à manger seulement de la viande casher. En tout cas, il n’y a aucun doute que l’atteinte la plus grave est celle de la liberté professionnelle.”³⁷

Le juge Barak reconnaît donc que le fait d'imposer certaines alimentations pour des motifs religieux pourrait porter atteinte à la liberté de conscience. Les critères qui ont été fixés par le président Barak ne sont pas conformes aux critères posés par le droit international des droits de l'homme. Ce genre de motifs de limitation ne figurent pas parmi les motifs qu'on peut invoquer pour limiter cette liberté³⁸.

³⁶ Par. 24 de l'arrêt.

³⁷ Bagatz 4676/94, Mitral, par. 23.

³⁸ Article 18.3 du Pacte des droits civils et politiques de 1966.

Il est clair qu'il y a une atteinte à la liberté professionnelle des Chrétiens et des Musulmans. Le président Barak ajoute qu'en ce qui concerne l'argument soulevé par le requérant, à savoir une atteinte au principe d'égalité, il faut l'autorisation d'une autorité religieuse juive et non pas d'une autorité religieuse musulmane. Le président Barak dit que

“Même s'il y a une atteinte au principe d'égalité, elle n'est que secondaire par rapport à la liberté professionnelle et elle n'a pas une intensité réelle”

Est-ce que cela veut dire que le principe d'égalité est secondaire par rapport à la liberté professionnelle en général ou est-ce que, en l'espèce, l'atteinte à la liberté professionnelle a été plus grande que l'atteinte à celle de l'égalité? L'arrêt ne donne pas de réponse claire à cette question.

Il ressort des développements ci-dessus que le but principal de la loi sur l'importation de la viande, ainsi que sa modification, était la protection de la religion juive et non pas de la religion musulmane. Cette loi, comme la loi sur l'interdiction de l'élevage des porcs, protège de manière oblique les Musulmans mais limite la liberté commerciale des Chrétiens. La loi fondamentale sur la liberté professionnelle n'a pas pu être un obstacle à cette adoption puisque cette loi a été elle-même modifiée. La loi fondamentale sur la dignité de la personne et sa liberté n'a pas été non plus d'un très grand secours, puisque l'atteinte au principe d'égalité a été considérée comme “secondaire”, dans la mesure où elle chargeait des responsables religieux juifs uniquement de la responsabilité de délivrer des certificats de *cashrout*. Ce qui montre bien encore une fois la limite de la “révolution constitutionnelle”.³⁹

B) La question de la barbe

Certaines religions prescrivent de se laisser pousser la barbe. Ce droit découlerait du droit qu'à chaque individu de pratiquer les rites de son choix⁴⁰. Dans la première affaire où cette question s'est posée

³⁹ Voir la critique de DOTAN (Y.), “Une constitution pour l'Etat d'Israël”, *op.cit.*, p.193.

⁴⁰ DINSTEIN(Y.), “Freedom of Religion”, *op.cit.*, p.160.

à la Cour Suprême⁴¹, il s'agissait de requérants juifs pratiquants. Ils demandaient au Ministre de la Sécurité de leur accorder des outils spécifiques, car lors de la Guerre du Golfe, les autorités israéliennes avaient distribué des masques aux citoyens israéliens. Le problème des Juifs religieux était que les masques étaient conçus pour des personnes imberbes. Le Ministre de la Sécurité consacra un budget spécial pour les personnes portant la barbe, dans le but de leur assurer une protection efficace. Le juge Alon, le juge religieux (juif) à la Cour Suprême, estima que, si la *Halakha* donnait le droit de ne pas respecter certaines prescriptions religieuses en cas de danger mortel, on pouvait alors facilement éviter le problème soulevé par les religieux et choisir entre la barbe et la vie. Il faut cependant que les autorités prennent toutes les mesures nécessaires pour éviter que l'on retombe dans ce dilemme et, en cas d'impossibilité, que les vies des personnes prévalent ainsi que le droit de ne pas respecter la loi religieuse enjoignant de se laisser pousser la barbe. Le droit de se laisser pousser la barbe a été reconnu comme faisant partie de la loi fondamentale sur la dignité de la personne et sa liberté et elle s'étend aussi aux laïcs. Dans l'affaire *Nof*⁴² le juge Matza a dit:

*“A mon avis, le droit de toute personne à laisser pousser sa barbe constitue une partie de sa dignité, sans rapport avec ses croyances et ses tendances religieuses. Le droit à la dignité contient le droit de façonner son caractère, et celui qui laisse pousser sa barbe pendant des années constitue une partie de son caractère et de son expérience personnelle.”*⁴³

Si cette solution a été donnée pour les Juifs barbus, elle est également valable pour les Musulmans et les Chrétiens. Les Druzes religieux ont plutôt l'obligation de porter des moustaches⁴⁴. Les Chrétiens religieux grecs orthodoxes ont des barbes. Pour les Musulmans, ce n'est pas obligatoire d'avoir une barbe, mais c'est préférable, car c'est une manière de ressembler au prophète Mahomet.

⁴¹ Bagatz 4919/90, *Miler c. Le ministre de la sécurité*, P.D., 45(2), p.293.

⁴² Affaire précitée.

⁴³ *Ibid.*, p.459.

⁴⁴ DANA (N.), “Le caractère druze: la pratique”, in DANA (N.), *Les druzes*, Ramat Gan, L'édition de l'Université Bar Ilan, 1998, pp.37-47, (en hébreu), p.45.

C) *L'affaire du Foulard*

En cas de conflits entre deux membres de minorités religieuses différentes, c'est aux organismes étatiques que revient la responsabilité de solutionner le conflit. Ce conflit peut se manifester dans le cadre des affaires du statut personnel où chaque partie appartient à une religion différente. Un autre cas de figure peut être illustré par l'affaire de la Mosquée de Nazareth où l'Etat a dû intervenir pour résoudre le conflit en faveur des Musulmans, en leur garantissant le droit d'établir une mosquée. En dehors de ces deux cas de figure, on ne trouve qu'un seul arrêt de la Cour Suprême traitant d'un litige opposant une fille musulmane à une école de la communauté melkite catholique dans l'affaire du foulard.

Pour certains, la religion musulmane n'obligerait pas les femmes à mettre de foulard et les prescriptions coraniques ne concerneraient que les femmes du prophète Mahomet. Ainsi, n'était-ce qu'un mode de différenciation sociale entre femmes libres et esclaves. Puis cette habitude s'est imposée à toutes les femmes musulmanes en se transformant en instrument de réclusion de la femme⁴⁵. Quelques soient les divergences idéologiques, les juges nationaux ne devraient pas jouer le rôle d'interprète du dogme⁴⁶. La question du port du foulard par des filles et des femmes musulmanes a fait l'objet de travaux aussi bien de la part d'instances judiciaires nationales qu'internationales. Du fait que le foulard se présenterait comme un signe religieux, son port pourrait heurter le principe de laïcité tel qu'il est interprété par certains pays comme la France⁴⁷ ou la

⁴⁵ Pour plus de détails voir FAHMY (M.), *La condition de la femme dans l'islam*. Paris, Allia 65-89; ASCHA (G.), *Du statut inférieur de la femme en islam*, Paris, L'Harmattan, pp.123-131.

⁴⁶ VELAERS (J.) et FOBLETS (M.C), *op.cit.*, pp. 282-283 et pp. 286-287.

⁴⁷ Pour une vision synthétique des récents arrêts du Conseil d'Etat voir DURAND-PRINBORGNE (C.), "Le port des signes extérieurs de convictions religieuses à l'école: une jurisprudence affirmée..., une jurisprudence contestée", *RFD adm.*13(1) Janv-févr.1997, pp.151-167, pour ces arrêts récents voir *Ibid.*, pp.169-172. Voir aussi DEFFAIN (N.), "Le principe de laïcité de l'enseignement public à l'épreuve du foulard islamique", *RTDH*,1998, pp.203-250. On constatera la nuance de la jurisprudence française. Pour le Conseil d'Etat, les sanctions fondées sur des interdictions générales ou absolues sont illégales. DEFFAIN (N.), *op.ci.*, pp.229-233.

Turquie⁴⁸. Le port du foulard peut heurter le principe d'uniformité que certaines écoles imposent comme c'est le cas par exemple en Egypte⁴⁹. Etant donné que le droit de manifester son appartenance à une religion n'est pas absolu, des restrictions tenant à l'ordre public ou à la sécurité publique sont légales. Le Comité des Droits de l'Homme ne s'est pas encore prononcé sur la question du foulard, mais il l'a fait sur des faits analogues dans l'affaire *Sing Bhinder*.⁵⁰ Sing Bhinder, citoyen canadien sikh, couvrait sa tête d'un turban dans la vie quotidienne et refusait de mettre un casque de sécurité pendant son travail. Son contrat de travail fut résilié par son employeur. Il considéra que l'Etat canadien n'avait pas respecté sa liberté religieuse et cela au mépris de l'article 18 par.3 du Pacte des Droits Civils et Politiques. Pour le Comité des Droits de l'Homme, il s'agit d'une limitation à la liberté religieuse conforme à l'article 18 par.3 du Pacte.

Pour limiter la liberté de la personne sur la base de la sécurité publique, il faut examiner si la manifestation de la religion est de nature à créer un danger pour le public: une limitation pour motif de "sécurité publique" peut être alors invoquée. Dans le cas en question, il s'agissait de la protection, non pas du public, mais d'une personne déterminée. A-t-on le droit de défendre la vie d'une personne contre sa volonté⁵¹? On pourrait même aller jusqu'à se demander si

⁴⁸ Voir l'arrêt de la Cour constitutionnelle, Décision du 7 mars relative à la constitutionnalité d'une loi universitaire turque (port de "foulards islamiques" dans les établissements d'enseignement supérieur) in RUDH,1991, pp.143-151 et GREWE(C.) et RUMPH (C.), "La Cour Constitutionnelle turque et sa décision relative au "foulard islamique"", *R.U.D.H.*, 1991, pp. 113-124, spécialement pp. 121-124. Dans cette affaire, la Cour constitutionnelle turque a sanctionné une loi autorisant le port des foulards islamiques dans certains endroits précis en préférant le principe de laïcité sur celui de liberté religieuse.

⁴⁹ N'a pas été annulé un règlement administratif interdisant l'accès à l'école aux élèves portant le voile complet (*niqab*) et imposant à tous les élèves le port d'un uniforme. Pour arriver à ce résultat la Haute Cour Constitutionnelle a interprété les textes coraniques ainsi que la sunna comme n'indiquant pas une obligation pour la femme de se couvrir entièrement. (Voir BERNARD. MAUGIRON (N.), *La Haute Cour Constitutionnelle égyptienne et la protection des droits fondamentaux*, Thèse de droit, Université de Nanterre (Paris XI), 1999, pp.123-124.

⁵⁰ Communication No.208/1986, *K.Singh Bhinder v. Canada* (Views adopted on 9 November 1989, at the thirty-seventh).CCPR/9/Add.1, p.398

⁵¹ TAHZIB (B.G.), *op.cit.*, pp.298-299.

on peut défendre la liberté d'une personne contre sa liberté? En l'espèce, la préservation des droits d'autrui était en question puisque Singh Bhinder, en refusant de mettre un casque, augmentait la probabilité d'une éventuelle blessure et, donc, le risque pour la société qui l'employait d'avoir à payer une compensation plus élevée.

Au niveau européen, la Commission des Droits de l'Homme a eu à se prononcer sur une affaire de foulards. Une licenciée turque s'était vue refuser la délivrance de son diplôme car elle avait refusé de fournir une photographie d'identité sur laquelle elle apparaissait sans foulard. La Cour constitutionnelle turque débouta la jeune femme de sa demande.

“La Commission est d'avis qu'en choisissant de faire ses études supérieures dans une université laïque, un étudiant se soumet à cette réglementation universitaire. Celle-ci peut soumettre la liberté des étudiants de manifester leur religion à des limitations de lieu et de forme destinées à assurer la mixité des étudiants de croyances diverses. Notamment, dans les pays où la grande majorité de la population adhère à une religion précise, la manifestation des rites et des symboles de cette religion, sans restriction de lieu et de forme, peut constituer une pression sur les étudiants qui ne pratiquent pas ladite religion ou sur ceux adhérant à une autre religion. Les universités laïques, lorsqu'elles établissent les règles disciplinaires concernant la tenue vestimentaire des étudiants, peuvent veiller à ce que certains courants fondamentalistes religieux ne troublent pas l'ordre public dans l'enseignement supérieur et ne portent pas atteinte aux croyances d'autrui”⁵².

La Commission ajouta:

“qu'un diplôme universitaire a pour but d'attester des capacités professionnelles d'un étudiant destiné à l'attention du grand public. La photo apposée sur un diplôme a pour fonction d'assurer l'identification de l'intéressé et ne peut

⁵² Requête No16278/90, *Semay Karaduman c.Turquie* 3 mai 1993, D.R., 74, pp. 93, pp.100-101.

⁵³ *Ibid.*, p.101.

*être utilisée par celui-ci afin de manifester ses convictions religieuses.*⁵³

La Cour Suprême israélienne ne s'est prononcée qu'une seule fois sur l'affaire des foulards⁵⁴. Une jeune fille musulmane avait terminé son cursus scolaire à Oum Ilfahem⁵⁵ et avait réussi les examens d'entrée de l'école Saint-Joseph de Nazareth, école appartenant à la communauté melkite catholique. En arrivant aux cours, la direction de l'école lui expliqua qu'elle ne pouvait être admise à l'intérieur de l'école en portant le foulard. La requérante refusa aussi de participer aux activités annexes de l'école comme les promenades et la natation. Pour la natation, elle souhaitait être habillée de longs vêtements conformément à la tradition religieuse musulmane et voulait être dans un endroit où la natation se faisait séparément des garçons. Un recours fut intenté pour obliger l'école à l'accepter avec le foulard. L'école est une institution d'éducation reconnue mais non officielle au sens de l'art1 de la loi sur l'éducation obligatoire de 1949. Dans cette école, 55% des élèves n'appartiennent pas à la communauté melkite catholique. L'école estimait que son cadre pédagogique pourrait être menacé si chaque élève se conduisait selon les règles de sa propre communauté. Pour le juge Barak, il ne s'agissait pas d'une école publique (officielle). Elle n'était donc pas tenue par l'Etat ou une autorité locale. Il ne s'agissait pas d'une institution officielle d'éducation mais d'une institution étant reconnue comme non officielle et étant la propriété d'une communauté religieuse. Le juge Barak estima que la liberté religieuse était garantie à toute personne, et ce inclus les mineurs. Il rappela que la liberté religieuse n'était pas absolue mais qu'il fallait néanmoins trouver un équilibre entre cette liberté et d'autres libertés et entre cette liberté et l'intérêt général. Le juge Barak⁵⁶ jugea que si la jeune fille en question voulait porter un foulard dans le cadre d'une éducation officielle (publique) il fallait reconnaître son droit et que dans le cas d'une école publique, le principe de la liberté religieuse avait la priorité sur le principe de l'uniformité. Mais étant donné qu'il s'agissait, en l'espèce, d'une école privée, elle était libre d'admettre ou non des Musulmans dans la

⁵⁴ Bagatz 4298/98, *Mona Jabarin c. Le ministre de l'éducation*, P.D., 49(5), p. 201.

⁵⁵ Ville arabe à très forte majorité musulmane.

⁵⁶ Affaire *Mona op.cit*, par.6.

mesure où derrière le principe de l'uniformité il y avait des intérêts pédagogiques à prendre en compte, intérêts qui étaient liés à la nature spécifique de l'école. L'uniformité permet la création d'un dénominateur commun basé sur le pluralisme.⁵⁷

Golberg précisa quant à lui que, dans le cas d'une école publique religieuse, il fallait respecter la religion et non pas la liberté religieuse. On ne peut pas ainsi laisser un Juif ne pas mettre une Kippa dans une école publique religieuse (juive évidemment car pour les minorités palestiniennes il n'y a pas d'écoles religieuses publiques).

Cet arrêt est basé sur de fausses propositions car les écoles publiques arabes n'offrent pas de véritable alternative à l'élève. Les écoles publiques arabes sont des écoles de très mauvaise qualité qui ont pour rôle principal la dépolitisation et la destruction de l'identité palestinienne et corrélativement la promotion de la race juive et de l'idéologie sioniste. Il n'y a donc pas de vraie alternative et de réelle liberté de choix. Pour cette jeune fille musulmane, il n'y avait pas d'écoles publiques musulmanes comme il en existe pour les Juifs. Par ailleurs, l'uniformité n'est pas un principe sur la base duquel on peut limiter la liberté religieuse⁵⁸. Il n'y a en effet pas de loi autorisant la limitation de la liberté religieuse en raison de la préservation du principe d'uniformité et cette limitation ne se base sur aucune loi, comme le requiert l'article 18 par du Pacte des Droits Civils et Politiques. Cette limitation pouvait se fonder, en revanche, sur la protection des droits de l'église melkite catholique.

Malgré ces limites, cette jurisprudence est, pour une fois, plus libérale que les jurisprudences française et turque. En Israël, le principe de laïcité ne joue pas un rôle important, au point par exemple d'abolir une liberté fondamentale (comme en Turquie) ou de la limiter (comme en France). En outre, la Cour Suprême israélienne dans l'affaire *Mona* n'a pas joué un rôle d'interprète de la religion musulmane comme c'est le cas en Egypte.

⁵⁷ *Ibid.*, par.7.

⁵⁸ Dans la décision de Haute Cour Constitutionnelle égyptienne précitée, le principe de l'uniformité a aussi prévalu. Mais la Haute Cour égyptienne est arrivée à ce résultat en interprétant les textes musulmans sacrés alors que la Cour Suprême israélienne est arrivée à ce résultat en limitant la liberté religieuses par le principe de l'uniformité.

D) *Les repos et les jours fériés*

L'article 2 de la Convention No.14 de l'O.I.T. relative à l'application du repos hebdomadaire dans les établissements industriels⁵⁹ énonce le principe d'un repos minimum de vingt-quatre heures dans tout établissement industriel. Ce repos coïncidera autant que possible avec les jours consacrés par la tradition ou les usages du pays ou de la région.

L'article 6(h) de la Déclaration de 1981 sur l'élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction reconnaît la liberté d'observer les jours de repos et de célébrer les fêtes et cérémonies conformément aux préceptes de sa religion ou de sa conviction. Dans l'observation générale no22 du Comité des Droits de l'Homme adoptée en 1993⁶⁰, il est dit que la liberté de manifester sa religion ou sa conviction par le culte englobe l'observation des jours de fête et des jours de repos.⁶¹

Au niveau européen, la pratique est plutôt hostile à l'égard des Musulmans. En effet, la Commission des Droits de l'Homme a approuvé le refus fait à un professeur britannique de religion musulmane de s'absenter pour 45mn le vendredi afin de suivre sa prière.⁶²

En Israël, l'art7(b) de la *Loi des horaires de travail et de repos* de 1951 dispose que le repos hebdomadaire pour un Juif est le samedi et pour un non juif, le samedi, le vendredi ou le dimanche selon le choix de la personne en question. Le professeur A Rubinstein dit que le fait d'inclure le samedi pour le non juif est destiné à permettre à celui-ci de pouvoir travailler chez un Juif⁶³. Mais pour le Juif, un tel choix n'existe pas. Est-ce à dire que pour le législateur il était inconcevable qu'un juif puisse travailler chez un Musulman? La Cour Suprême a dit qu'en choisissant le Shabat le législateur avait poursuivi deux buts. Le premier était social, il s'agissait d'accorder

⁵⁹ Entrée en vigueur, 19/06/1923, date d'adoption 17/11/1921, ratifiée par Israël le 26/06/1951.

⁶⁰ Texte in HRI/GEN/1/Rev.3 p.39.

⁶¹ Par. 4.

⁶² Application No 8160/78, *Ahmad v. United Kingdom*, *European Human Rights Reports*, 1984, p.126 voir para 23

⁶³ RUBINSTEIN(A.), *op.cit.*, p.87.

un jour de repos pour les travailleurs et le second religieux, à savoir, suivre un ordre religieux et la tradition juive.⁶⁴

Pour les jours fériés l'art18a(a) de l'ordonnance sur le pouvoir donne les détails des fêtes juives. Pour les non juifs, les fêtes devront être réglées par une décision du gouvernement, ce qui implique une protection moindre quant à la nature de l'acte. Les Juifs sont protégés par l'ordonnance ayant valeur de loi, alors que les non juifs sont protégés par un acte administratif du gouvernement. Le gouvernement israélien, en vertu de l'art18a(a) de l'ordonnance sur le pouvoir, a décidé⁶⁵ de fixer les jours de fêtes, et donc de repos, aux jours suivants: Noël, le Nouvel an, le Vendredi d'avant Pâques et le deuxième jour de Pâques pour les chrétiens. Pour les musulmans, les jours fériés correspondent aux jours du nouvel an musulman (Premier du mois de *mouharam*), de la naissance du prophète Mahomet, de la fête de la fin du ramadan (*alfitr*) et la fête du sacrifice (*aladha*). Pour les Druzes, la fête du sacrifice (*aladha*) et le jour de naissance du prophète Shoueb. Il faut noter cependant que la fête de la fin du ramadan (*alfitr*) n'a pas été reconnue comme un jour férié pour les Druzes et ceci dans le but clair de séparer les Druzes des Musulmans.

L'art9a (a) de la loi de 1951 sur les horaires de travail et de repos énonce l'interdiction de travailler durant les jours de repos. Dans une municipalité ou un quartier d'une municipalité où les résidents non juifs constituent plus du quart des résidents, demeure la possibilité de choisir comme jours de repos soit les jours de repos juifs, soit les jours de repos de leur fêtes religieuses. L'art9(c)(a) de cette même loi interdit la discrimination d'une personne et sa non acceptation en raison du seul fait qu'elle a déclaré ne pas souhaiter travailler durant les jours de repos de sa religion. De même, il ne peut être demandé à personne de travailler durant ses jours de repos.

E) La protection des Lieux saints

La liberté religieuse concerne aussi les lieux de son exercice. Cela peut être une mosquée, une Eglise, un monastère, une synagogue mais aussi un cimetière, une rue (*via dolorosa* à Jérusalem), une

⁶⁴ Bagatz 5073/91, *Tiatrot Yisrael c. Natanya*, PD, 47(3), p.192, pp.206-207.

⁶⁵ Y.P1289 du 31 mai 1954.

montagne (*arafa* en Arabie Saoudite) ou bien encore un mur (le mur de lamentation à Jérusalem).

La protection des Lieux Saints prend deux formes: par la loi de la protection des Lieux et par le respect du *statu quo*. On n'envisagera ici que le premier aspect car le deuxième aspect, qui vise à protéger plus spécifiquement les minorités chrétiennes, sera envisagé dans la deuxième section.

L'art1 de la loi sur la garde des Lieux Saints dit que les lieux saints seront protégés de toute profanation, de toute atteinte et de tout ce qui pourrait entraver le libre accès aux lieux saints ou porter atteinte aux sentiments des pratiquants vis-à-vis de ces lieux. Celui qui profane un lieu saint ou y porte atteinte encoure une peine de prison de sept ans. Celui qui porte atteinte à la liberté d'accès des pratiquants ou à leurs sentiments encoure une peine de cinq ans de prison.

Cette loi ne définit pas ce que l'on entend par lieux saint. Est-ce qu'elle adopte une définition subjective? Selon cette loi, serait saint un lieu qui est saint pour la communauté religieuse en question. En effet, l'art.1 interdit de porter atteinte aux lieux qui sont saints pour elle. Cette absence de définition est d'autant plus problématique que des sanctions pénales sont prévues pour celui qui porte atteinte à ces lieux saints. L'art3 dit que cette loi a été conçue pour ajouter et non pour porter atteinte au droit existant. On pourrait dire que le *statu quo* tel qu'il était avant cette loi de 1967 doit être préservé. L'art4 donne le pouvoir au Ministre des Affaires Religieuses d'édicter des règlements pour appliquer cette loi en consultant les représentants des communautés religieuses ou en tenant compte de leurs propositions. Des règlements ont été édictés pour sauvegarder les Lieux Saints juifs en 1981⁶⁶. L'art1 de ces règlements définit les lieux saints en les énumérant. Cette façon de définir les lieux saints révèle qu'il s'agit d'une définition objective. Mais, étant donné qu'il s'agit de règlements, ils bénéficient d'une légalité douteuse, puisqu'ils entraînent une modification de la loi définissant les lieux saints d'une façon subjective. D'autre part, ces règlements n'énumèrent que les Lieux Saints juifs.

⁶⁶ K.T.,1881, p.1212.

F) *L'ignorance de certaines prescriptions religieuses musulmanes*

Être minoritaire c'est souvent suivre le rythme de la majorité. C'est se reposer les mêmes jours de repos que ceux de la majorité. C'est manger ce que la majorité mange. C'est aussi subir la conception morale de la majorité.⁶⁷ En raison de leur situation, les minorités religieuses sont en quête de normalité aussi bien dans leur vie quotidienne que dans leur vie religieuse⁶⁸. Être minoritaire, c'est être aussi ignoré par la législation, aussi bien du législateur que des juridictions de l'Etat, qui s'applique apparemment d'une façon neutre et objective à toute la population⁶⁹, mais qui heurte en réalité une population spécifique qui, normalement, appartient à la minorité. C'est le cas pour la minorité musulmane dans au moins deux cas.

Le premier correspond aux cas où le système juridique israélien ignore les interdictions de la religion musulmane. Il peut être illustré par la question de l'euthanasie qui a été soulevée devant la Cour Suprême dans l'affaire *Yael Shefer*⁷⁰. Dans cette affaire, la Cour Suprême a autorisé l'euthanasie passive, c'est-à-dire, le fait de laisser le malade souffrant mourir tout seul, à la différence de l'euthanasie active où il faut faire un effort pour mettre fin à la vie de la personne malade. La Cour Suprême en est arrivée à autoriser l'euthanasie passive après l'examen des sources du droit hébraïque, trouvant que ce droit l'autorisait. Cet arrêt, bien qu'il ait été décidé pour une

⁶⁷ Dans l'affaire I.E, 809/89 *Lutfi Masour et autres c. Emile Habibi*, PD,47(1), p.1, il a été décidé par le juge de la minorité Matza que pour décider s'il y avait atteinte à la dignité du fameux écrivain palestinien Emile Habibi, il fallait prendre en compte le point de vue du lecteur raisonnable qui est en fait le lecteur juif. Dans l'affaire Bagatz 394/92, *Gerard c. Le gouverneur militaire de la Judée et de la samarie*, PD, p.2986 il a été décidé qu'il faut juger selon la morale israélienne et non pas selon la morale palestinienne. Il faut souligner que cette affaire concernait un Palestinien des territoires occupés.

⁶⁸ KARAGIANNI(S.), "Les minorités religieuses et la Convention européenne des droits de l'homme", *L'Observateur des Nations Unies*, 1997, No3, pp83-104.

⁶⁹ Voir pour la définition des normes "neutres et généralement applicables" STAVROS (S.), "*Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?*", E.H.R.L.R., 1997, pp. 607-627, p. 611 "one would have to consider under the rubric "neutral and generally applicable" those laws which, in the process of advancing a legitimate secular public interest, have some incidental effects on some persons' religious beliefs."

⁷⁰ I.E506/88, *Yael Shefer c. L'Etat d'Israël*, P.D., 48(1), p.87.

jeune fille juive, a eu des répercussions sur les minorités religieuses. L'Islam n'autorise pas de mettre fin à sa vie, considérant que la vie n'appartient qu'à Dieu et non pas aux hommes. La souffrance que l'homme subit pendant sa maladie n'est qu'une épreuve imposée à l'homme par Dieu afin de vérifier sa capacité à supporter les souffrances⁷¹.

Une autre ignorance de la réalité religieuse musulmane concerne l'adoption, que l'Islam interdit, à la différence du judaïsme qui ne la reconnaît pas.

En effet, l'adoption a été réglementée en droit israélien par la *Loi sur l'adoption* de 1960. Au cours du vote de cette loi, il ne semblait pas clair au législateur que l'Islam interdisait l'adoption. Le projet de loi en question⁷² dit en effet que

“L'adoption des enfants est mentionnée dans l'article 51 du POIC, 1922-1947 comme une affaire “de statut personnel” pour laquelle les tribunaux doivent appliquer leur propre loi de statut personnel. La loi de statut personnel des Juifs est la loi hébraïque, mais la loi hébraïque ne reconnaît pas l'institution d'adoption des enfants dans son acception générale telle qu'elle est pratiquée et reconnue dans les systèmes juridiques étrangers. Le droit musulman, lui aussi, ne réglemente pas l'adoption des enfants.”

Le professeur Menahem Alon⁷³, qui était aussi juge à la Cour Suprême, émit l'idée que la loi d'adoption de 1960 constituait un compromis entre le droit hébraïque et le droit des différents Etats qui reconnaissent cette institution. Ce compromis se manifeste par le fait que la loi d'adoption ne crée pas seulement des droits entre les adoptants et les adoptés, mais qu'elle met aussi fin aux obligations et droits entre l'adopté et les parents naturels ainsi que les membres de sa famille. Mais d'un autre côté, la loi autorise la Cour à réduire les effets de l'adoption et autorise aussi à faire en sorte que l'adoption

⁷¹ RISPLAIR-CHAIM (V.), *Islamic Medical Ethics in the Twentieth Century*, Leiden, New York, Köln, E.J. Brill, 1993, pp.93-94.

⁷² H.H. 364, p77, p.81

⁷³ ALLON (M.), *Le droit hébraïque: Son histoire, ses sources, ses principes*; 3^{éd}, Jérusalem, Magnas, 1988, (en hébreu), pp.699-670(en hébreu) et aussi note 178 à la page 670,

ne porte pas atteinte aux interdits relatifs au mariage et au divorce, ce qui signifie que l'adopté ne peut pas se marier avec les membres de la famille avec qui la loi religieuse le lui interdit.

Cette ignorance de la loi musulmane est aussi valable pour la loi d'adoption de 1981, qui abolit la *loi d'adoption* de 1960 mais conserve les caractéristiques de la loi sur l'autorisation de l'adoption. L'article 16 de la *loi sur l'adoption* est ainsi rédigé

“L'adoption crée entre l'adoptant et l'adopté les mêmes obligations et droits qui existent entre les parents et leurs enfants, et accorde à l'adoptant par rapport à l'adopté les mêmes pouvoirs qui sont donnés à des parents par rapport à leur enfant, elle met fin aux obligations et aux droits qui liaient l'adopté et ses parents et le reste de sa famille et aux pouvoirs qu'ils détenaient sur lui mais :

- (1) *Le tribunal peut réduire la portée de l'ordonnance d'adoption*
- (2) *L'adoption ne porte pas atteinte aux règles d'interdiction et d'autorisation concernant le mariage.”*

L'article 5 de la *loi sur les noms* de 1956 dispose qu'un *“Enfant mineur qui a été adopté prend le nom de la famille de son adoptant mais ne prend pas un nouveau prénom, sauf si le tribunal en décide autrement”*.

Les dispositions de l'article 16 de la *loi sur l'adoption de 1981*, et surtout l'article 5, heurtent d'une manière frontale les valeurs de l'Islam et plus précisément le verset 5 de la Sourate des Factions⁷⁴. Ce verset a été rédigé pour mettre fin à une pratique de la période préislamique, pratique selon laquelle l'enfant adopté appelait son adoptant comme son père. Le prophète Mahomet lui même a adopté Zayed et les gens l'appelaient Zayed ben Mouhamad c'est-à-dire Zayed le fils de Mouhamad mais, après la révélation de ce verset, les gens l'ont appelé Zayed Ben mouhamad Ben Harith. L'Islam n'interdit

⁷⁴ ‘Appeler ces enfants adoptifs du nom de leurs pères, -ce sera plus juste auprès de Dieu – mais si vous ne connaissez pas leurs pères, ils sont vos frères en religion, ils sont des “vôtres”.

pas aux Musulmans de soigner des enfants qui ne sont pas leurs propres enfants par le biais de l'institution islamique *kafalah*⁷⁵. L'interdiction de la reconnaissance de l'adoption par l'Islam n'est pas contraire au droit international. La Convention sur les Droits des Enfants qu'Israël a ratifiée en 1991 mentionne expressément dans le troisième paragraphe de l'article 20 "la *kafalah* de droit musulman". De surcroît cet article enjoint aux Etats de tenir dûment compte de l'origine "ethnique, religieuse, culturelle et linguistique" de l'enfant lorsqu'ils doivent le placer. Enfin, l'article 21 de cette même Convention débute par la formule "*Les Etats parties qui admettent et/ou autorisent l'adoption...*" Ce qui renforce ainsi l'idée que la Convention, elle-même, n'enjoint pas de prévoir dans la législation nationale l'institution de l'adoption. Cette convention ne crée pas un droit à l'adoption⁷⁶. L'Etat d'Israël n'était donc nullement obligé d'introduire dans sa législation l'institution de l'adoption.

Cette ignorance de l'Islam est d'autant plus grave que la Cour Suprême israélienne⁷⁷ a reconnu le fait d'être adopté comme dérivant de la dignité de l'homme telle qu'elle est reconnue par la *loi fondamentale sur la dignité de la personne et sa liberté*. Le droit d'un enfant à être adopté a donc une valeur constitutionnelle et l'atteinte à l'Islam est donc dans ce cas aussi constitutionnelle.

⁷⁵ Voir cette institution en droit musulman algérien L'article 46 de la loi No 84-11 du 9 Juin 1984 portant Code de la famille, (*J.O.R.A.*, du 12 Juin 1984, p.612) dispose que "L'adoption (*Tabani*) est interdite par le Chari'a et la loi." L'article 116 définit la notion de *kafala* (recueil légal): Le recueil légal est l'engagement de prendre bénévolement en charge l'entretien, l'éducation et la protection d'un enfant mineur, au même titre que le ferait un père pour son fils. Il est établi par acte légal." Voir sur le *kafala* en droit algérien BENCHENEB (A.), "La formation du lien de *kafala* et les silences législatifs", *Revue algérienne des sciences juridiques, économiques et politiques*, 1991, pp.47-53., AÏT ZAI (N.), "La *Kafala* en droit algérien", *Revue algérienne des sciences juridiques, économiques et politiques*, 1993, pp.793-804; DAOUIA (D.), "Droit de filiation, adoption et *kafala*", *Revue algérienne des sciences juridiques, économiques et politiques*, 1993, pp.779-793.

⁷⁶ Malgré cette absence d'obligation de reconnaître l'institution de l'adoption plusieurs Etats musulmans ont émis de réserves concernant ces dispositions.

⁷⁷ I.E 7155/96, *Ploni c. Le Conseiller juridique du gouvernement*, P.D., 51(1), p.160, p.175.

1.2.3. *Le droit de se convertir*

Le droit de la liberté religieuse contient en son sein le droit de changer de religion. Ceci découle clairement de l'article 18 de la Déclaration Universelle des Droits de l'Homme. L'article 18 du Pacte des Droits Civils et Politiques est moins clair sur ce point. Dans son observation générale No22, le Comité des Droits de l'Homme considère que le droit 'd'avoir ou d'adopter' une religion ou une conviction contient le droit de substituer à sa religion ou sa conviction actuelle une autre religion ou conviction ou d'adopter une position athée (par.5 de l'observation).

La Déclaration sur l'élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction de 1981 ne contient pas expressément le droit de changer de religion, mais son article 8 énonce qu'elle ne porte pas atteinte à la Déclaration Universelle des Droits de l'Homme, ni aux Pactes relatifs aux Droits de l'Homme.

Les formulations nuancées de l'article 18 du Pacte des Droits Civils et Politiques et de la Déclaration de 1981 visent à préserver les susceptibilités des certains Etats musulmans qui se sont opposés à l'inclusion de la liberté de changer de religion en raison d'une certaine interprétation de l'Islam interdisant à un musulman de quitter l'Islam.⁷⁸

En droit israélien, le droit de conversion fait partie de la liberté de religion et de conscience. Le Président de la Cour Suprême Shamgar a par exemple décidé dans l'arrêt *Pasho*⁷⁹ que la

"liberté de religion et de conscience est un des principes fondamentaux de notre système. Cette liberté est une des valeurs qui constituent les fondements normatifs de notre système depuis la création de l'Etat. La liberté de changer de religion est garantie dans le cadre de la liberté de religion et de conscience. Il résulte qu'une interprétation raisonnable de l'état actuel du droit existant nous montre que les différentes autorités n'interviendrons pas dans ce domaine de l'autonomie de la personne, et que la décision du résident ou du citoyen de changer sa religion d'une part, et la décision d'accepter une personne dans une religion déterminée d'autre part, seront libres de toute intervention et réglementation de l'Etat. La conversion religieuse est l'affaire de l'individu. Dans une société libre toute personne

peut changer de religion comme il l'entend. Il n'a pas besoin pour se faire de l'autorisation formelle des autorités."

Le principe est donc la liberté de se convertir, sauf pour le cas où un texte limiterait cette liberté. L'ordonnance sur la conversion⁸⁰ régleme ainsi la procédure de la conversion. Dans l'arrêt *Pasho*⁸¹, s'est posée la question de savoir si cette ordonnance constituait un moyen de réglementation unique valable pour tous les types de conversion, ou bien si au contraire il s'agissait d'un instrument législatif ayant pour objet de réglementer les questions de juridiction entre les différents tribunaux religieux. En se fondant *inter alia* sur la liberté religieuse, la Cour Suprême a opté pour la seconde solution. L'ordonnance a en effet pour objet de limiter la fraude à la loi, pour ne pas aboutir, par le biais de conversion religieuse, à se dérober aux obligations découlant du mariage. La fonction de l'ordonnance doit donc être limitée au domaine du statut personnel.

L'article 13 de la *loi sur la capacité juridique et la tutelle*⁸² est une deuxième limite au droit à la conversion:

- "(a) La religion du mineur ne sera changée que si ses deux parents ont donné leur accord par écrit ou que le tribunal, selon la demande d'un de parents ou à la demande du tuteur du mineur, a donné son accord préalable.*
- (b) Si le mineur a dix ans, sa religion ne sera changée que, si en plus de l'accord de ses parents ou le permis du tribunal d'après l'alinéa (a), le tribunal a donné son accord."*

La liberté de conversion de l'enfant est limitée, soit par les deux parents, soit par le tribunal à la demande de l'un des parents. Mais quand il y a désaccord entre les parents, comment le tribunal doit-il

⁷⁸ TAHZIB (B.G.), op.cit., pp.84-87, pp.184-185.

⁷⁹ Bagatz 1031/93, *Pasho et autres c. Le ministre de l'intérieur et autre*, P.D., 49 (4), p.661, p.685.

⁸⁰ Journal officiel No. 195 du 16 Septembre 1927, p. 654.

⁸¹ Affaire *Pasho* précitée.

⁸² S.H., 1962, p.120.

procéder? Cette question a été posée à la Cour Suprême dans l'affaire *Ploni et autres c. Ploni*⁸³. Dans cette affaire, la requérante était mariée au défendeur. Tous les deux étaient juifs au moment de la célébration du mariage. Ils ont eu trois enfants. La femme s'est ensuite convertie aux Témoins de Jéhovah. Après cette conversion, la mère a souhaité que ses enfants reçoivent une éducation religieuse de témoin de Jéhovah, alors que le père voulait que ses enfants continuent à avoir une éducation juive. La Cour de district a donné raison au père, d'où l'appel à la Cour Suprême. La mère invoqua sa liberté religieuse et celle de ses enfants. Elle se basa aussi sur l'article 14 de la Convention sur les Droits de l'Enfant.

Le président Shamgar souligna d'abord l'importance de la liberté religieuse et de conscience dans le système juridique israélien en rappelant que ce principe était mentionné dans la Déclaration d'Indépendance et dans la jurisprudence de la Cour Suprême. Il dit ensuite que la liberté religieuse et de conscience ne contenait pas seulement la liberté de croyance du for intérieur, mais aussi la liberté d'agir et de se comporter selon cette croyance. La liberté religieuse et la liberté de conscience contiennent aussi la liberté de la personne de se convertir et de propager sa religion. Cette liberté, de changer de religion, est aussi accordée aux enfants mineurs mais, dans ce cas, se pose un problème qui n'existe pas pour les majeurs. Le juge estima en effet que les mineurs n'avaient pas la capacité de comprendre, d'intérioriser et de comparer entre les religions concurrentes. Pour cela, il rappela qu'il était important de limiter les droits des enfants à changer de religion et de limiter aussi le droit des parents⁸⁴. Si le Président Shamgar reconnu à la famille son autonomie en cas de crise, il souligna néanmoins que l'Etat pouvait intervenir pour protéger le mineur en vertu de son obligation de protéger ceux qui ne peuvent pas le faire eux-mêmes. Dans ce cas, l'autonomie doit être limitée par le principe de l'intérêt de l'enfant. Ainsi l'Etat interviendra-t-il quand les décisions des parents et leurs choix ne seront pas conformes aux droits et intérêts de l'enfant⁸⁵.

⁸³ I.E., 2266/93, *Ploni et autres c. Ploni*, P.D., 49(1), p. 221.

⁸⁴ *Ibid.*, pp. 233-234 pour le point d'équilibre par. 5.

⁸⁵ *Ibid.*, p. 238.

Le droit des parents à éduquer leurs enfants comprend le droit d'accorder aux enfants une éducation religieuse⁸⁶. Quel sens donner à ce droit? Quand les parents de l'enfant s'entendent, une pleine autonomie est accordée à la famille et l'Etat ne peut intervenir que dans le cas où des coutumes religieuses seraient nuisibles ou seraient susceptibles de porter atteinte à la vie du mineur ou à sa santé, comme par exemple l'interdiction de transfusion sanguine en cas de danger de mort selon les témoins de Jéhovah.⁸⁷

En cas de désaccord entre les parents, c'est le tribunal qui décidera, en prenant en compte l'intérêt du mineur⁸⁸. Pour le Président Shamgar, une des expressions de la liberté religieuse et de conscience est la neutralité de l'Etat.⁸⁹ Dans le cadre de la recherche de l'intérêt de l'enfant, il faut chercher la déviance à la norme. Le Président Shamgar, en mentionnant les Témoins Jéhovah, utilise le terme de secte. Le Judaïsme serait la norme et les Témoins de Jéhovah la déviance. Le Président reconnaît aux personnes le droit de se convertir mais cette liberté n'est pas accordée aux mineurs⁹⁰. Finalement, la Cour Suprême a décidé que l'éducation des enfants serait confiée au père juif. Pour motiver sa décision, le Président Shamgar déclara que:

“Les enfants sont nés et éduqués en tant que juifs. Dans leur famille et dans leur environnement naturel, ils sont entourés de Juifs. Les enfants n'ont exprimé aucune volonté de se joindre à la secte de leur mère. Ils désirent que le conflit soit arrêté. C'est leur droit d'être éduqué en tant que juifs, jusqu'à ce qu'ils puissent en décider autrement. Le résultat est que leur droit est préférable au droit de la mère de les éduquer selon une éducation religieuse”⁹¹.

En conclusion on dira que cette reconnaissance de la liberté de conversion par le droit israélien, mis à part les deux limites mentionnées – la restriction de la liberté de conversion quand il

⁸⁶ *Ibid.*, p. 241.

⁸⁷ *Ibid.*, p. 241.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, p.242.

⁹⁰ *Ibid.*, p.257.

⁹¹ *Ibid.*, p.258.

s'agit des affaires touchant au statut personnel et la limite de la conversion religieuse d'un enfant appartenant à une "secte"- est en concordance avec la liberté religieuse telle qu'elle est reconnue en droit international. Cette reconnaissance de la liberté de conversion pose un problème quant à la minorité musulmane et catholique dont les religions ne reconnaissent pas le droit de se convertir⁹². Comme on verra dans le cadre de l'examen de l'autonomie religieuse, le droit international sur ce point est clair: les libertés des personnes appartenant à des minorités ne doivent pas enfreindre les droits de l'homme. Quel que soit le point de vue de la religion le droit à la liberté religieuse prévaudra.

2. LA PROTECTION DE LA LIBERTÉ RELIGIEUSE DES CATHOLIQUES

Les catholiques bénéficient d'un régime spécial de protection en matière de liberté religieuse, qui vient s'ajouter au régime commun de protection de la liberté religieuse des minorités. Ce régime spécial découle du rôle historique joué par la France en tant que protectrice des catholiques, mais aussi de la montée en puissance de la diplomatie papale. La protection de la liberté religieuse des catholiques est garantie par certains traités bilatéraux conclus entre la France et l'empire ottoman d'une part, et par les accords conclus entre l'Etat d'Israël et le Saint-Siège d'autre part. Les accords de Mytilène consistent dans un échange de lettres entre la Sublime Porte et la France en date des 2, 4, 6, 9, et 10 Novembre 1901. Il n'y a pas donc de texte unique signé les deux parties, au contraire l'Agrément Franco-Turc du 13 Décembre 1913, dit aussi Accord de Constantinople, qui est quant à lui un traité composé de quatre articles, signé par le Prince Saïd Halim, Pacha Grand Vizir et

⁹² Pour les catholiques l'appartenance à la religion catholique est perpétuelle et, pour le droit musulman, il est possible de quitter la religion musulmane mais, selon certaines interprétations, il s'agirait d'un crime dont le châtiment est la peine de mort. Sur la position du droit musulman face à la conversion d'un musulman voir ODEH (A.Q.), *Le droit pénal musulman. Une comparaison avec le droit positif*. Vol. 2, 7ième édition, Beirut, Mouassassat Alrisala, 1986, pp.706-731.

Ministre des Affaires Etrangères de l'Empire ottoman, et par Maurice Bompard, ambassadeur de la République Française.

Ces accords concernent la protection des établissements catholiques tels les écoles, églises, hôpitaux, dispensaires, orphelinats et asiles qui disposent privilèges fiscaux et douaniers. La reconnaissance de l'existence légale des ces établissements et l'assimilation des institutions scolaires existant aux institutions scolaires ottomanes sont également prévues⁹³. Pour comprendre plus spécifiquement la liberté religieuse garantie par les traités bilatéraux, il faut examiner le rôle du Saint-Siège notamment à travers l'Accord fondamental.

Cet Accord contient plusieurs dispositions traitant de la liberté religieuse. C'est à ce titre que nous nous y intéresserons. Avant d'analyser le contenu de l'Accord à travers le principe de liberté religieuse (2.3), nous reviendrons sur sa conclusion (2.1) et ses liens avec les accords de Mytilène et l'agrément de Constantinople (2.2).

2.1 La conclusion de l'Accord fondamental

Le statut juridique de la minorité catholique en Israël est en partie déterminé par les traités conclus entre le Saint Siège et l'Etat d'Israël. Pour le moment il s'agit de deux traités : l'Accord fondamental du 30 décembre 1993 signé entre le Saint-Siège et Israël et entré en vigueur le 10 Mars 1994⁹⁴, et l'Accord entre le Saint-Siège et l'Etat

⁹³ Pour plus des détails voir : ABOU RAMADAN (M.), "Les accords de Mytilène de 1901 et l'agrément de Constantinople de 1913", in TRIMBUR (D.) et AARONSOHN (R.), (dir.) *De Bonaparte à Balfour. La France, l'Europe Occidentale et la Palestine 1799-1917*, Paris, C.N.R.S, 2001, pp.57-69.

⁹⁴ Texte publié in *RGDIP*, 1994, pp274-276, ou *Documents d'actualité Internationale* (DAI° No 5 du 1er mars 1994, p.104. Le texte en langue anglaise est publié dans *33 International Legal Materials* 153(1994). Sur cet accord, on consultera LANFRANCHI (M.P.) "L'accord fondamental du 30 décembre 1993 signé entre le Saint-Siège et Israël", *AFDI*, 1994, pp.326-355; BROGLIO (F.M.), "Israël-Vatican: un accord historique entre espoirs et craintes", *Géopolitique*; no.45 1994, pp.43-47; PERLA(D.), "The Fundamental Agreement between the Holy See and the State of Israel", *Israel Law Review*, 1994, pp.707-717; ROSEN (D.), "Vatican-Israel Relations: The Jewish Perspective", *Justice*, 1994, pp.22-25; MACCHI (A.), "Vatican-Israel Relations: The Catholic Perspective", *Justice*, 1994, pp26-27; BREGER (M.J.), "The Fundamental Agreement Between the Holy See and the State of Israel: A Third

d'Israël consécutif à l'article 3.3 de l'Accord fondamental signé entre le Saint-Siège et l'Etat d'Israël le 10 Novembre 1997 à Jérusalem et ratifié le 3 février 1999.⁹⁵

La conclusion de ces accords n'était possible qu'au prix d'un long et lent processus au cours duquel plusieurs obstacles ont été levés. Plusieurs facteurs théologiques et politiques expliquent cette évolution.⁹⁶

Avec la déclaration conciliaire *Nostra Aetate* (Déclaration sur les relations de l'Eglise avec les religions non chrétiennes, adoptée le 28 Octobre 1965), l'Eglise catholique a abandonné ses thèses selon lesquelles le peuple juif était maudit, leur condamnation à l'exil en constituant la preuve. Le deuxième obstacle était lié au sort réservé par l'Etat d'Israël au Peuple palestinien. L'existence de fortes minorités catholiques en Palestine et dans les Etats arabes faisait craindre au Vatican que toute amélioration de ses relations avec l'Etat hébreu conduise à une détérioration de la situation des catholiques. L'existence d'un clergé arabe à l'intérieur de l'Eglise catholique constituait un troisième facteur de *statu quo* dans les rapports vaticano-israéliens. Le Saint-Siège se trouvait donc dans une position délicate pour s'engager dans des relations diplomatiques avec l'Etat d'Israël. Le processus de paix entamé à Madrid en 1991

Anniversary Perspective. An Introduction, *Catholic Law Review*, 1998, pp.369-384; WASTON(G.R.), "Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement", *Ibid.*, p497.-JAEGER (D.M.A.), "The fundamental Agreement Between the Holy See and the State of Israel: A New Legal Régime of Church-State Relations" *Ibid.*, pp.427-440; FERRARI (S.), "The Fundamental Agreement Between the Holy See and Israel and the Conventions Between States and the Church Since the Vatican II Council", *Ibid.*, pp.385-406; PALOMINO (R.), "The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective-Church-State Agreements in Spain", *Ibid.*, pp.477-495; HIRSCH (M.), "The freedom of Proselytism Under the Fundamental Agreement and International Law", *Ibid.*, pp.407-425; ARBOIT (G.), *Le Saint-Siège et le nouvel ordre au Moyen-Orient. De la guerre du Golfe à la reconnaissance diplomatique d'Israël*, Paris, L'Harmattan, 1996, pp.163-178.

⁹⁵ Voir le texte de l'Accord dans *Jérusalem. Bulletin diocésain du Patriarcat latin*, Année 64, no.5, Novembre-Décembre, 1998. Le texte a été aussi publié (à l'exception des listes d'adresses) dans la *Documentation Catholique*, no. 2173 du 4 Janvier 1998.

⁹⁶ LANFRANCHI (M.P), *op.cit.*, pp.339-342; ROSEN(D.), 1994, *op.cit.*; MACCHI (A.), *op.cit.*; BROGLIO (F.M.), *op. cit.*, ARBOIT (G.), *op.cit.*, pp.163-178.

et la signature à Washington d'un accord entre l'OLP et Israël devaient lever un certain nombre de réticences puisque l'OLP avait elle-même franchi le rubicond de la reconnaissance d'Israël⁹⁷.

Concernant Jérusalem, la position classique du Saint Siège, à savoir l'internationalisation de la ville, a été abandonnée au profit d'une demande plus modeste de garantie internationale⁹⁸.

L'accord fondamental fut le fruit du travail d'une Commission bilatérale et permanente qui eut pour fonction d'étudier et de définir les questions d'intérêt commun en vue d'une normalisation politique.⁹⁹ Cet accord fondamental établit en effet de "pleines relations diplomatiques"¹⁰⁰. La reconnaissance par l'Eglise d'une forme de responsabilité concernant le sort réservé aux juifs en Europe, a conduit cette dernière à insérer dans l'Accord fondamental une série de concessions, notamment une condamnation explicite de l'antisémitisme dirigé contre le peuple juif et les personnes juives¹⁰¹. On peut noter cependant l'absence de mention de toute forme de responsabilité israélienne dans les torts causés aux Palestiniens par le sionisme. Pourtant, le Saint Siège a su, quand il le voulait, dénoncer les violations des droits de l'homme à l'égard de certaines minorités catholiques¹⁰². Ce déséquilibre apparent a été renforcé par le texte qu'a publié la Commission vaticane sur les rapports avec le judaïsme le 16 mars 1998, intitulé "Nous nous souvenons: une réflexion sur la Shoah"¹⁰³. Par ailleurs, l'Accord fondamental n'englobe pas tous les aspects des relations entre l'Eglise catholique et l'Etat d'Israël. Il constitue plutôt un "accord symbolique" qui nécessitera des précisions¹⁰⁴. Le Préambule de cet accord va dans cette direction puisqu'il énonce "qu'un tel accord constituera une base saine et

⁹⁷ Voir le porte parole du Vatican Joachim Navarro-Valls : il a dit que si les Palestiniens affiliés à l'OLP se réconcilient avec les Israéliens, pourquoi ne pourrions-nous pas le faire? ROSEN (D.), 1994, *op.cit.*, p.24.

⁹⁸ BREGER (M.J.), *op. cit.*, p.373.

⁹⁹ Voir le préambule de l'Accord fondamental.

¹⁰⁰ *Ibid.*, article 14.

¹⁰¹ *Ibid.*, article 2.2.

¹⁰² Voir la déclaration de Jean Paul II sur les discriminations subies par les minorités catholiques en Asie entre 7 et 8 Novembre 1999.

¹⁰³ Voir le texte intégral dans *La Croix* du 18 mars 1998

¹⁰⁴ PALOMINO (R.), *op.cit.*, p484

durable pour le développement continu de leurs relations présentes et futures et pour la poursuite des travaux de la Commission." Cet aspect d'accord cadre est souligné par plusieurs articles de l'Accord fondamental. L'article 3§3 prévoit la négociation entre le Saint-Siège et l'Etat d'Israël d'un accord concernant la personnalité légale catholique au regard du droit canonique. De même l'article 10 prévoit-il une négociation pour la conclusion

*"d'un accord complet, contenant des solutions acceptables pour les deux parties, sur les questions obscures, mal établies et disputées, concernant la propriété, les matières économique et fiscale relatives à l'Eglise catholique ou à des communautés catholiques ou institutions spécifiques"*¹⁰⁵

Une sous-commission rattachée à la commission bilatérale permanente fut créée pour en discuter.

Enfin, l'article 12 prévoit la poursuite de négociations sur "d'autres matières agréées bilatéralement comme objets de négociation."

2.2 Le lien entre l'Accord fondamental, les Accords de Mytilène et l'Agrément de Constantinople

Les accords de Mytilène et l'agrément de Constantinople ne contiennent pas de clauses de dénonciation et ne sont pas conclus pour une durée déterminée. L'article 8 du Mandat pour la Palestine du 24 Juillet 1922¹⁰⁶ dit que les privilèges et immunités des étrangers, y compris la juridiction et la protection consulaires, seront sans application en Palestine mais que ceux-ci seront, à la fin du mandat et sans délai, rétablis intégralement ou avec telle modification qui aurait été convenue par les Puissances intéressées. Il s'agit d'une suspension des accords et non pas d'une abrogation. Le gouvernement français, soutenant cette thèse de suspension, a présenté à la

¹⁰⁵ Le travail du comité responsable de la négociation que cet accord traite. L'accord réglera la question essentielle de l'exemption fiscale. Le Saint-Siège réclame le financement des cimetières chrétiens comme c'est le cas pour les cimetières juifs. La question du financement des écoles est aussi soulevée.

¹⁰⁶ Texte dans Nations Unies, *Origines et évolution du problème palestinien: Première Partie: 1917-1947*, New York, 1978, p.95 et ss.

Commission spéciale des Nations Unies pour la Palestine le 15 Juin 1947, un *mémoire* relatif aux œuvres françaises en Terre Sainte, document au dans lequel est annexée une liste de ces œuvres. L'Assemblée générale des Nations Unies a opté pour l'interprétation selon laquelle le Mandat n'a fait que suspendre les accords et engagements qui ont été pris par l'empire ottoman. Dans le chapitre premier de la première partie de la résolution de partage, l'Assemblée Générale oblige les Etats arabes et l'Etat juif qui seront créés, à inclure des dispositions dans leur lois internes ayant valeur de lois fondamentales de l'Etat et visant à ne pas porter "atteinte aux droits existants". La quatrième partie de cette même résolution 181(II) invite les Etats à renoncer aux privilèges et immunités réservés aux étrangers, y compris les avantages de la juridiction et de la protection consulaires conférés sous l'empire ottoman en vertu des Capitulations ou de la coutume. On voit donc que l'Assemblée Générale estime que le mandat n'a fait que suspendre les droits des différents Etats en Palestine.

En effet, le gouvernement provisoire israélien s'est engagé, lors de sa reconnaissance par la France en 1948, à respecter les droits et privilèges des établissements français ou sous protection de la France¹⁰⁷. Pour la France, il s'agit d'accords qui obligent l'Etat d'Israël à respecter les droits acquis et les privilèges des Etablissements français". Mais pour l'Etat d'Israël, il ne s'agirait que d'une invitation à entamer des négociations¹⁰⁸.

Il ne faut pas sous-estimer l'importance de ces accords qui ont reconnu l'inviolabilité des biens et des personnes. D'autre part, des

¹⁰⁷ Voir la série des échanges de lettres dits "Chauvel-Fischer" note 15 MOCHON (J.P), "Le consulat général de France à Jérusalem. Aspects historiques, juridiques et politiques de ses fonctions", *AFDI*, 1996, pp.929-945, p.941; voir aussi BALLOT (P.), *op.cit.*, pp.41-42. La lettre de Maurice Fischer, représentant du Gouvernement Provisoire de l'Etat d'Israël à Paris, à Monsieur Jean Binoche, Conseiller d'Ambassade et Directeur d'Afrique-Levant en date du 6 Septembre 1948 se lit comme suit : "Cher Monsieur Binoche, Ayant fait part à mon Gouvernement des déclarations de M.Neuville qui ont paru dans la presse française au sujet des droits existants français en Israël, j'ai été autorisé à réaffirmer que mon Gouvernement a pour principe de respecter les droits acquis et les privilèges des Etablissements français".

¹⁰⁸ Voir BALLOT (P.), *op. cit.*, pp.42-44.

exemptions fiscales ont été accordées à une longue liste d'organismes français ou sous protection de la France. Les accords de Mytilène et de Constantinople concernent plusieurs établissements catholiques figurant dans l'Annexe de l'accord sur la personnalité juridique. Ils ne concernent que les latins. Il pourrait y avoir des rivalités entre la France et le Saint-Siège car pour une grande partie d'entre eux, du moins pour les établissements latins, il y a un objet commun.

L'article 13 de l'accord fondamental prévoit que:

“les parties agréent que cet accord ne portera pas préjudice aux droits et obligations de quelques traités existant entre l'une ou l'autre partie et un Etat ou des Etats, qui sont communs et en fait accessibles aux deux parties au moment de la signature de cet accord.”

La France a officiellement communiqué les échanges de lettres “Chauvel-Fischer” au Saint-Siège en Octobre 1993¹⁰⁹. L'article 13 de l'accord fondamental évoque “cet accord”. Mais quand est-il de l'accord sur la personnalité juridique? Certes, ce dernier ne contient pas de dispositions préservant les droits des tierces parties. Mais en tout état de cause, ce rappel n'était nullement nécessaire pour préserver les droits de la France en vertu du principe de l'effet relatif des traités, de la continuité de la validité des accords de Mytilène et de Constantinople et enfin de la valeur coutumière des principes qui y sont énoncés. Du point de vue du droit israélien néanmoins, et selon l'arrêt de la *Custodie de la Terre Sainte*, il apparaît que ces accords ne peuvent pas être invoqués devant les tribunaux israéliens¹¹⁰. Cet arrêt ne peut constituer un précédent valide car la *Custodie de la Terre Sainte*, dont il est question dans l'arrêt, ne figure pas sur la liste annexée aux Accords Chauvel-Fischer du 24 Janvier 1949. De toute manière, si Israël n'a pas voté de loi pour introduire ce traité en droit interne, c'est un problème interne. Au niveau international en effet, l'Etat d'Israël est tenu de respecter ses engagements.

¹⁰⁹ MOCHON (J.P.), *op.cit.*, p.941.

¹¹⁰ Voir les accords de Mytilène et de constantinople et leur non application à un organe de la Custodie de la terre Sainte c'est l'arrêt IE 519/79, *La Custodie de la Terre Sainte c L'Etat d'Israël et la municipalité de Nazareth*, PD 38(2) p.747.

2.3 La protection de la liberté religieuse par l'Accord fondamental

L'Accord fondamental insiste sur la liberté religieuse, principe qui constitue en quelque sorte le noyau de l'Accord.¹¹¹ L'article 1 stipule que

- “1. *L'Etat d'Israël, rappelant sa Déclaration d'indépendance, affirme son engagement continu à maintenir et à observer le droit humain de liberté de religion et de conscience comme c'est entendu dans la Déclaration universelle des droits de l'Homme et dans les autres instruments internationaux dans lesquels il est partie(signataire).*
2. *Le Saint Siège, rappelant la Déclaration sur la liberté religieuse du Concile œcuménique Vatican II, “Dignitatis humanae”, affirme l'engagement de l'Eglise catholique à maintenir le droit humain de liberté de religion et de conscience comme c'est entendu dans la Déclaration universelle des droits de l'Homme et dans les autres instruments internationaux dans lesquels il est partie (signataire). Le Saint-Siège souhaite affirmer également le respect de l'Eglise catholique pour les autres religions et leurs fidèles comme ce fut établi solennellement par le Concile œcuménique Vatican II dans sa déclaration sur la relation de l'Eglise avec les religions non chrétiennes, “Nostra aetate”*

La formulation de cet article rend les obligations des parties asymétriques¹¹². Les deux parties s'engagent à respecter la liberté religieuse selon des textes différents. La Déclaration universelle des droits de l'homme est mentionnée par les deux parties. Mais c'est l'article 18 de cette déclaration qui est le plus pertinent. Les deux parties invoquent des actes unilatéraux¹¹³. L'Etat d'Israël invoque sa déclaration d'indépendance qui mentionne la liberté religieuse.

¹¹¹ PALOMINO (R.), *op.cit.*, p.483 et pp.495-496.

¹¹² Voir pour l'incidence de cette asymétrie sur le prosélytisme HIRSCH (M.), *op.cit.*

¹¹³ LANFRANCHI (M.P.), *op.cit.*, pp.347-348.

Sur ce point, la déclaration d'indépendance a désormais une valeur conventionnelle. Pour sa part, le Vatican est tenu de respecter la liberté religieuse conformément au *Dignitatis humanae*¹¹⁴ et *Nostra aetate*. Il y a également une différence dans les engagements quant aux instruments internationaux auxquels les deux contractants sont parties. L'Etat d'Israël est partie au Pacte international relatif aux droits civils et politiques qu'il est possible d'invoquer au titre de l'article 18 et de l'article 27. L'article 13 du Pacte international relatif aux droits économiques, sociaux et culturels et les dispositions qui concernent la liberté religieuse citées plus haut dans la Convention sur les droits de l'enfant peuvent aussi être invoqués à l'égard de l'Etat d'Israël. Le problème réside dans le fait que le Saint-Siège n'est pas partie à ces instruments. D'autres articles de l'Accord fondamental ne font que donner un détail sur le contenu de la liberté religieuse¹¹⁵. L'article 4 affirme la reconnaissance par les deux parties du *statu quo* dans les Lieux Saints chrétiens. Bien que l'article 5 n'accorde pas de droit aux chrétiens de faire le pèlerinage en Terre Sainte¹¹⁶ et ne crée pas d'obligation positive de la part de l'Etat d'Israël¹¹⁷, il reste néanmoins en accord avec le droit international¹¹⁸. L'article 3 par2 précise que "L'Etat d'Israël reconnaît le droit de l'Eglise catholique de satisfaire à ses fonctions religieuses, morale, éducative et charitable, d'avoir ses propres institutions et former, affecter et déployer son propre personnel pour les dites institutions ou aux fins de ces dites fonctions." Certains aspects de cet article sont précisés par d'autres articles. L'article 6 précise le droit à exercer les activités de l'église mentionné par l'article 3 par2 en reconnaissant son droit "à établir, maintenir et diriger des écoles et des centres d'études à tous les niveaux."

Les articles 3 et 9 précisent, quant à eux, le droit de l'Eglise à l'exercice de l'activité caritative "par l'intermédiaire de ses

¹¹⁴ Sur cet acte voir JOBLIN (J.), "La liberté religieuse selon le Concile Vatican II", in D'ONORIO (J.B)(dir.), *La liberté religieuse dans le monde. Analyse doctrinale et politique*, Belgique, Editions Universitaires, 1991, pp.55-69, notamment pp.58-66.

¹¹⁵ FERRARI (S.), *op.cit.*, pp.400-401; voir aussi LANFRANCHI (M.P), *op.cit.*

¹¹⁶ WASTON (G.R.), *op.cit.*, p.498.

¹¹⁷ *Ibid.*, p.507.

¹¹⁸ *Ibid.*, p.525-526.

institutions hospitalières et sociales". Le droit à la liberté religieuse n'est pas absolue selon l'accord fondamental. En plus des limites qui se trouvent dans les instruments internationaux comme l'article 18 du Pacte de 1966 et l'article 18 de la déclaration universelle, des limites accordent certains droits.¹¹⁹ Autrement dit, quand il s'agit de la reconnaissance de l'intérêt à favoriser le pèlerinage¹²⁰ ou l'intérêt commun à promouvoir et encourager les échanges culturels¹²¹, il n'y a pas de limites. Dans ces derniers cas, il n'y a pas de limites car il n'y a pas de droits. L'accord fondamental ne reconnaît ni un droit au pèlerinage¹²² ni un droit aux échanges culturels.

Enfin, le *statu quo* a une incidence certaine sur la liberté religieuse.

Le *statu quo* se définit comme "la réglementation très minutieuse de la répartition des Lieux Saints entre les confessions chrétiennes au point de vue de la possession, des droits et de l'usage."¹²³

Du côté des latins, les droits dans les Lieux Saints appartiennent à la Custodie de la Terre Sainte. L'article 4 de l'accord du 10 novembre accorde la personnalité juridique à cette institution. Est-ce que le Saint-Siège viserait à consolider sa position dans les Lieux-Saints au détriment de la Custodie de la Terre Sainte? Une modification dans le *statu quo* est-elle opérée?

Dans l'article 4 de l'Accord fondamental, et alors même qu'Israël affirme son engagement à maintenir le *statu quo* dans les Lieux Saints chrétiens auxquels il s'applique et les droits respectifs des communautés chrétiennes en place, "le Saint-Siège affirme l'engagement continu de l'Eglise catholique au respect du *statu quo* susmentionné et desdits droits". Le paragraphe 2 de ce même article précise même que cette disposition "s'appliquera nonobstant une interprétation contraire à quelques articles dans cet accord fondamental". Si les parties ont prévu qu'en cas de contradiction entre le principe du maintien du *statu quo* et une autre disposition de l'Accord fondamental, le premier prévaudra, en revanche, la

¹¹⁹ Articles 3, 6, 8, et 9 de l'Accord fondamental.

¹²⁰ *Ibid.*, article 5

¹²¹ *Ibid.*, article 7.

¹²² Ce qui est considéré par certains auteurs comme conforme au droit international des droits de l'homme WASTON(G.R.), *op.cit.*, p.525-526.

¹²³ COLLIN (B.), *Le problème juridique des Lieux Saints*, Sirey, Paris, 1956, p. 179.

question de la primauté du droit applicable n'a pas été prévue dans les cas de contradiction entre l'Accord fondamental et l'Accord sur la personnalité juridique. Deux interprétations sont alors possibles.

- En vertu du principe selon lequel la loi nouvelle prévaut sur la loi antérieure, il semblerait que l'Accord sur la personnalité prévale sur l'Accord fondamental. En effet, l'article 30§3 de la Convention de Vienne sur le droit des traités énonce que "lorsque toutes les parties au traité antérieur sont également parties au traité postérieur, sans que le traité antérieur ait pris fin ou que son application ait été suspendue en vertu de l'article 59, le traité antérieur ne s'applique que dans la mesure où ses dispositions sont compatibles avec celles du traité postérieur"¹²⁴. Le droit international postule également, en vertu du principe *specialia generalibus derogant*, qu'un traité ayant un caractère spécial doit prévaloir sur un traité de caractère général¹²⁵. Dans notre cas, l'Accord sur la personnalité peut être considéré comme un traité à caractère spécial et l'Accord fondamental un traité à caractère général.

D'un autre côté cependant, certains indices semblent plutôt indiquer la supériorité de l'Accord fondamental sur l'accord sur la personnalité. D'abord, le titre de l'accord sur la personnalité insiste sur le fait qu'il est conclu consécutivement à l'Accord fondamental. Ensuite, l'article 1 de l'accord sur la personnalité juridique dit qu'il est conclu sur la base des dispositions de l'Accord fondamental. Enfin, l'article 11.1 montre bien la hiérarchie existant entre ces deux accords¹²⁶.

¹²⁴ Cet article a une valeur coutumière, Voir MUS (J.B.), "Conflicts Between Treaties in International Law", *Netherlands International Law Review*, 1998, pp.208-234, pp.211-213.

¹²⁵ NGUYEN(Q. D.), et autres *op. cit.* pp.265-266

¹²⁶ "Without derogating from any provision, declaration or statement in the Fundamental Agreement, the ecclesiastical legal persons in existence at the time of the entry of this Agreement into force are deemed as being legal persons in accordance with the provisions of this Agreement, if listed in the ANNEXES to this Agreement, which are specified in §4" (Sans déroger aucunement à ce que prévoit, déclare ou énonce l'Accord fondamental, les personnes juridiques ecclésiastiques existant au moment de l'entrée en vigueur du présent Accord sont considérées comme étant des personnes juridiques conformément aux dispositions de ce dernier, si elles figurent dans la liste établie dans les Annexes de cet Accord, spécifiés au §4).

Conclusion

A titre de conclusion, trois remarques s'imposent. On constate tout d'abord que les Musulmans jouissent dans certains domaines d'une protection oblique en raison de similitudes de certaines prescriptions religieuses, comme l'interdiction de l'élevage du porc, de la viande *cachère* ou la possibilité de se laisser pousser la barbe. Cette protection des Juifs et des Musulmans limite la liberté commerciale des Chrétiens dont la religion ne reconnaît pas certaines de ces prescriptions. La deuxième remarque découle du déséquilibre, au profit des Juifs, de la protection de la liberté religieuse. Ce déséquilibre est particulièrement manifeste dans les domaines des jours de repos, de la reconnaissance des lieux saints (uniquement juifs dans la loi de 1967 sur la protection des lieux saints), de la préférence donnée à l'éducation religieuse juive au détriment de celles des Témoins de Jéhovah ou des Musulmans. A tout cela, il faut ajouter le financement des institutions religieuses juives et l'absence de tels financement pour les institutions des religions minoritaires.

La troisième remarque met en évidence une protection spécifique accordée aux catholiques, aussi bien par la France que par le Saint-Siège. Une liberté religieuse est garantie aux catholiques au niveau des exemptions fiscales, de la reconnaissance des écoles et des hospices religieux et surtout au niveau de la gestion autonome de l'église¹²⁷.

¹²⁷ Voir sur ce dernier aspect : ABOU RAMADAN (M.), "L'accord de 1997 entre Israël et le Saint-Siège: Quelles incidences pour les Palestiniens et le statut de Jérusalem?", *Monde arabe - Maghreb Machrek*, No.161, 1998, pp.115-126.

ACTS OF BLASPHEMY AGAINST ISLAM BY MUSLIMS IN EGYPT: IS THE DEATH PENALTY WRITTEN IN THE QUR'AN?

DECLAN O'SULLIVAN

There is an initial introduction to the definition of the act of blasphemy within Islam, and how this concept can be legally determined, in its various forms. There is also a short analysis of the different legal school's opinion as to whether or not the accused are able to repent their deeds before the accusations could lead to a court case. In this context, there is a brief reference to how Islamic scholars and jurists interpreted the ahadith (Traditions) to establish the relevant legal punishments for blasphemy. This is followed by a detailed assessment of how certain verses in the Qur'an have been selected by those who interpret them, to promote the death penalty as the established and standardised punishment for blasphemy. Attention is also paid to those scholars who reject this interpretation, as they argue that it does not reflect the Qur'anic Message. Finally, some very recent modern cases of blasphemy that have occurred in Egypt are assessed in some detail. These include the cases of the feminist writer Nawal al-Sa'adawi, in April 2001 and Salaheddin Mohsen who was imprisoned in January 2001. The article also covers the case of Farag Foda who was convicted of blasphemy and was then shot dead in the street, in 1992 and the case of Naguib Mahfouz, the first Egyptian Nobel Prize winner, who had also been accused of blasphemy and was later stabbed in the neck, in a knife attack, in 1994. Other cases are also discussed, and the conclusion provides an overview of the present situation in Egypt, and within Islamic law in general. The question is then raised as to how the historical interpretation of the Qur'an, together with the legal documents of the different Islamic schools of law, could respond to the need for a change in the way in which the law on punishment for blasphemy is presently implemented.

1. Blasphemy within Islam – Definition

The terms of blasphemy within Islam consists of several possible forms, *Sabb Allah* (to vilify, slur, insult, blaspheme against God), *Sabb al-Rasul* (blasphemy against the Messenger), this is also known as *Sabb al-Nabi* (blasphemy against the Prophet), and there is also *Sabb al-sahabi* (to insult one of the Companions of the Prophet). The blasphemer is a *sabbab*.¹ The main words used for blasphemy in Arabic are *sabb* (abuse, insult) and *shatm* (abuse, vilification).² Lutz Wiederhold expands on these words, in his recent article when signifying that:

“In addition, there are a number of other terms that are used less frequently in order to describe acts of blasphemy, such as la’n (cursing, malediction), ta’n (accusing, attacking), idha (harming, hurting), or the verb nala with the preposition min (do harm to somebody, defame).”³

The use of the word *la’n* will be presented in further detail below here. Mohammad Hashim Kamali in his work *Freedom of Expression in Islam* makes: *“a general statement that classical Islamic law penalises both blasphemy and apostasy with death – the juristic manuals of fiqh (jurisprudence) across the madhahib (the four Islamic Schools of law⁴) leave us in little doubt that this is the stand of the*

¹ Kamali, Mohammad Hashim, *Freedom of Expression in Islam*, 1997, Islamic Texts Society, Cambridge, UK, p.326

² Wiederhold, Lutz, ‘Blasphemy against the Prophet Muhammad and his Companions (*sabb al-rasul, sabb al-sahabah*): The Introduction of the Topic into Shaf’i Legal Literature and its Relevance for Legal Practice under Mamluk Rule’ in *Journal of Semitic Studies*, Vol.XLII, No.1, Spring 1997, p.40

³ Wiederhold, Lutz, *ibid.*, p.40

⁴ The four Islamic schools of Sunni law are the Hanafi, Maliki, Shafi’i and Hanbali, named after their founders: Imam Abu Hanifah, 80-150AH, circa 700-767AD (full name: Abu Hanifah al-Nu’man bin Thabit.), Malik bin Anas, 93-179AH, circa 712-795AD (full name: Malik bin Anas bin Malik bin Abu ‘Aamir al-Asbahi Malik.), Muhammad bin Idris Shafi’i, 150-204AH, circa 767-820AD, (full name: Muhammad bin Idris bin Al-‘Abbas bin ‘Uthman bin Shafi’ bin As-Sa’ib bin ‘Ubaid bin ‘Abd Yazid bin Hashim bin ‘Abdul-Muttalib bin ‘Abd Manaf Al-Qurashi Al-Makki) and Ibn Hanbal, 164-241AH, circa 780-850- AD, (full name: Ahmad bin Muhammad bin Hanbal Ash-Shaibani), see Shihabuddin, Ahmad bin ‘Ali bin Muhammad bin Muhammad bin Ahmad Al-Kinani Ash-Shafi’i, (known generally as Al-Hafiz Ibn

law.”⁵ However, he then goes on to raise the important issue that: “*despite the remarkable consistency that one finds on this point, the issue of punishment by death for apostasy is controversial, and various opinions have been recorded on the matter ever since the early days of Islam.*”⁶

A major, ever present, problem is the actual difficulty in defining the concept of blasphemy. It has always been an offence with a very wide scope. Thus it becomes complicated to mark its boundaries. Kamali argues that this is also the case within Christianity and Judaism. A main obstacle to a precise definition within Islam is that there is no specific definition of blasphemy in the *fiqh* (jurisprudence) literature, as it is cited in these legal documents to be included under the offence of apostasy and treated within that category. Kamali suggests though, that blasphemy has its own classification as being: “*a contemptuous and hostile attack on the fundamentals of religion which offends the sensibilities of its adherents. It is on this basis that blasphemy can be distinguished from apostasy, for the latter can take place without any contemptuous attack or sacrilege being committed.*”⁷ The overall reason for subsuming blasphemy under apostasy is based on the idea that when someone blasphemes the essential nature of a faith, in doing so, they simultaneously abandon it. This is understandable, but there is an important need for a unique definition of blasphemy on its own, to establish the crime itself because, obviously a non-Muslim can only commit blasphemy against Islam, but *not* become an apostate, by leaving it.

From a linguistic perspective, the origin of the word ‘blasphemy’ can be derived from the Greek words *blapto* (to harm) and *pheme*

Hajar Al-Asqalani), *Bulugh Al-Maram min Adillat Al-Ahkam: Attainment of the Objective according to Evidence of the Ordinances, (with brief notes from the book Subul-us-Salam by Muhammad bin Ismail As-Sanani)*, 1996/1416, Dar-us-Salam Publications, Riyadh, Saudi Arabia, p.580, p.585 and p.588, also see Khadduri, Majid, *The Islamic Laws of Nations; Shaybani's Siyer*, 1966, The Johns Hopkins Press, Baltimore, USA, p.302, and also see Nasir, Jamal, J., *The Islamic Law of Personal Status*, 1986, Graham and Trotman Ltd., London, p.14-16.

⁵ Kamali, Mohammad Hashim, *op.cit.*, p.212-213.

⁶ *Ibid.*, p.213.

⁷ *Ibid.*, p.213.

(speech), which, when placed together, refer to an insult or defamation.⁸ For a broad definition of blasphemy, as perceived in Islam, the *Encyclopedia of Religion and Ethics* suggests that it is:

*“all utterances expressive of contempt for God, for His Names, attributes, laws, commands and prohibitions...such as the case, for instance, if a Muslim declares that it is impossible for Allah to see or hear everything, or that Allah cannot endure to all eternity, or that He is not one (wahid)... All scoffing at Muhammad or any other prophets of Allah is also to be regarded in Islam as blasphemy.”*⁹

Kamali refers to this definition as being so broad that there is a very flexible scale of acts that it can apply to, thus combining different and overlapping concepts. This definition does not offer a clear understanding of what is perceived to be an accurate accusation of blasphemy *per se*. It means that there is a vague boundary, not presenting precise distinctions between the similar concepts of apostasy from Islam (named as *ridda* and *irtidad*), heresy (*zandaqah*)¹⁰ and the denial of Islam, or disbelief (*kufr*). He refers to

⁸ Ibid., p.214.

⁹ Ibid., p.214, Also see *Encyclopaedia of Religion and Ethics*, ed. James Hastings, New York, T&T Clark, 1908, Vol.II, p.672.

¹⁰ A *zindiq* is “anyone who, professing to be a Muslim, is really an unbeliever, or anyone who belongs to no religion,” *The Encyclopaedia of Islam*, Volume IV, 1978, p.771. Also, in a general reference to heresy it relates to those who are considered as atheists (*zanadiqah*; single as *zindiq*), see Kamali, *op.cit*, p.330. *Zandaka / zandaqah* is defined as “heresy, unbelief” and this word had an important emphasis and relevance to the “convert of the Manichaeans.” in 982AD, *The Encyclopaedia of Islam*, Volume VI, p.421 Essentially, *zindak* and the other forms derived from it are terminology used in *Sharia*’ courts to describe the heretic whose written work and spoken teachings are considered as a danger to the state. The conviction of this crime is potentially with the sentencing of the death penalty, based on an interpretation of both the Qur’anic verses 5:33 and 26:48. It also induces damnation by the Maliki school of law, which states that it is useless to ask the convicted *zindak* to recant (*istitaba*). However, diametrically opposed to this position, is the Hanafi school of law in their *takfir* [the denunciation, or excommunication of an unbeliever]. Bernard Lewis, *Islam in History: Ideas, People and Events in the Middle East*, 1993, Open Court, Chicago, USA, p.290 and also H. A.R. Gibb and J. H. Kramers, *Shorter Encyclopaedia of Islam*, 1953, p.659.

the differing approach of Judaism, which attempts to confine the scope of what it seen as blasphemy, where it does not include the act of simple disbelief of faith. Also, unlike modern Western law, the simple renunciation of faith is not included within the category of blasphemy.

Isabel Fierro, within her work *Andalusian 'Fatawa' on Blasphemy*, argues that there is little consistency, with much disagreement (*ikhtilaf*) between the Islamic legal scholars about the punishment to be given to those convicted of blasphemy against Islam, the Qur'an and/or the Prophet Muhammad. As she states:

"Punishment for blasphemy, like that for apostasy, is usually (but not without ikhtilaf) included among the hudud (sing. hadd). Both are crimes against religion and can lead to the death penalty¹¹"

The apostate is granted the possibility to repent (*al-istitaba*) with a period of three days, to allow the possibility of returning to Islam.¹² The possibility for repentance (*al-istitaba*) is denied to those accused of *zandaqa*, thus perceived to be a *zindiq*. Malik ibn Anas in his work *al-Muwatta'* argues that a *zindiq* is an apostate who overtly acts as a believer, hiding their 'apostasy' of disbelief (*kufr*).¹³ If the apostate does not repent, he is then sentenced to death by the sword (*man baddala dina-hu fa-qtulu-hu*), in the manner of being beheaded, as can be seen by the expression of the *hadith*: *man jayyara dina-hu fa-dribu 'unqa-hu*.¹⁴

Within Islamic law, there is an emphasis on protecting the honour of the Prophet and the Islamic community, rather than regulating religious belief. As Malise Ruthven explains, the Islamic law of blasphemy is only applied in Muslim countries. Classical jurists,

¹¹ Fierro, Isabel, 'Andalusian 'Fatawa' on Blasphemy' in *Annales Islamologiques*, Institut Français D'Archéologie Orientale du Caire, 1991, Tome XXV, p.103.

¹² Safwat, Safia F., 'Offences and Penalties in Islamic Law,' in *The Islamic Quarterly*, The Islamic Cultural Centre, London, 1982, Vol. 26, No. 3, p.168, also see An-Na'im, Abdullahi Ahmed, 1986, 'The Islamic Law of Apostasy and its Modern Applicability: A Case From The Sudan' in *Religion*, Vol. 16, p.211.

¹³ Fierro, Isabel, *Andalusian 'Fatawa' on Blasphemy*, op.cit., in footnote 4 on p.103

¹⁴ Ibid. p.103. No translation of the Arabic transliteration was provided.

having divided the world into the *Dar al-Harb*¹⁵ (the abode of war) and *Dar al-Islam* (the abode of Islam), *Dar al-Islam* is the 'liberated' territory where the law, or 'God's final revelation to mankind' is applied in its fullness. It is clear that:

*"Its rulers, apart from the caliphs, who virtually disappeared from political view after the tenth century CE, are not theocrats: in theory they cannot legislate. The Law having been revealed in its perfection, their duty is to maintain it by 'ordering the good and forbidding the evil.' Subjects are enjoined to obey their rulers, however arbitrary: in a famous phrase quoted with approval of Ibn Taymiyyah, 'the Sultan is the Shadow of God on earth. Sixty years with an unjust imam is better than one night of anarchy.'"*¹⁶

2. Repentance for Blasphemy by Muslims

Blasphemy (*shatm*)¹⁷, when specifically used against both Allah (*sabb Allah*) and His Messenger, the Prophet Mohammad (*sabb al-rasul*) in normally accepted and handled within the same category as that of apostasy. This is because a blasphemer, and also one who is believed to be magician (*sahir*) are those who undertake the acts of *kufr* (unbelief). However, specifically on this point, the Maliki school of law have established a separation between the blasphemer and the apostate. This school argues that a blasphemer should not be given the chance to repent or to recant his acts. Also, Fierro argues that within the Maliki school the penalty may not be death, but a discretionary punishment (*ta'dib, adab*), as this final sentence should

¹⁵ This concept also exists within Christianity. There is Christian theological belief that the world is divided into 'the territory of believers' and those who live in the *in partibus* (in heretical territory). This derives from the original form of *in partibus infidelium* which is the Latin for 'in the region of the unbelievers,' Sykes, J.B. (Ed.), *The Concise Oxford Dictionary of Current English*, 1988, The Oxford University Press, Oxford, p.517

¹⁶ Ruthven, Malise, 1991, *A Satanic Affair: Salman Rushdie and the Wrath of Islam*, The Hogarth Press, London, p.51

¹⁷ Fierro, Isabel, Andalusian '*Fatawa*' on Blasphemy, op.cit. p.107. Also see Wiederhold, Lutz, op.cit, p.40

reflect the degree of seriousness attached to the words said by the accused, which initiated the accusation for the act of blasphemy.¹⁸ This is a crucial point to raise, as any discretionary punishment indicates the acceptance that the crime ought to be categorised within the *ta'zir* (discretionary punishment) system, as opposed to *hudud* crimes and this punishment system.¹⁹

Fierro also states that capital punishment is not clearly specified within *Shari'ah*. Although one could simply assume that a blasphemer would be killed, beheaded by the sword, as is the sentence for an apostate; other forms of execution were undertaken, such as "whipping, decapitation, hanging, burning and crucifixion."²⁰ The punishment of crucifixion (*salb*) is stated within the Maliki doctrine, particularly in the work entitled *Muhtasar*, by Halil ibn Ishaq (d.776AH/1374AD). He based his own work mainly on the previous work undertaken by the respected *Qadi* (judge) 'Iyad (d.544AH/1149AD) who wrote *al-Sifa' bi-ta'rif huquq al-Mustafa*.

It interesting to note that *Qadi* 'Iyad not only based his work of legal interpretation purely on the relevant evidence he found in the Qur'an and the appropriate *ahadith* (Traditions), together with earlier

¹⁸ Fierro, Isabel, Andalusian '*Fatawa*' on Blasphemy, *ibid.* p.104

¹⁹ *Ta'zir* is the discretionary punishment, delivered on the assessment of given circumstances to provide deterrence of the offence to re-occur; Kamali, Mohammad Hashim, *op.cit.*, p.94 and p.329. The Islamic legal system consists of three forms of punishment, *hudud*, or *hadd* in single form, (fixed punishments stated within the Qur'an,) *Qisas* (retaliation) and *Ta'zir* (discretionary punishment). *Hudud* and *Qisas* are both restricted to crimes where both the offences and the punishments are prescribe within the Qur'an and Sunnah. See Mohammad Iqbal Siddiqi, *The Penal Law of Islam*, 1991, International Islamic Publishers, New Delhi, p.158 also see El-Awa, Mohammad Selim, *Punishment in Islamic Law: A Comparative Study*, American trust Publications, Indianapolis, 1982, p.96 also see Tahir-ul-Qadri, Muhammad, *Islamic Penal System and Philosophy*, Minhaj-ul-Qur'an Publications, Lahore, 1995, p.259, p.429 See also Tahir-ul-Qadri, Muhammad, *Classification of Islamic Punishments*, Minhaj-ul-Qur'an Publications, Lahore, 1988, p.5, and see O'Sullivan, Declan, '*Al-Hudud: Definition of Crimes and Punishments stated within the Qur'an and Sunna – Focusing on 'Apostasy' [Ridda wa irtidad: as a Hadd: in Le Courrier Du Geri – Recherches D'Islamologie et de Theologie Musulmane*, in 'Vol. 3, No. 1-2, Printemps-Automne 2000' January 2000, GERI (Groupe d'Etudes et de Recherches Islamologiques) in l'Université Marc Bloch de Strasbourg, France, p.41-72.

²⁰ Bernard Lewis, *Islam in History*, *op.cit.* p.291

Maliki doctrinal documentation by former authorities. It also became clear that he had based his conclusions on the legal precedents formally established by two *fatwas* that had been issued on the cases of blasphemy in Al-Andalus (presently known as Andalusia) during the 3rdAH /9thAD century. The two cases involved Harun ibn Habib and Yahya ibn Zakariya al-Hassab and both of these *fatwa* were issued during the reign of 'Abd al-Rahman II, who reigned in that Spanish region from 206AH/822AD until 238AH/852AD. They are the only two recorded cases of two Muslims who were accused and convicted of blasphemy against God during 'Abd al-Rahman II's reign.²¹ They are very interesting cases to assess through further reading, in order to analyse and understand the very specific circumstances that surrounded them, that also led to two very different sentences for those convicted of the same crime of blasphemy.²² However, they will not be covered now, within the limited space of this present article.

Kamali makes it apparent that differences of opinion are presented by the four schools of law concerning whether the perpetrator of blasphemy should be requested to repent and also whether such repentance, if offered, would be acceptable and admissible within the rules of law. In the context of blasphemy, it is essential for the perpetrator to have their repentance accepted, as this would result in the unconditional acquittal of the case. He points out that there are disagreements among jurists, and significantly, amongst jurists of the same school of law. This offers some doubt when trying to determine the legal position on this issue.²³

The Hanafi school argue that it is recommended to request the blasphemer to repent (*istitabah*) and return to the faith of Islam, while Imam Malik finds such repentance unnecessary. The Shafi'is and Hanbalis have differing views, one corresponding with the Hanafi's and the other with Imam Malik's view. The majority opinion is that

²¹ It is also clearly recorded that, at that time, a group of Christians and crypto-Christians had sought martyrdom through the acts of insulting Islam and God's Prophet Muhammad, knowing the result would mean being executed due to the blasphemous acts; Fierro, Isabel, *Andalusian 'Fatawa' on Blasphemy*, op.cit., ibid. p.104

²² ibid. p.104

²³ Kamali, Mohammad Hashim, op.cit., p.233

istitabah is a necessary requirement to be received before any punishment is delivered. As already mentioned, there is a period of three days, which are allowed for the accused to consider their position and offer a repentance within this time-scale. However, the Malikis do not consider that any time for repentance should occur, based on the *hadith* 'Kill whoever changes his religion.' Some Shafi'i and Hanbali jurists accept this view. The support for the acceptance of repentance is based on a tale from A'ishah (a wife of the Prophet Muhammad) which describes how a woman renounced Islam on the day of the battle in Uhud and the Prophet Mohammad ordered that she should be requested to repent of her own will.²⁴ In his work covering the concept of apostasy, Yahya b. Ali Al-Shawkani intertwines both views, by maintaining that it is valid to ask an apostate to repent if the accused has acted from the stance of ignorance. But he argues that repentance would not be a valid option if the accused also claims to have superior 'knowledge' and is self-righteous.²⁵

When the accused has insulted God and/or the Prophet Muhammad then repentance, whether requested for, or not, is admissible according to the majority of jurists. It is the need for repentance and its importance that is addressed by differing approaches from the schools of law. The predominant view of both the Hanbalis and Malikis is that repentance will not exempt the blasphemer from punishment in this world, although it would help him if he was sincere, as it would then be more beneficial for him in the 'hereafter'.²⁶ Under these conditions, the Hanbalis and Malikis do not draw any distinction between insulting either God or the

²⁴ Kamali, Mohammad Hashim, *op.cit.*, p.233 Also see Al-Shawkani, Yahya b. Ali, *Nayl al-Awtar: Sharh Muntaqa'l-Akhbar*, no date given, Mustafa al-Babi al-Halabi, Cairo, VII, p.221, and also Ibn Qudamah, Muwaffaq al-Din Ibn Qudamah al-Maqdisi, *al-Mughni*, 1267AH, Dar al-Manar, Cairo, third edition, X, p.74 and also Al-Yahsabi, al-Qadi Abu'l-Fadl 'Iyad, *al-shifa' bi-Ta'rif Huquq al-Mustafa*, (annotated by Ahmad al-Shamani), no date given, Dar al-Fikr li'l-Tiba'ah wa'l-Nashr, II, p.254

²⁵ Kamali, Mohammad Hashim, *Ibid.*, p.233 Also see Al-Shawkani, *Nayl al-Awtar*, *Ibid.*, VII, p.221

²⁶ Kamali, Mohammad Hashim, *Ibid.*, p.234 Also see Muhammad 'Ali b. Ahmad b. Sa'id al-Zahiri Ibn Hazm, *al-Muhalla*, no date given, Maktabat al-Salam al-'Alamiyyah, Cairo, XI, p.411 and also Al-Buhuti, Mansur b. Yunus b. Idris, *Kashshaf al-Qinna' an Matn al-Iqna'*, 1968, Maktabat al-Nasr al-Hadithah, Riyadh, VI, p.168

Prophet Muhammad. Either act is considered the same offence and should, thus to be treated on an equal level. The position is based on the cases dealt with by the Caliph 'Umar b. al-Khattab who gave equal punishments on *Sabb al-Allah* and *Sabb al-Rasul*. In both cases he never requested repentance from the blasphemers:

*"Thus it is said that the main difference between blasphemy and apostasy is that the latter is open to repentance but the former is specifically not."*²⁷

However, contrary to this, there is another view held by the Hanbali and Maliki schools of law, both of which state that it is obligatory for a convicted blasphemer to be given every opportunity to repent and return to Islam.²⁸ A further difference of opinion is present in the other two schools of law, as the Hanafi and Shafi'i jurists classify blasphemy within the same category as apostasy. They argue that repentance from both the blasphemer and the apostate is acceptable as legally admissible. The blasphemer is to be allowed three days, as is the apostate, to contemplate, and consider whether to repent and return to Islam. The three days begin on the day of conviction. During the three days the convicted is entitled to food, clothing and anything else felt necessary. Repentance, in the case of a Muslim who has become an apostate, consists of their return to Islam, by reciting the testimonial of faith (*kalimat al-shahadah*).²⁹

²⁷ Kamali, Mohammad Hashim, *Ibid.*, p.234 Also see Ibn Taymiyya, Taqi al-Din, 1398/1978, *al-Sarim al Maslul 'ala Shatim al-Rasul*, edited by Mohammad Muhyi'l-Din 'Abd al-Hamid, Beirut, Dar al-kitab, p.302

²⁸ al-Samara'i, Nu'man 'Abd al-Razzaq, 1968, *Akham al-murtadd fi al-shariat al-Islamiyyah*, Dar al-'Arabiyyah li'l-Taba'at wa'l-Nashr wa'l-Tauzi, Beirut, Lebanon, p.104, also see Kamali, Mohammad Hashim, *Ibid.*, p.234 Also see Al-Jaziri 'Abd al-Rahman, *Kitab al-Fiqh 'ala'l-Madhahib al-Arba'ah*, 1392AH, Dar al-Fikr li'l-Tiba'ah wa'l-Nashr, Beirut, V, p.425

²⁹ There are two statements within it, thus it is entitled the *shahadatun*, and is spoken by devout Muslims to express their unquestionable belief of the truth: "*ashhadu an la ilaha illa-Llah, wa ashhadu anna Muhammadan rasulu-Llah*" (None has the right to be worshipped but Allah, and Muhammad is the Messenger of Allah), Az-Zubaidi, Al-Imam Zain-ud-Din Ahmad bin Abdul-Lateef, *The Translation of the Meanings of Summarized Sahih Al-Bukhari, Arabic-English*, translated by Khan, Muhammad Muhsin, 1994, Maktaba Dar-us-Salam Publications, Riyadh, Saudi Arabia, p.1068, also see Cyril Glasse, *The Concise Encyclopaedia of Islam*, Stacey International, London, 1989, p.370

Concerning a Muslim apostate, the Hanafi and Shafi'i schools of law accept his repentance and return to Islam for a maximum of only four states of apostasy. If the apostate repents, then commits apostasy on a fifth occasion and returns to Islam, the fifth return to the faith will carry no weight. On the first four times the apostate is allowed the three day consideration time, in order to repent. This procedure is based on a report about the Prophet Muhammad having asked a Nabhan 'for repentance four or five times.' This is reported by *Qadi 'Iyad al-Yahsabi* (d.544AH/1149AD), who states that Ibn Wahab reported from Imam Malik that on each occasion that the apostate committed the offence, he should be asked to repent permanently. There is also the same ruling by Imams Shafi'i and Ibn Hanbal.³⁰ Another report holds that a differing time-scale for repentance is held. It states that 'Ali b. Abi Talib held the view that an apostate should be called to repentance over a period of two months. Further more, both Ibrahim al-Nakha'i, who taught Imam Abu Hanifah, and Sufyan al-Thawri hold the view that the door of repentance should remain open indefinitely, giving the apostate the length of his natural lifetime to be allowed to re-embrace Islam.³¹

3. Interpretation of the *ahadith* (Traditions) for the Punishment of Blasphemy

As Wiederhold suggests, concerning the relevant *hadith* that researchers have analysed covering this topic, it is quite correct to argue that all the respected *hadith* collections contain consistent traditional themes. The main emphasis is that any vilification of the Prophet and/or his Companions was considered completely intolerable and therefore, was expressly forbidden by some religious scholars at the time when the *hadith* books were compiled.³² However, there is a very important point that he also observes, which explains

³⁰ Kamali, Mohammad Hashim, *Ibid.*, p.234. Also see Al-Yahsabi, al-Qadi Abu'l-Fadl 'Iyad, *al-shifa' bi-Ta'rif Huquq al-Mustafa*, *Ibid.*, II p.260

³¹ Kamali, Mohammad Hashim, *Ibid.*, p.235, Also see Al-Yahsabi, al-Qadi Abu'l-Fadl 'Iyad, *al-shifa' bi Ta'rif Huquq al-Mustafa*, *Ibid.*, II p.260, and also Ibn Qudamah, Muwaffaq al-Din Ibn Qudamah al-Maqdisi, *al-Mughni*, *op. cit.*, VIII, p.125, and also Al-Shawkani, Yahya b. Ali, *Nayl al-Awtar*, *op. cit.*, VII, p.221

³² Wiederhold, Lutz, *op.cit.*, p.41-42

why a certain level of confusion and ambiguity has arisen in the legal sentencing of this crime. As he explains, following the point just made:

*"Be that as it may, the extent to which the hadiths [sic] in question reflect theological disputes regarding the role of the Prophet and his Companions in the first two centuries of Islam appears far from being examined in an exhaustive manner."*³³

One primary example of a case involving utter intolerance of blasphemy against the Prophet Muhammad, (*sabb al-rasul*) occurred in the 2ndAH /8thAD century, in which which imposed the death sentence was imposed. This particular conviction involved Muhammad b. Sa'id b. Hassan al-Urdunni, who was executed in 153AH /770AD, for having added one sentence to the end of a *hadith* that he had related to other people. The *hadith* in question makes reference to the well-known statement expressed by the Prophet, that: *"I am the seal of the prophets; there will not be any Prophet after me."* In his own version of the *hadith*, al-Urdunni attached to the end of this phrase his extra comment, claiming that the Prophet had also explained: *"if God does not intend otherwise."* This led al-Urdunni to be accused and convicted of a blasphemous act by the political and religious authorities of the time.³⁴ With this case, it can be argued that there was clearly a very strong feeling that anything even remotely close to being perceived as an act of blasphemy against the Prophet was considered intolerable during the 2ndAH /8thAD century. This level of intolerance can also be found in the legal manual *Muwatta'* authored by 'Abdallah b. Wahb (d.197AH/812AD).

In this manual, in the chapter on *al-muharabah*, 'Abdallah b. Wahb refers to anybody who commits any form of *sabb* (insult) against the Prophet, which could potentially lead to the death penalty for such behaviour. Referring to the possibility of the offender having the right to repent before being punished, the work quotes from

³³ Wiederhold, Lutz, *ibid.*, p.43

³⁴ Ess, Joseph van, *Theologie und Gesellschaft in 2 und 3 Jahrhundert Hidschra*, Berlin, 1991, vol.I, p.136-137. Also see Wiederhold, Lutz, *ibid.*, p.43

Malik ibn Anas, whose opinion on this issue is that any blasphemer, specifically those who express insults against the Prophet Muhammad, whether they are Muslims or Christians, are not to be regarded as having any chance to state their repentance. The same paragraph also reports the opinion from the Caliph 'Umar b. 'Abd al-'Aziz (the Caliph from 101-104AH/717-720AD), who emphasised that only those who insulted and/or blasphemed the Prophet Muhammad himself, would be punished. Therefore, similar insults towards the Prophet's Companions, or any other prophets, were not considered as being equally punishable, at that time.³⁵

However, as time passed by, the 3rdAH/9thAD century, the opinion of jurists who focused on the legal sentencing for such crimes, had broadened more. The law then included that the act of insulting any of the Prophet's Companions would also be categorised as blasphemy and thus, the perpetrator would receive the established punishment for the act of *sabb al-rasul*. This change of the penalties for each crime can be seen in the work of a Maliki legal manual of the 3rdAH/9thAD century, entitled '*Utbiyyah*', compiled by the Maliki *faqih* (jurist), Muhammad al-'Utbi (d.255 AH/869AD).³⁶

The main source for the actual acts of blasphemy by using any verbal abuse or insults, when they are referred to by using the legal terminology of *sabb* and/or *shatm*, can be found within the collections of *ahadith* (Traditions). One particular *hadith* that is relevant to this debate, is the case of Abu Bakr who, in the presence of the Prophet Muhammad, was insulted by an unnamed man. During the man's expressions of abuse and insult, Abu Bakr was confused by the reaction of the Prophet, who had refrained from defending Abu Bakr, his Companion, and was also seen to be smiling while the insults were delivered. However, when Abu Bakr reciprocated the insults to the anonymous abuser, the Prophet became angry and rose to his feet, to leave. When the insulting interaction had terminated, Abu Bakr requested the Prophet to explain why he had not offered any support while Abu Bakr had been the receiver of the blatantly offensive comments. He also requested the Prophet to

³⁵ Muranyi, M., '*Abd Allah b. Wahb (125/743-197/812. Leben und Werk. Al-Muwatta'*. *Kitab al-muharaba*), Wiesbaden, 1992, p.287-288. Also see Wiederhold, Lutz, *ibid.*, p.43

explain why he had become angry when Abu Bakr had attempted to defend himself by returning equivalent comments of insult. The Prophet replied that while Abu Bakr had initially been calm while receiving the insults, an angel had entered the place and had replied for Abu Bakr, but when his reply had become equally offensive, the Prophet explained that the devil (*iblis*) had then entered into the argument, and he could not have remained seated there while the devil was present.³⁷

This *hadith* can be found in the collection of Abu Da'ud, where it is narrated by Sa'id ibn al-Musayyab, and also in the collection of Mishkat al-Masabih, narrated by Abu Hurayrah. It has also been reported by Ahmad Ibn Hanbal, the founder of the Hanbali school of law, in his work *Musnad*. The version held by Abu Da'ud reads as:

*"While the Apostle of Allah (peace be upon him) was sitting with some of his companions, a man reviled Abu Bakr and insulted him. But Abu Bakr remained silent. He insulted him twice, but Abu Bakr controlled himself. He insulted him thrice and Abu Bakr took revenge on him. Then the Apostle of Allah (peace be upon him) got up when Abu Bakr took revenge. Abu Bakr said: 'Were you angry with me, Apostle of Allah?' The Apostle of Allah (peace be upon him) replied: 'An angel came down from Heaven and he was rejecting what he had said to you. When you took revenge, a devil came down. I was not going to sit when the devil came down.'"*³⁸

This *hadith*, along with many others proffers the theme that the Prophet himself, personally presented. He promoted the concept of

³⁶ Wiederhold, Lutz, *ibid.*, p.43

³⁷ Wiederhold, Lutz, *ibid.*, p.41-42

³⁸ Abu Da'ud, Sulaiman bin Al-Ash'ath bin Ishaq Al-Azdi As-Sijistani, *Sunan Abu Da'ud*, edited by Muhammad Muhyi al-Din 'Abd al-Hamid, Matba'at Mustafa Muhammad, Cairo, no date given, *hadith* number 4878. Also see Ash-Shaibani, Ahmad bin Muhammad bin Hanbal, *Musnad*, Cairo, Vol.II, 1913, p.436 and also see Mishkat al-Masabih, found on e:\islamica\winhadis\winhadis.tex on CDROM *islamica: Digital Library of Islamic Software*, Islamic Computing Centre, London, [www.ummah.org/icc], *hadith* No.5102

total tolerance as be the priority for all Muslims when they endeavour to engage with non-Muslims and especially those who offer such hateful insults in any manner related to God, the Qur'an or Islam.

4. Interpretation of the Qur'an for the Punishment of Blasphemy

It is interesting to note how the use of both the terms *sabb* and *shatm* occur within the Qur'an and the *hadith* (Traditions), to determine how they were interpreted by jurists to be included within the context of *shari'ah* law. In the Qur'an, the words derived from *s-b-b*, in connotation of any abuse or insults, occur twice, but only in one verse, 6:108, as:

"wa-la tasubbu al-ladhina yad'una min duni allahi fa-yasubbu allaha 'adwan bi-ghayri 'ilmin

Abuse not those to whom they pray, apart from God, or they will abuse

God in revenge without knowledge."³⁹

This Qur'anic verse encourages the tolerance of all Muslims to completely accept that polytheists will worship idols, as they see such objects as 'divine,' but it is up to the polytheists to find their own way to the True faith, and only God has the authority to decide whether to punish them or not, should they remain in their 'ignorance' (*jahl*), which is a specific form of *kufr* (unbelief). It is interesting to discover that there is no mention within any verse of the Qur'an, which is directed towards the act of vilification, that uses either the verb *shatama*, or any other derivation from the root of *sh-t-m*.⁴⁰

Kamali suggests that the most detailed analysis of the treatment of blasphemy in the Qur'an, still remain the studies undertaken by Taqi al-Din Taymiyyah (d.728AH/1328AD), in his work *al-Sarim al-Maslul 'ala Shatim al-Rasul*. Within this work Ibn Taymiyyah also covers the punishment for apostasy and the evidence in the Qur'an

³⁹ Wiederhold, Lutz, op.cit., p.41. The English translation of the verses is from Arberry, Arthur, J., *The Koran: Interpreted*, Oxford University Press, Oxford, 1933, (first published in 1955 by Allen & Unwin Ltd., no place given), p.134

⁴⁰ Wiederhold, Lutz, *ibid.*, p.41

that relates to it.⁴¹ Ibn Taymiyyah wrote the book to illustrate the legal position on this topic, in reaction to the dispute he engaged in with a Christian cleric who was accused of insulting the Prophet.⁴² As Ruthven explains:

“Ibn Taymiyya links vilification of the Prophet with disparaging the Muslims: both constitute a hadd offence – that is an offence against the ‘boundaries’ set by God, which cannot be settled by compensation. According to Ibn Taymiyya, anyone defaming the Prophet must be executed, whether he is a Muslim or not. There is a disagreement among the experts about whether the blasphemer should be allowed to repent. Ibn Taymiyya comes down on the side of those who insist that even if the culprit repents, or converts to Islam in the case of a non-Muslim, he must be killed. Some authorities argued that Jews or Christians who cursed the Prophet should be killed unless they converted to Islam, and there are documented cases where this was applied.”⁴³

While Ibn Taymiyyah gives a meticulous survey of the diverse opinions held on the issue, he himself is consistent that blasphemy is liable to the mandatory death penalty, as the deciding judge has very little choice but to implement this punishment on given proof and also that the convicted offender does not need to be requested for repentance. Ibn Taymiyyah’s conclusions are equivalent to those of his predecessor, the Maliki jurist *Qadi ‘Iyad al-Yahsabi* in his work *al-shifa’ bi-Ta’rif Huquq al-Mustafa*. Both cover the authority of the Qur’an and cite from the same verses, both finding the same interpretation as to the applicable punishment.⁴⁴ Kamali argues that perhaps both Ibn Taymiyyah and *Qadi ‘Iyad al-Yahsabi*, although they were well-respected, distinguished and erudite authors, may have taken slightly too far their interpretation of the Qur’an on this

⁴¹ Kamali, Mohammad Hashim, op.cit., p.236 and also see Ruthven, Malise, *A Satanic Affair*, op.cit., p.51

⁴² Ruthven, Malise, *A Satanic Affair*, ibid., p.51.

⁴³ ibid., p.51

⁴⁴ Kamali, Mohammad Hashim, op.cit., p.236 Also see Al-Yahsabi, al-Qadi Abu’l-Fadl ‘Iyad, *al-shifa’ bi-Ta’rif Huquq al-Mustafa*, op. cit., Vol. II p.219

issue. Ibn Taymiyya has written copiously on blasphemy but maintained from the beginning that the death penalty for this act of insult against both God and His Messenger is provided by the Qur'an. More importantly, Ibn Taymiyya defends the punishment as being a Qur'anic command. Thus he sees it as a *hadd* crime, leaving a convicting judge with no option but to deliver the death penalty.⁴⁵

Ibn Taymiyya uses seven Qur'anic verses to defend his corollary of the death sentence, which include 9:61; 9:63; 58:5; and 8:12-13,⁴⁶ but the main focus of Ibn Taymiyya's hypothesis, and where he firmly bases his conclusion on the death penalty, is within verse 33:57-58:

إِنَّ الَّذِينَ يُؤْذُونَ اللَّهَ وَرَسُولَهُ لَعَنَهُمُ اللَّهُ فِي الدُّنْيَا وَالْآخِرَةِ وَأَعَدَّ لَهُمْ
عَذَابًا مُهِينًا. وَالَّذِينَ يُؤْذُونَ الْمُؤْمِنِينَ وَالْمُؤْمِنَاتِ بَغَيْرِ مَا كَتَبْنَا
فَقَدْ أَحْتَمَلُوا بُهْتَانًا وَإِثْمًا مُّبِينًا

*"Verily, those who insult/annoy (yu'dhuna) God and His Messenger, have been cursed by God in this world and in the Hereafter, and He has prepared for them a humiliating punishment. And those who insult/annoy believing men and women without due cause bear on themselves a calumny (buhtanan) and a glaring sin (ithman mubinan)."*⁴⁷

Ibn Taymiyya's assessment of the text in this verse brings him to an unquestionable conclusion that: *"This verse makes obligatory the death penalty for one who insults God and His Messenger."*⁴⁸ Also here, Ibn Taymiyya draws a parallel between *Sabb Allah* (insulting

⁴⁵ Kamali, Mohammad Hashim, *Ibid.*, p.237-238

⁴⁶ *Ibid.*, p.238,

⁴⁷ Kamali, Mohammad Hashim, *Ibid.*, p.240, Qur'an 33:57-58

⁴⁸ Kamali, Mohammad Hashim, *Ibid.*, p.240, Also see Ibn Taymiyya, *al-Sarim al-Maslul*, op. cit., p.40

and blasphemy against God) and the act of *Sabb al-Rasul* (blasphemy against the Messenger) and *Sabb al-Nabi* (blasphemy against the Prophet) which he perceives as being clearly drawn from the verse. Thus, he argues that anyone who insults the Prophet, will act in the same manner as anyone who insults God, so “*anyone who insults God is an infidel (kafir) and legally liable to be executed (halal al-dam).*”⁴⁹ In his interpretation of this verse, Ibn Taymiyya also distinguishes different penalties for someone who insults God and/or the Messenger compared to those delivered on those who insult just believers. The acts of the former receive great humiliation but the latter commit a major sin. He emphasizes that God will curse those who blaspheme, such as “*Cursing (la’nah) is the opposite of mercy (rahmah) [sic]: anyone whom God has cursed and precluded from His mercy both in this world and the next is certainly a non-believer (kafir).*”⁵⁰ To express the vast nature of the *la’nah* (also *la’n*) involved, Ibn Taymiyya uses a *hadith* that is related to the latter act. It states that:

لَعْنُ الْمُؤْمِنِ كَقَتْلِهِ

- “*cursing a believer is tantamount to killing him.*”⁵¹

The word for cursing (*la’n*) has also been explained by the Shafi’i jurist Taqi al-Din al-Subki, (d.755AH/1355AD), in his work *al-Fatawa*.⁵² Al-Subki presents the arguments by Ibn Hazm (d.456AH/1064AD), a prominent figure of the Zahiri school of Islamic law. Ibn Hazm declared “that cursing (*la’n*) is a sin which entails more severe legal consequences than merely to abuse (*sabb*).”⁵³

Kamali argues that Ibn Taymiyya has neglected to perceive the figurative style of the language used in this *hadith*, as he concluded

⁴⁹ Kamali, Mohammad Hashim, *Ibid.*, p.240

⁵⁰ *Ibid.*, p.241

⁵¹ p.241

⁵² al-Subki, Taqi al-Din, *al-Fatawa*, Beirut, no date given, vol.II, p.571-p.584. “Al-Subki is also the author of a treatise on blasphemy against the Prophet entitled *al-Sayf al-maslul ‘ala man sabba al-rasul*,” Wiederhold, Lutz, *op.cit.*, p.40 and also see footnotes 1 and 4 on p.40

⁵³ Wiederhold, Lutz, *ibid.*, p.55

that someone who has been cursed by God is then eligible for the death penalty – “*It is thus known that killing him is permissible (fa ‘ulima anna qatluhu mubah)*”⁵⁴ Kamali’s view is that cursing a believer alone does not warrant the curse from God, either in this world or the next, as this has been distinguished within the Qur’an as a separate crime from the act of insulting God and His Messenger. Insulting a Muslim is seen as an act of glaring sin (*ithman mubinan*), which is a slanderous allocation (*qadhif*), a *hadd* crime. This is an appalling offence, but is not so severe as the *Sabb Allah* and *Sabb al-Rasul* or *Sabb al-Nabi*. Kamali argues that only these latter forms of blasphemy would receive chastisement in this world and the next.⁵⁵

5. Assessing the Interpretation of the Qur’anic Message

Kamali assesses Ibn Taymiyya’s interpretation of the relevant Qur’anic verses which lead to his belief that the Qur’an clearly delivers the death penalty for blasphemy. Kamali claims that Ibn Taymiyya’s selection of the Qur’anic verses: “*does not sustain the conclusions that he has drawn from it.*”⁵⁶ Kamali makes a rather direct assessment of Ibn Taymiyya’s work and the corollary that he discovered, as:

“The tone and tenor of this analysis are dominantly speculative and it does not, with due respect to Ibn Taymiyya’s unquestionable erudition and piety, stand the test of accuracy which is normally observed by the commentators (mufasssirun) on the Qur’an. The Qur’an has made no reference to the death penalty for blasphemy, and the text does not warrant the conclusion that it is a Qur’anic obligation, or a prescribed punishment or a mandate. On the contrary, we would submit that the general language of the Qur’an can only sustain the broad conclusion that the perpetrator of blasphemy disgraces himself and invokes the

⁵⁴ Kamali, Mohammad Hashim, op.cit., p.241; Also see Ibn Taymiyya, *al-Sarim al-Maslul*, op.cit., p.42

⁵⁵ Kamali, Mohammad Hashim, Ibid., p.241; Also see Ibn Taymiyya, *al-Sarim al-Maslul*, op.cit., p.44

⁵⁶ Kamali, Mohammad Hashim, Ibid., p.243

curse of God upon himself, and that it is a criminal offence which carries no prescribed or mandatory punishment, and, as such, automatically falls under the category of ta'zir offences, whose punishment may be determined by the head of state or competent judicial authorities."⁵⁷

Kamali further argues that there is ample evidence within the Qur'an that the pagan Arabs, the disbelievers, the polytheists and the hypocrites quite often offended and insulted the Prophet. One example is the Qur'anic Surah *Lahab*, 111, which refers to Abu Lahab, one of the Prophet's uncles who used to offer constant slights and vilification. His actual name was 'Abd al-'Uzza, but he was commonly known by his nick-name Abu Lahab which means 'father of the flame,' or 'he of the flame,' that related to his hot temper and his red countenance. "*He was one of the most inveterate enemies of early Islam.*"⁵⁸ There were often accusations that the Qur'an had been written by the Prophet, as a self-created product, done by an insane 'poet.'⁵⁹ There are other references in the Qur'an relating to the disbelievers' suggestions that the Prophet was a 'soothsayer' (*kahin*), a 'magician' or a 'sorcerer' (*sahir*).⁶⁰ Kamali raises the point that the Qur'an openly addresses the falsehood of these charges and "*on numerous occasions instructs the Prophet to exercise patience, sound reasoning and persuasion.*"⁶¹

⁵⁷ Ibid., p.243-p.244

⁵⁸ Ali, Abdullah Yusuf, *The Holy Qur'an: Text, Translation and Commentary*, 1969, Sh. Muhammad Ashraf, Kashmiri Bazar, Lahore, Pakistan, Vol. III, in footnote 6294 on p.1804, also see Asad, Mohammad, *The Message of the Qur'an: Translated and Explained*, 1980, Dar al-Andalus Limited, Gibraltar, in footnote 1 on p.983 and Daryabadi, Maulana Abdul Majid, *Tafsir-ul-Qur'an: Translation and Commentary of the Holy Qur'an*, (Preface dated as 1941), Islamic Book Foundation, Islamabad, Pakistan, Vol. IV, in footnote 583 on p.638; and also Ali, Maulvi Mohammad, 1920, *The Holy Qur'an: Containing the Arabic Text With English Translation and Commentary*, Ahmadiyya Anjuman-I-Ishaat-I-Islam, Lahore, India, in footnote 2813 on p.1233

⁵⁹ Ali, Abdullah Yusuf, *The Holy Qur'an*, Ibid., Volume III, in footnote 4057 on p.1196; and also Maulana Abdul Majid Daryabadi, *Tafsir-ul-Qur'an*, Ibid., Vol.IV, in footnote 186, on p.22 and Mohammad Asad, in *The Message of the Qur'an*, Ibid., in footnote 14 on p.684 and in footnote 38 on p.680 (in reference to 36:69)

⁶⁰ Kamali, Mohammad Hashim, Ibid., p.244

⁶¹ Ibid., p.244

Kamali then refers to a Qur'anic verse which offers the Prophet and his Companions the correct approach at such ill-treatment. The verse is from Surah *Al-Imran*, 3, verse 186, which reads as:

وَلَتَسْمَعَنَّ مِنَ الَّذِينَ آتَوْكَ الْكِتَابَ مِنْ قَبْلِكَ وَمِنَ الَّذِينَ أَشْرَكُوا أَدْوَى
كَثِيرًا وَإِنْ تَصْبِرُوا وَتَتَّقُوا فَإِنَّ ذَلِكَ مِنْ عَزْمِ الْأُمُورِ

*"And you shall certainly hear much that will insult you (adhan kathira) from those who received the Scripture before you and from the polytheists. But if you persevere patiently and guard against evil, this will be the best course with which to determine your affairs."*⁶² (3:186)

This verse was revealed in Medina, leaving very little doubt that the Prophet and his Companions frequently received such disrespect. This was considered to be a fully expected opposition, considering the mission of the Prophet in the surrounding environment of 'those who received the Scripture before you,' i.e. the *ahl al-kitab* (the People of the Book; i.e. Christianity and Judaism). Thus, these circumstances did not offer much time to be spent on being: *"preoccupied with persecution and punishment. This is precisely what the Qur'an has recommended and also what the Prophet actually did."*⁶³ However, the judicial approach that developed later on, took another approach, that took a far more direct punitive response, as opposed to extending patience and perseverance. The hostile reaction that the Prophet received is also stated elsewhere in the Qur'an, confirming its inevitable existence.

The cases that are documented to involve *Sabb al-Rasul*, all occurred in Medina, once the Prophet had gained the position of the head of the state. Kamali argues that, although he was frequently insulted and abused during his time in Mecca, there is no report that he ever raised the issue against the offender(s). Thus, *"this*

⁶² Ibid., p.244

⁶³ Ibid., p.245

would suggest that blasphemy as a punishable offence materialised in a political context.”⁶⁴ Due to the circumstances within Mecca during the very early days of Islam, these did not allow for any enforcement of punishment or penalties for the act of blasphemy. Kamali states that, as can be seen in the Qur’an and Sunnah, there is a direct denunciation of such behaviour and that the perpetrators will be subject to the wrath of God in the Hereafter. Another fascinating point is raised by Kamali here, that:

*“It is also significant to note that the Prophetic Sunnah, during the Meccan period, does not provide the evidence by which to identify blasphemy as the serious offence it was later identified as under different circumstances in Medina.”*⁶⁵

The many cases that Kamali has assessed do not provide unequivocal evidence to establish a: *“distinction ex post facto between the religious and the political contents of the cases that were prosecuted for blasphemy and insult.”*⁶⁶ It becomes manifestly clear that the jurists have not attempted to separate blasphemy from apostasy and have also shown no awareness of isolating anything religious from political. Thus, as Kamali suggests, it is then difficult to determine whether the people involved were given the death sentence for their apostasy on its own; or whether the apostasy was a peripheral incident, as their main crime was the more serious attempted treason and clandestine rebellious acts against the newly established Islamic state.

The crimes could even have been more as personal insults against the Prophet. It is also important to note that there is no record that, in Medina, any Muslim was either accused or punished for the offences of high treason or any conspiracy against the state. Thus, as blasphemy and apostasy were certainly equivalent to treason, they became offences to be included in that category of crimes. Kamali also mentions that: *“there is no separate terminology either in the Qur’an or in the sayings of the Prophet for ‘high treason.’ It is*

⁶⁴ Ibid., p.246

⁶⁵ Ibid., p.246

⁶⁶ Kamali, Mohammad Hashim, Ibid., p.247

*understood that the death penalty was designed not for blasphemy as a crime against religion alone but primarily as a crime against the community and state.*⁶⁷

It will now be of some interest to assess the very recent cases of blasphemy against Islam, the Qur'an and/or the Prophet Muhammad that have occurred in Egypt, in recent months, and recent years. These case assessments will cover how the legal system presently works in Egypt on cases of blasphemy, but also includes cases that involved both a knife attack in the street, in 1994, and a shooting that killed the victim, in 1992, as public reactions to the court convictions. The cases also clearly show that not all accusations that very similar acts should be considered as blasphemous crimes, are accepted as legitimate by the court rulings, hence the acquittal of Haidar Haidar from the accusation of blasphemous writing, which will be covered below.

6. Modern Day Cases of Blasphemy in Egypt

Mohammad Sa'id al-'Ashmawy, a prominent Islamic scholar and *Shari'a* judge, presents his position on the reasons behind both legal and physical attacks on writers and intellectuals in Egypt, that have been undertaken in recent years. Al-'Ashmawy argues that:

*"Militant Islamists start from the premise that Islam is the sole valid and complete religion and abrogates all other religions. All non-Muslims, it follows, are infidels and should be converted to Islam. An essential part of their creed is the belief that politics is an integral part of the faith, a claim they present without justification or clarification. It is important to distinguish between Islam as history and Islam as religion. If by Islam the Islamists mean a religion, by claiming politics as a pillar of the faith, they have added a sixth to the recognised five pillars of Islam – the recitation of the creed, prayer, fasting, pilgrimage to Mecca, and charity. Such a claim undermines orthodox Sunni Islamic doctrine."*⁶⁸

⁶⁷ Kamali, Mohammad Hashim, *Ibid.*, p.247

⁶⁸ Al-'Ashmawy, Mohammad Sa'id, 'What are the Militants after?', *Index on Censorship*, May/June, London, Vol.1/2, 1994, p.119-120

He further suggests that if the emphasis of the militant Islamists were defining Islam as being the history of Muslim people, then clearly in this context, politics would be an integral part of the historical events. With this understanding then, *"Their claim would be unremarkable and their arguments against the civil state, incorrectly referred to by them as secular, would collapse."*⁶⁹ Al-'Ashmawy expands these comments, and makes reference to the policy of these militant groups, who confront the present government systems in Islamic countries, by presenting the question to the population: 'Do you wish to be ruled by God or by man?' Al-'Ashmawy raises an interesting point here, commenting that this is their form of methodology in portraying their message, because: *"their question is an invitation to bestow the ruler with the divine right to oppress the ruled. It is an invitation to authoritarianism in the name of God."*⁷⁰ He concludes that such an approach towards Islam is not respecting or representing the belief in faith as a religion, but more obviously their agenda is using the name Islam to promote 'nationalism.' However, it becomes rather clear that utilising the label of 'Islam,' by mutating the religion and reforming it into 'nationalism,' this becomes a threat to the genuine national interests of any Muslim state or nation. The process of implementing the name of Islam in this manner *"erodes the loyalty of the citizen to his country and condemns those who oppose it as traitors and apostates. It is a certain recipe for sectarian strife and racism."*⁷¹

There have been several attacks on writers and scholars, particularly in Algeria and Egypt, in recent years. As Donna Arzt states, relating to these attacks, reiterating the points raised by Mohammad Sa'id al-'Ashmawy, above:

"Even more disturbing are the non-official vigilante cases, which often result in brutal assassinations, ordered without trial by Islamic revivalists in countries where they threaten government stability. While militants in Egypt and Algeria have killed government officials, foreigners, religious minorities, and average Muslim civilians in the course of

⁶⁹ al-'Ashmawy, *ibid.*, p.120

⁷⁰ *ibid.*, p.120

⁷¹ *ibid.*, p.120

their struggles for power, when they target intellectuals they often rely on the Shari'a as a rationale."⁷²

As a broader overview on these points, of such vicious attacks becoming more physical, as opposed to remaining merely academic and/or of theoretical verbal attacks, the *Article XIX* human rights organisation declared that:

*"Lives, even, are at stake. Farag Foda, a noted secular Muslim writer, was murdered by Islamist extremists in June 1992. Naguib Mahfouz, Egypt's first Nobel prize winning novelist, barely escaped with his life when he was the victim of a politically motivated stabbing by an Islamist militant in 1994. At the same time, writers and thinkers have been targeted by the state and harassed by its religious institutions. In May 1997, Allaa Hamed began a one-year prison sentence imposed on account of his writings after an appeal court upheld his conviction and sentence by a court in 1992."*⁷³

The Egyptian legal system has one specific law that has established the position to be upheld in regard to the treatment in cases involving any publication that is cited as being based on an 'anti-religious' theme. As Kamali explains:

*"Anti-religious publications in Egypt are normally treated under the provisions of the Penal Law no.29 of 1982 which penalise offenders to a term of imprisonment ranging from six months to five years and a fine of 500 to 1000 Egyptian pounds'(Art.928)."*⁷⁴

⁷² Arzt, Donna E., 'Religious Human Rights in Muslim States of the Middle East and North Africa' in *Religious Human Rights in Global Perspective: Religious Perspectives*, 1996, John Witte, Jr. and Johan D. van der Vyver (eds.), Martinus Nijhoff Publishers, p.387-454. This is also an article in *Emory International Law Review*, Volume 10, Number 1, Spring 1996, Emory University School of Law, Atlanta, Georgia, USA

⁷³ Article XIX, *The Egyptian Predicament: Islamists, The State and Censorship*, 1997, Article XIX, London, p.48

⁷⁴ Kamali, Mohammad Hashim, *op.cit*, p.291

The three cases mentioned above, involving Farag Foda, Naguib Mahfouz, and Allaa Hamed together with some other cases with very linked circumstances and rather similar consequences, will now be assessed in more detail. The most recent cases for the conviction of blasphemy against either Islam and/or the Qur'an and the Prophet Muhammad involved the Egyptian writers Nawal al-Sa'adawi and Salaheddin Mohsen. Nawal al-Sa'adawi was accused of apostasy in April 2001, and Salaheddin Mohsen was convicted of blasphemy, and sentenced to prison for three years in January 2001.

6.1 The Case of Nawal El-Sa'adawi

In the Arabic newspaper *Al-Quds al-'Arabi* (see below),⁷⁵ the AFP news agency reported that on Wednesday 18th April 2001 the well known

القدس العربي

Al-Quds Al-Arabi Volume 12- Issue 3711 Thursday 19 April 2001

السنة الثانية عشرة - العدد 3711 الخميس 19 نيسان (أبريل) 2001 - 25 محرم 1422 هـ

دعوى لتفريق نوال السعداوي عن زوجها

القاهرة - أ.ب.ب: إمام مصدر قضائي ان الحامي المصري نبيه الوحش أعلن عزمه امس الاربعاء التقدم بشكوى للتفريق بين نوال السعداوي وزوجها لانه يتهمها بالردة ما يفقدها بالتالي اهليتها للبقاء زوجة رجل مسلم.

ويريد الحامي الحصول على التفريق بين السعداوي وزوجها لتكثف شريف جنتانة بالاستناد الى التصريحات الاخيرة التي ادلى بها مفتي مصر الشيخ نصر فريد واصل ومفادها انها «انكرت معلومات من الدين ما يخرجها بانضروية عن دائرة الاسلام».

وكانت السعداوي قالت في مقابلة صحفية ان «الحج من بقايا الوثنية» مضيفة انه «لا يوجد نص يوجب ارتداء الحجاب» للنساء في القرآن.

وظالمت السعداوي بالمساواة في الميراث بين الرجال والنساء» ما يخالف الشريعة التي تقول ان للذكر مثل حظ الأنثيين. وقالت ان «الإسلام المصري يعمل على تجهيل الشعب لان الشعب الجاهل يسهل قيادته وضربه واستغلاله وان يحكم ديكتاتوريا».

⁷⁵ An extract from this newspaper article is published above.

Egyptian writer Nawal al-Sa'adawi had been accused of apostasy from Islam by the Egyptian lawyer, Nahib al-Wahsh. Al-Wahsh:

*"announced that he intends to submit his case calling for Nawal al-Sa'adawi to be divorced from her husband. He accuses her of apostasy (al-riddah), which in turn denies her the right of remaining the wife of a Muslim [man]. The lawyer wants al-Sa'adawi to be divorced from her husband, who is the intellectual Sharif Hatata."*⁷⁶

Due to this claim: *"Egypt's prosecutor-general has ruled that a case against feminist writer Nawal el-Saadawi [sic] on charges of apostasy will be heard in court."*⁷⁷

Nahib al-Wahsh had based his accusation on recent comments presented by the Grand Mufti of Egypt, Sheikh Nasr Farid Wasil, who argued that al-Sa'adawi had: *"renounced the facts of [the] religion, which, by necessity, means she is excluded from the da'irat al-Islam (sphere of Islam)."*⁷⁸ He also presented her with the option of renouncing the statements that she had made, thus allowing her repentance.

The incident that induced such a reaction by the Sheikh Nasr Farid Wasil, was an interview that Al-Sa'adawi had recently undertaken for the weekly magazine *Al-Midan*, where she is argued to have stated that the *"the hajj is a remnant of paganism,"* adding that in the Qur'an: *"there is no textual evidence that makes wearing the hijab obligatory' for women."*⁷⁹ She is further accused of

⁷⁶ 'Legal proceedings to divorce Nawal al-Sa'adawi from her husband,' *Al-Quds al-'Arabi*, 19 April, 2001 front page, Volume 12, Issue 3711, translation by Emma Westney, Centre for Middle Eastern and Islamic Studies, University of Durham, England.

⁷⁷ 'Egyptian writer faces apostasy trial', *BBC news report*, Tuesday, 24 April, 2001, found on http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1295000/1295075.stm. Also see 'Egyptian feminist writer faces apostasy trial,' *BBC World Service*, Tuesday, 24 April, 2001, found on http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1294000/1294921.stm

⁷⁸ 'Legal proceedings to divorce Nawal al-Sa'adawi from her husband,' *Al-Quds al-'Arabi*, op.cit.

⁷⁹ Ibid. Also see 'Egyptian writer faces apostasy trial', *BBC news report*, Tuesday, 24 April, 2001, op.cit., and also see 'Egyptian feminist writer faces apostasy trial,' *BBC World Service*, Tuesday, 24 April, 2001, op.cit.

demanding a change in the present Egyptian law on inheritance, to gain the:

*"equal rights of inheritance for men and women", which is incompatible with the shari'ah [Islamic law], that maintains that a man is entitled to inherit the same amount as two women.' She stated that 'the Egyptian media is out to make the population ignorant, as an ignorant nation is easier to govern, control and exploit and for dictatorial rule.'*⁸⁰

However, in her defence, Nawal al-Sa'adawi declared that the Grand Mufti of Egypt, Sheikh Nasr Farid Wasil, who had listened to tape recordings of her interview with *Al-Midan*, had distorted what had actually been said. She claims to have merely referred to some historical facts.⁸¹ In an interview with the BBC, she also stated that: *"she was astonished at the prosecutor's decision, adding that el-Wahsh was 'mentally disturbed.'*"⁸²

Nawal al-Sa'adawi is not a 'new-comer' to such controversial confrontations with the state, as in 1981, the late President Anwar Sadat imprisoned her following her conviction as a political activist. Most of her work involves 'feminist' themes and statements that are perceived to be blatantly polemic views when expressed in an Islamic state. Some of her books were recently banned from the Cairo Book Fair in January 2001.⁸³ Concerning whether the announcement of taking this case to court would be considered as sufficiently legitimately valid to do so, al-Sa'adawi's husband stated that, as yet: *"they had not been informed of the decision, but – if true – it would be a licence to kill her. He added that neither he nor his wife planned to leave Egypt."*⁸⁴

⁸⁰ 'Legal proceedings to divorce Nawal al-Sa'adawi from her husband,' *Al-Quds al-'Arabi*, *ibid.* Also see 'Egyptian writer faces apostasy trial', *BBC news report*, Tuesday, 24 April, 2001, *ibid.* and see 'Egyptian feminist writer faces apostasy trial,' *BBC World Service*, Tuesday, 24 April, 2001, *ibid.*

⁸¹ 'Egyptian writer faces apostasy trial', *BBC news report*, Tuesday, 24 April, 2001, *ibid.*

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*, and also see 'Egyptian feminist writer faces apostasy trial,' *BBC World Service*, Tuesday, 24 April, 2001, *op.cit.*

This case would resemble the case involving the Qur'anic scholar Nasr Hamid Abu Zayd, in 1995. His wife, Ibthal Younis was informed that she should divorce Abu Zayd, as she was not legally entitled to remain married to an apostate. They both refused to divorce, and left Egypt in the same year, "*fearing attacks by Islamic fundamentalists.*"⁸⁵ Further details of this case involving Nasr Hamid Abu Zayd, can be found in a previous edition of *The Mediterranean Journal on Human Rights*, presented in the article by Abdel Salam Sidahmad.⁸⁶

El-Sa'adawi's first appearance in court was on the 18th May, when she was presented with the lawsuit against her concerning the comments published in the *Midan* magazine.⁸⁷ This was followed on the 23rd May with the more formal court hearing, which followed the necessary investigations that were undertaken during interviews with El-Sa'adawi by the Prosecutor-General Maher Abdel-Wahed. During the court hearing on 23rd May, Prosecutor-General Maher Abdel-Wahed rejected the accusation of the crime of 'apostasy' against Nawal El-Sa'adawi, and this rejection of permitting any legal case on this issue was based on the grounds that there was a lack of any genuine evidence for such a conviction. The State Prosecutor's office stated clearly, when considering whether El-Sa'adawi's written opinions made her an apostate or not, that: "*there is nothing in the articles published by Nawal Al Saadawi which justifies the charge.*"⁸⁸

⁸⁵ 'Egyptian writer faces apostasy trial', *ibid.*

⁸⁶ Sidahmed, Abdel Salam, 'Freedom of Religion, Apostasy and Human Rights: An Appraisal,' in *The Mediterranean Journal of Human Rights*, Vol. 4 (Double Issue), 2000, p.125-144

⁸⁷ Egyptian Committee for Solidarity with Nawal El-Saadawi, *Saadawi Receives Official Court Notification*, Cairo, June 3, 2001, found on: <http://www.geocities.com/nawalsaadawi/articles/committeestatementJune3.htm> Also see Hassan-Gordon, Tariq, 'Saadawi rejects lawsuit alleging she 'scorned Islam', *Middle East Times: International Edition*, 25 May, 2001, found on <http://metimes.com/2K1/issue2001-22/methaus.htm>

⁸⁸ Hassan-Gordon, Tariq, 'Lawsuit against Saadawi tossed out,' *Middle East Times: International Edition*, 1 June, 2001, found on <http://metimes.com/2K1/issue2001-22/methaus.htm> Also see El-Magd Nadia Abou, 'The price of freedom', *Al-Ahram Weekly*, 31 May – 6 June 2001, Issue No. 536, found on <http://www.ahram.org.eg/weekly/2001/536/eg7.htm> Also see Egyptian Committee for Solidarity with Nawal El-Saadawi, *Saadawi Receives Official Court Notification*, *ibid.*

However, the case has not been completely dropped from the legal arena, because the prosecutor, Nabih al-Wahsh also filed a further case to be heard within the Cairo Personal Status Court, which was held on Monday June 18th, 2001. The aim of this case for al-Wahsh, was to achieve his demand that Nawal El-Sa'adawi 70, should be divorced from her husband, Sherif Hattata, 78, for reasons that al-Wahsh also based on the grounds of 'apostasy.' He also based his legitimacy to bring this claim to court, on the *Hisba* law (law 3/1996).⁸⁹ This law was amended in 1996, following the case of Nasr Hamid Abu Zayd in 1995, where he was involved in his own legal struggle in trying to defend both himself and his wife, Ibtehal Younes, against such demands for an enforced divorce, against both married couple's wish.⁹⁰ The *Hisba* law 3/1996 changed the existing situation that had occurred before then, where any member of the community could raise such an accusation against anyone whom they felt had personally offended them. In 1996 this position was changed, so that any case to be taken to court would only be assessed initially by the State Prosecutor, who would then deem whether it was valid or not to be heard in court as a *hisba* case. On the 18th June, the case of Nawal El-Sa'adawi and Sherif Hattata was held, but the actual hearing of the case was delayed until 9 July, because:

*"Nabih al-Wahsh's claim is that this stipulation is unconstitutional, and he is taking this case to the High Constitutional Court. The case was therefore postponed to July 9th, to enable the judges to consider Al-Wahsh's request."*⁹¹

⁸⁹ Egyptian Committee for Solidarity with Nawal El-Saadawi, *ibid*. Also see Egyptian Committee for Solidarity with Nawal El-Saadawi, *Clarification Regarding the divorce case filed against Dr. Nawal El Saadawi and Dr. Sherif Hetata*, Cairo, May 26, 2001, found on: <http://www.geocities.com/nawalsaadawi/articles/clarification.htm> Also see El-Magd Nadia Abou, 'The price of freedom', *Al-Ahram Weekly*, *op.cit*.

⁹⁰ Egyptian Committee for Solidarity with Nawal El-Saadawi, *Monday, June 18th, 2001*., Cairo, June 18, 2001, found on <http://www.geocities.com/nawalsaadawi/articlesby/June18.htm> Also see Sidahmed, Abdel Salam, 'Freedom of Religion, Apostasy and Human Rights: An Appraisal,' *op.cit*, p.140

⁹¹ Egyptian Committee for Solidarity with Nawal El-Saadawi, *Monday, June 18th, 2001*; *ibid*.

6.2 *The Case of Salaheddin Mohsen*

On the 27th January 2001, the Egyptian writer Salaheddin Mohsen was sentenced by the state security court in Cairo, to three years in jail with the added penalty of hard labour.⁹² This three-year sentence was an extension to Mohsen's original conviction of blaspheming against Islam in June 2000, as the initial sentence was a suspended six months prison term. However, Salaheddin Mohsen "*was being tried for a second time, after prosecutors argued that a six-month suspended jail sentence handed down at his first trial last June was too lenient.*"⁹³ Salaheddin Mohsen was initially arrested in March 2000, following the private publication of his book, and was taken to court in June. The case accused him of describing the Qur'an as a book of 'holy ignorance.' "*He was accused of spreading extremist ideas – a charge which usually carries a five-year sentence*"⁹⁴ and he was sentenced to a six-month suspended jail term.⁹⁵ Mohsen faced charges of promoting a deviant ideology with the aim of deriding Islam. Within his several books, he expresses his views that describe Islam to be the main source that had caused the 'backwardness' of many Islamic countries.⁹⁶

During his interrogation, Mohsen stated that he did not believe in God or religion, and also admitted that that he was dedicated to promoting his views and beliefs via his writings. As reported in *Al-Ahram Weekly* newspaper:

"Mohsen has openly stated that he is an atheist. He has also called for the establishment of an Egyptian atheists' association. In Egypt, such blasphemous sentiments are not only illegal, but widely considered to be contemptuous of

⁹² BBC World Service, *Egyptian Writer to Jail*, 27 January, 2001, on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1139000/1139918.stm

⁹³ *Egyptian Writer to Jail*, 27 January, 2001, *ibid.*

⁹⁴ BBC World Service, 8 July, 2000, *Egyptian 'Blasphemer' Escapes Heavy Sentence*, on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_825000/825266.stm

⁹⁵ *Ibid.*

⁹⁶ Halawi, Jailan, 'Shudders of Rage,' *Al-Ahram Weekly*, 18 – 24 May 2000, Issue No. 482, found on: <http://www.ahram.org.eg/weekly/2000/482/eg11.htm>. Also see Halawi, Jailan, 'Detained for deriding Islam,' *Al-Ahram Weekly* 13 – 19 April 2000 Issue No. 477

*the religious sensibilities of the great majority of the population.*⁹⁷

He was arrested based on a report by the state security investigators, concerning his book entitled *Shudders of Enlightenment*.⁹⁸ The report declared that his book propagates ideas which clearly violate *Shari'ah* (Islamic law) and hold Islam in contempt. His house was searched, and the police seized over one hundred copies of three other similar books, entitled *Chatting With Heaven*, *Abdel-Ati* and *A Muslim's Memoirs*.⁹⁹

Within all four books, it is argued that:

*Mohsen mocked Islam, its beliefs and religious rites and duties in the context of a discussion of enlightenment ideas and the nature of free creativity. He claimed that Islam is the reason for Egypt's 'backwardness,' that Prophet Mohamed is not in fact a prophet but rather the author of the Qur'an and that the Qur'an moreover is full of contradictions.*¹⁰⁰

⁹⁷ Halawi, Jailan, 'Limits to Expression,' *Al-Ahram Weekly*, 21-27 December 2000, Issue No. 513. Also see Hawley, Caroline, *Egyptian Writer on Trial Over Religion*, BBC news report, 17 June, 2000, found on http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_795000/795456.stm Also, Jailan Halawi presents the background to Salaheddin Mohsen, by mentioning that "After finishing his high school studies in 1967, Mohsen began reading the books of revealed religion as well as philosophical texts. He was profoundly influenced by the writings of Jibran Khalil Jibran, an early 20th century Lebanese-American poet, and Abu Al-Ala Al-Me'arri, an Abbasid poet well-known for his pessimism. By 1972, Mohsen had become an atheist. Through his readings and observations, he came to the conclusion that advancement is achieved through science and not religion. In his writings, Mohsen described the Prophet Mohamed as a Bedouin who developed a new religion with the aim of assuming the leadership of his tribe," see Halawi, Jailan, 'Detained for deriding Islam,' *ibid.*

⁹⁸ Halawi, Jailan, 'Shudders of rage,' *Al-Ahram Weekly*, 18 - 24 May 2000, *op.cit.* The books title is also translated as *Shivers of Enlightenment*, by BBC News Report, *Suspended Sentence for Egyptian 'Blasphemer'*, 8 July, 2000, found on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_825000/825306.stm

⁹⁹ Halawi, Jailan, 'Shudders of rage,' *Al-Ahram Weekly*, 18 - 24 May 2000, *ibid.* Also see Halawi, Jailan, 'Detained for deriding Islam,' *op.cit.*

¹⁰⁰ Halawi, Jailan, 'Limits to Expression,' *Al-Ahram Weekly*, *op.cit.*

Judicial advisors who were interviewed by the newspaper *Al-Ahram Weekly*, indicated that the Egyptian state would take to court those who propagate deviant and/or extremist thoughts, as the country has the right to protect its religious beliefs. The jurists explained that *"We are not against freedom of expression, but we strongly fight the spread of deviant beliefs in our society"*¹⁰¹ and added that: *"Mohsen was not arrested because of his beliefs; he is free to embrace whatever ideology he pleases, but this freedom should not extend to propagating erroneous beliefs."*¹⁰² Another comment, in reference to the state's role and its authority to protect religious views, argued that the law *"is not, and will never be, against freedom of expression, but any country has the right to protect its religious beliefs against the propagation of deviant or extremist thought."*¹⁰³

In the book, *Shudders of Enlightenment*, Salaheddin Mohsen argues that all civilized nations achieve such success solely by means of scientific research and not through religion.¹⁰⁴ On 14 December 2000 the initial sentencing was abrogated and the office for the ratification of court sentences accepted the appeal for a re-trial. The request for a re-trial had been submitted by the prosecutor Ashraf El-Ashmawi; who demanded that the state should enforce its role as the protector against subversive, anti-religious ideologies. El-Ashmawi argued that Mohsen had used religion to propagate extremist ideas, slight Islam and thus, attempt to: *"provoke conflict and undermine national unity."* El-Ashmawi added that: *"Mohsen used derogatory terminology in propagating his 'beliefs,' and was blatantly disrespectful of the sentiments of pious individuals 'which is illegal.'"*¹⁰⁵

Contrary comments were made by Mohsen's defence lawyer, Samir El-Bagouri, who argued that Mohsen had the legal right to express his views freely. His views expressed in his work raised philosophical points, and thus, was not a matter to be dealt with by law. El-Bagouri continued the defense of Salaheddin Mohsen by stating the perhaps liberal, but by all means very relevant comment that had also been

¹⁰¹ Halawi, Jailan, 'Shudders of rage,' op.cit.

¹⁰² Halawi, Jailan, 'Detained for deriding Islam,' op.cit

¹⁰³ Halawi, Jailan, *ibid.*

¹⁰⁴ Halawi, Jailan, *Shudders of rage,* op.cit

¹⁰⁵ Halawi, Jailan, 'Limits to Expression,' op.cit.,

mentioned several years earlier by Naguib Mahfouz as defense, in his case 'Ala' Hamid. This can be read below, but as El-Bagouri explained, concerning Mohsen:

*He has an opinion and he expressed it in these books. Mohsen's arguments are not new. In fact, they have been made repeatedly throughout history. Why charge Mohsen for asking them now?*¹⁰⁶

Further to this point, El-Bagouri extended the potential problems in legally trying a person for their individual religious beliefs. He announced that it would be a dangerous precedent because: "*it not only threatens intellectual freedom, but also threatens intellectuals themselves.*"¹⁰⁷ Mohsen's eldest son, Alaa, also defended his father's position to be free in expressing his own views, although he denounced the views themselves. In an interview with the *Al-Ahram Weekly* newspaper in December 2000, Alaa stated: "*You can criticise what he writes, but the matter should not be taken to the courts. Unfortunately, our society does not respect anyone who tries to challenge traditional assumptions.*"¹⁰⁸ He further added that while he, himself, is a devout Muslim, he respects his father's courage in defending his own lack of faith or belief in God.¹⁰⁹

Another recent case occurred in Egypt just a few weeks before the court case of Salaheddin Mohsen, which involved a novel by the Syrian writer, Haidar Haidar.

6.3 *The Case of Haidar Haidar*

The trial and controversy of the case of Salaheddin Mohsen followed just weeks after a major cultural confrontation over a novel by a Syrian writer: Haidar Haidar. Islamists said the book was blasphemous while many intellectuals argued it had been taken out of context.¹¹⁰ Haidar Haidar was accused as being 'a new Salman Rushdie' due to his novel, *A Banquet of Seaweed*,¹¹¹ and was accused

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ Hawley, Caroline, *Egyptian Writer on Trial Over Religion*, op.cit

of distributing blasphemous comments in this work.¹¹² The book was first published in Beirut in 1983 and was not released in Egypt until November 1999, by an institution affiliated with the Culture Ministry.¹¹³

This case also included a charge by the state security prosecutor against two Culture Ministry officials for their role in accomplishing the publication of the book believed to be a blasphemous novel.¹¹⁴ Both Ibrahim Aslan, the editor of the series that published the novel, and Hamdi Abu Golail, the managing editor, were charged with “*disparaging religion, as well as editing and publishing a work offensive to public morals.*”¹¹⁵ However, in their defense, the Culture Ministry announced that it is “*one of the best Arabic novels of the 20th century.*”¹¹⁶ They also stated that the ministry had reprinted the book as part of a project to publish celebrated Arabic novels. The main plot of the novel focuses on two left-wing Iraqi intellectuals who managed to leave Iraq in the late 1970s; fleeing from what they witnessed to be the ‘injustice’ in Iraq imposed by President Saddam Hussein. Both characters blamed political oppression in the whole Arab world on dictatorships and the right wing, conservative movements. The author Haidar Haidar suggests that the book aimed towards trying “*to explore the atmosphere of Arab hope and the subsequent retreat of this hope.*”¹¹⁷

¹¹¹ The book is also translated as *Feast for Seaweed*, by Hawley, Caroline, *Syrian Book Cleared of Blasphemy, Religious students pelted the police with Stones*, BBC New report, 10 May, 2000, found on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_743000/743929.stm

¹¹² BBC New report, *A New Salman Rushdie?*, 8 May, 2000, found on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_741000/741359.stm Also see Hawley, Caroline, *Egyptian Writer on Trial Over Religion*, op.cit.

¹¹³ BBC New report, *A New Salman Rushdie?*, ibid. Also see Halawi, Jailan, ‘Shudders of rage,’ op.cit. Also see Hawley, Caroline, *Egypt Blasphemy Row Deepens*, BBC New report, 18 May, 2000, found on: http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_754000/754406.stm

¹¹⁴ Halawi, Jailan, ‘Shudders of rage,’ ibid. Also see Hawley, Caroline, *Egypt Blasphemy row Deepens*, ibid

¹¹⁵ ibid.

¹¹⁶ BBC New report, *A New Salman Rushdie?*, op.cit

¹¹⁷ Ibid. Also see Hawley, Caroline, *Syrian Book Cleared of Blasphemy, Religious students pelted the police with Stones*, op.cit.

However, it seemed to create a fierce reaction by Al-Azhar, who perceived it to be purely based on blasphemous insults against Islam in general:

*"Al-Azhar, seen as the final arbiter of all things religious, has thrown its considerable weight into the confrontation. The government-appointed head of Al-Azhar, Mohamed Sayyid Tantawi, said the book offended all sacred beliefs and should not have been printed. Many intellectuals have been shocked by Al-Azhar's stand. A newspaper representing them says the entire body of Arabic literature would be lost if judged in a similar vein."*¹¹⁸

The novel's reprinting led to a rather fierce campaign launched by the bi-weekly Islamist-oriented newspaper *Al-Sha'b*, which quoted selected extracts from the book including one which described God as a 'failed artist' and another which depicted the Prophet Mohammed as "a womaniser."¹¹⁹ Haidar Haidar was accused of "insulting God and the Prophet ... The Syrian writer treats the Koran [sic] as rubbish and the Prophet Mohammed as a polygamist who married 20 times."¹²⁰ The BBC news report assessed the situation, stating that:

*"The Islamists have denounced Haidar as a new 'Salman Rushdie', the British writer who was forced into hiding in the 1990s after Iran's religious leaders adopted a fatwa, or decree, calling for his death."*¹²¹

The media campaign incited thousands of students from Al-Azhar University to demonstrate outside the campus, demanding the resignation of the Culture Minister Farouk Hosni: "Protesters called for Haidar's death and criticised the grand imam of Al-Azhar, Sheikh Mohamed Sayed Tantawi, for keeping silent regarding the whole affair. Nearly 100 students were briefly arrested and later released."¹²²

¹¹⁸ Hawley, Caroline, *Egypt Blasphemy row Deepens*, op.cit. Also see Hawley, Caroline, *Egyptian Writer on Trial Over Religion*, op.cit.

¹¹⁹ Halawi, Jailan, 'Shudders of rage,' op.cit.

¹²⁰ BBC New report, *A New Salman Rushdie?*, op.cit.

¹²¹ *ibid.*

¹²² Halawi, Jailan, 'Shudders of rage,' op.cit. Also see Hawley, Caroline, *Syrian Book Cleared of Blasphemy, Religious students pelted the police with Stones*, op.cit.

Several of Egypt's intellectuals and political analysts argued that the *Al-Sha'b* campaign had been instigated by political motivation. They also accused groups such as the outlawed Muslim Brotherhood, the traditional allies of the Labour Party, (the party which publishes *Al-Sha'b*), to have also been involved. Another point that observers mentioned was that "*the timing of the newspaper's campaign, ahead of the November parliamentary elections, was also considered to be significant.*"¹²³ However: "*Seif El-Islam Hassan El-Banna, a leading brotherhood figure denied the claims, asserting that the Muslim Brothers would not use Islam to achieve political gains.*"¹²⁴

During the newspaper's campaign and the student protests, Refa'i Ahmed Taha, an exiled leader of *Al-Gama'a Al-Islamiya*, Egypt's largest militant group, urged all Egyptians to follow the example of the religious students, who were rioting over Haidar's novel. Refa'i Ahmed Taha made the statement that:

"We call on the youth of our Muslim Egyptians, in its universities, cities, villages and factories, to follow the example of their brothers in Al-Azhar University and break the chains they [the government] want for them."¹²⁵

In reaction to these accusations and particularly to the manner in which *Al-Sha'b* had been quoting extracts from the book, that had invoked such aggressive public response, Haidar Haidar: "*accused his critics of taking the extracts out of context, and said the real message of his novel was totally different.*"¹²⁶ To present the genuine message of the book, he quoted a paragraph where one of the Iraqi characters argues that: "*Islam was the fortress of the old Arab world. We need Mohammed today in the 20th century.*"¹²⁷ Haidar also accused the protesters of "*trying to impose their monopoly of interpreting Islam the way they like. By doing this, they want to impose a totalitarian cultural system after they lost their political battle.*"¹²⁸

¹²³ Halawi, Jailan, 'Shudders of rage,' *ibid.* Also see Hawley, Caroline, *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ BBC New report, *A New Salman Rushdie?*, *op.cit.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

He also declared that the protest against both him and the Egyptian Ministry of Culture was: "*an attempt to halt the establishment of a civil society that will confront backwardness, reactionism and obscurantism.*"¹²⁹

As the protests increased, a five-member committee was appointed by the Egyptian culture minister, Faruq Husni, to assess the main complaints held against the book. The committee's report described the Islamist campaign against the book as a 'gross distortion.' The inquiry also "*ruled that a celebrated book which provoked rioting earlier this week is not blasphemous.*"¹³⁰ It declared that: "*the novel 'Feast for Seaweed', by Syrian writer Haidar Haidar, has been misunderstood, misquoted and taken out of context.*"¹³¹ The committee concluded that the *Al-Sha'b* newspaper had published extracts presenting the views of only one of the Iraqi characters, and did not present the other characters' response to it. This clearly led to a potentially deliberate misrepresentation of the full nature of the book's genuine context and the tone with which it was written. In a BBC news report, Caroline Hawley presented what the committee had highlighted in its assessment:

*"In one particular extract, it says the paper omitted a punctuation mark, so that it appeared that the Koran [sic] was described with an obscene word, when this was not, in fact, the case. The committee described this as a deliberate provocation."*¹³²

Another interesting case to mention, is that of Mohammad Sa'id al-'Ashmawy who, although an Islamic scholar and a *Shari'a* court judge, has himself had to take twenty-four hour armed police protection, due to death threats by the Islamist groups whose legitimacy he has questioned, following similar statements as cited above, that this article begins with.

¹²⁹ *ibid.*

¹³⁰ Hawley, Caroline, *Syrian Book Cleared of Blasphemy, Religious students pelted the police with stones*, *op.cit.*

¹³¹ *ibid.*

¹³² *Ibid.*

6.4 *The Case of Muhammad Sa'id al'Ashmawy*

In 1991 Muhammad Sa'id al'Ashmawy was criticised by Al-Azhar concerning his various books on Islam, such as *al-Khilafa al-Islamiyya* (Islamic Caliphate), *al-Islam al-Siyyassi* (Political Islam), *al-Riba wa al-Ribh fi al-Islam* (Usury and Interest in Islam) and *Usul al-Shari'a* (Origins of Islamic Law), as they are seen to challenge the Islamists' ideology in many areas. Within his work, he utilises Islamic references as primary sources to confront the Islamists' assertions that Islam contains a complete and unified political and judicial system. Al'Ashmawy argues that this belief is the heart of 'political Islam' and such confrontation provoked outrage and infuriation by the Al-Azhar sheikhs and all Islamist movements.¹³³

In January 1991 an Al-Azhar committee attempted to officially remove five of al'Ashmawy's books from a presentation at the Cairo International Book Fair, but they decided to withdraw their complaint, as al'Ashmawy threatened to sue them in court. Following the Book Fair, al'Ashmawy began to receive death threats from Islamist groups, which led to his present 24-hour armed protection. In the following year, a further action by Al-Azhar was successful in removing eight of al'Ashmawy's books from the presentation at the Cairo International Book Fair in January 1992. This act led to a public outcry as the protestors stated they were witnessing 'a crude act of censorship' by various Egyptian writers, human rights groups and the international media. The public and media attention was such that President Mubarak personally intervened and ordered that the books be returned to the exhibition.¹³⁴

During March 1994, the 'Committee for Qur'anic Affairs and Sciences,' a government institution within the Supreme Council of Religious Affairs, declared that Muhammad Sa'id al'Ashmawy's books were banned from being distributed in public circulation because the books had "*defamed and mutilated the image of Islam, offended the Prophet Mohammed and the early Caliphates of the*

¹³³ Article XIX, *The Egyptian Predicament*, op.cit. p.50

¹³⁴ Article XIX, *ibid.*, p.50. Also see Boyle, Kevin and Sheen, Juliet, (eds.), *Freedom of Religion and Belief: A World Report*, 1997, Routledge, London, p.32

*Islamic community.*¹³⁵ This decision created a rather inflammatory campaign in the Islamist press, against al'Ashmawy with the accusation that he intentionally harmed Islam. There was a demand for the banning of all of his work and for the prosecution of al'Ashmawy.¹³⁶ His position now is that:

*"despite this campaign, however, and the continuing threat to his safety, Sa'id al'Ashmawy has continued his writings and remains prepared to challenge Islamist dogmas."*¹³⁷

Now the case will be covered, concerning the murder of Farag Foda, who was shot dead in 1992, due to his intellectual arguments and polemical academic views.

6.5 *The Case of Farag Foda*

Farag Foda was an outspoken critic of what he argued were human rights abuses committed by both the Egyptian government and the Islamist groups. He published several books that challenged the Islamist groups' agenda and defended the Egyptian Coptic Christian minority community, due to their suffering of state repression. He also put forward the argument that al-Azhar were in complicity and collusion with the Islamist groups, and in response to this accusation Al-Azhar publicly proclaimed its condemnation of such suggestions and banned Farag Foda's books.¹³⁸

In 1990, on his return to Egypt from a lecture tour in Tunisia, Foda was summoned to appear before the State Security Intelligence (S.S.I.) officials to explain his reasons for writing his book *Nakun Awla Nakun* (To Be Or Not To Be). This 'appointment' with the S.S.I. had been raised following an official complaint put forward by Al-Azhar to the S.S.I., with which they presented their concern for the book and various articles written by Foda, which had been published in newspapers over the previous three years. The articles covered

¹³⁵ Article XIX, *ibid.* p.50

¹³⁶ Article XIX, *ibid.* p.50. Also see the Egyptian Organisation for Human Rights, press release, December 27, 1994.

¹³⁷ Article XIX, *ibid.* p.50-p.51

¹³⁸ Article XIX, *ibid.*, p.51. Also see Boyle, Kevin and Sheen, Juliet, (eds.), *Freedom of Religion and Belief*, *op.cit.*, p.29

various topics, such as violence by Islamist groups and what Foda saw as Al-Azhar's interference in 'freedom of thought.'¹³⁹ Following this 'interview' with the S.S.I., Farag Foda was charged with offending religion, encouraging atheism, objecting to the application of *Shari'a* law and for having offended Sheikh Al-Azhar by not using the Sheikh's official title as 'His Honourable Sheikh.' However, Foda was released without any prosecution, but his book was then banned for sale by the Minister of the Interior.¹⁴⁰ This seemed to start some hostility towards Foda by Al-Azhar, as in mid-1992 a group of Islamist scholars from Al-Azhar distributed a public statement announcing that Farag Foda was a follower of a non-Islamic movement that rejected Islam "*and effectively declared him an apostate.*"¹⁴¹ They also publicly demanded Foda's prosecution and a banning of all of his work.

One week after being declared as an apostate by Al-Azhar, on 8 June 1992, Farag Foda was shot dead by a member of the Islamist group *al-Gama'a al-Islamiyya*. Foda's teenage son was also wounded during the attack.¹⁴² During the court hearing for one of the alleged assassins, the defendant referred specifically to the Al-Azhar statement as providing pure justification for the writer's killing. The group *al-Gama'a al-Islamiyya* announced their responsibility, and justified that the killing was undertaken because Farag Foda was perceived to be an apostate, due to his activity in advocating the separation of religion and the state, and his opposition to the use of *Shari'ah* as the official Egyptian law.¹⁴³ This claim also received unequivocal support from Sheikh al-Ghazzali, who was, at that time, one of the most prominent religious figures in Egypt and the Arab world, and also a member of the influential Islamic Research Academy (I.R.A.) at Al-Azhar. Sheikh al-Ghazzali appeared in court as a witness for the defence "*and told the court that, in his view, anyone who objected to the implementation of the Shari'a is an*

¹³⁹ Article XIX, *ibid.*, p.51

¹⁴⁰ *Middle East Report*, January/February 1993, as cited by Article XIX, *ibid.*, in footnote 54 on p.51

¹⁴¹ Article XIX, *ibid.*, p.51

¹⁴² Article XIX, *ibid.*, p.51. Also see Arzt, Donna E., 'Religious Human Rights in Muslim States of the Middle East and North Africa,' *op.cit.*, p.387-454.

¹⁴³ Arzt, Donna E., *ibid.*

excommunicate and an apostate."¹⁴⁴ He further stated that any individual, or group of people, who killed such a person is not liable to be punished, because in carrying out the act of such a killing they would be executing the legitimate *hudud* penalty on apostasy, within *Shari'a*.¹⁴⁵ Sheikh al-Ghazzali furthered his position on his judgement of Farag Foda in a press interview, stating that:

*"Farag Foda had denied the Rule of Islam to me personally in an open debate at the Cairo Book Fair two years ago. Now a man is free to believe that if he wants to; he can go and sit at home and say it. But this man went out into the streets and worked against the Rule of Islam. This is unacceptable because it strengthens Zionism and colonialism and I am against anything that strengthens these."*¹⁴⁶

Another such case of a physical attack in a public street also occurred to Naguib Mahfouz, who was stabbed in the neck. However, he managed to survive this attack.

6.6 *The Case of Naguib Mahfouz*

Naguib Mahfouz is a world wide respected author of novels, who became a noticeably distinguished writer, having being awarded the Nobel Prize for Literature in 1988. He not only became the first Egyptian, but also the first Arab, to be awarded such an achievement in the world of literature. Mahfouz is a very prolific writer, and has produced many books and articles covering his views on contemporary social and political aspects. Several of his books have also been made into films and/or plays, along with some of his work which has been set as the standard texts for studying within universities and colleges throughout the Arab world.¹⁴⁷

¹⁴⁴ Article XIX, *ibid.*, p.51-p.52. Also see Boyle, Kevin and Sheen, Juliet, (eds.), *op.cit.*, p.32. Also see Arzt, Donna E., *ibid.*, p.387-454.

¹⁴⁵ 'Sheikh Ghazzali's *fatwa*: an invitation to extra-judicial killing', Egyptian Organisation for Human Rights, press release, June 29, 1993, as cited by Article XIX, *ibid.*, in footnote 55 on p.52. Also see Boyle, Kevin and Sheen, Juliet, (eds.), *ibid.* p.32 and also Arzt, Donna E., *ibid.*

¹⁴⁶ *The Guardian Newspaper*, London, April 8, 1994, An interview with Sheikh Ghazzali.

¹⁴⁷ Article XIX, *The Egyptian Predicament*, *op.cit.* p.52

However, irrelevant to his particularly impressive input as a contributor to modern Egyptian literature and thought methodology, a few of Naguib Mahfouz's novels have come to be banned, due to their content which addresses 'politically sensitive' issues. Such sensitive topics include work on Egypt's human rights record, the status of women within an Islamic community and the role of the military in governing the country. Mahfouz has also been openly criticized by Arab nationalists, in response to his support for President Sadat's peace process and the initiatives undertaken with neighbouring Israel. Mahfouz has also been condemned by Islamists due to his promotion of secularism, but in particular, due to one specific novel, *Awlad Haritna* (Children of Gaballawi), that was first published in 1959.¹⁴⁸ From its very first publication in 1959, *Awlad Haritna* was banned in Egypt, by Al-Azhar, because they argued that it offended the Prophets. However, since then, the book has always been publicly available in other Arab countries, although it has remained banned in Egypt, due to some influence by the Islamists. Mahfouz has been the target for a relentless campaign by the Islamists to humiliate him and reduce his reputation, which includes some Islamist literature stating that, because of *Awlad Haritna*, Mahfouz "will burn in hell."¹⁴⁹ Other Islamist publications present cartoons portraying Mahfouz walking into the fires in Hell, while carrying the collection of his books under his arms. One example of this literature, including these cartoons, was published as recently as 1994, entitled *Kalimatuna Fi Radi Ala Awlad Haritna* (Our Response to *Awlad Haritna*).¹⁵⁰

Naguib Mahfouz has been "subject to relentless attacks as the 'corrupter of youth' and 'the filth of the artistic community.'"¹⁵¹ The hostility of the Islamists against Mahfouz is so extreme that several incidents have occurred against him. The Egyptian Organization for Human Rights (E.O.H.R.) supports the view that militant Islamic

¹⁴⁸ *ibid.* p.52

¹⁴⁹ *ibid.* p.53

¹⁵⁰ Kashk, Sheikh, A. H., *Kalimatuna Fi Radi Ala Awlad Haritna* (Our Response to *Awlad Haritna*), 1994, al-Mukhtar al-Islami for Publicization and Printing, Cairo, Egypt; as cited by Article XIX, *ibid.*, in footnote 57 on p.53

¹⁵¹ Arzt, Donna E., *op.cit.* p.387-454.

groups have undertaken relentless attacks on Naguib Mahfouz, which led to the successful banning of the book *Gablawi's Children*. Also, "their own publications include virulent attacks on Mahfouz insisting that he will burn in Hell fire for the book."¹⁵² In 1989, there was a campaign to support Mahfouz, with an attempt to remove the ban from *Awlad Haritna* (Children of Gaballawi). The newspaper *Al-Yasar* allowed a series of extracts from the book to appear in the paper. However, the reaction to this attempt to have the book re-published caused so much public controversy that Mahfouz personally requested the newspaper to stop publishing the book's extracts. As E.O.H.R. commented:

*"By this stage Sheikh Omar Abdul Rahman, the spiritual leader of the militant 'Gamaat Islamia' [sic], had issued a fatwa excommunicating the author and calling on him to repent having written the novel and to denounce it."*¹⁵³

This was also seen to be an almost inevitable reaction to:

*"Mahfouz, who had publicly denounced the death warrant against Rushdie and supported Anwar Sadat's peace accord with Israel, was 'excommunicated' by the fatwa by Sheikh Omar Abdul Rahman, who demanded that the author denounce his own 1959 novel, Children of Gebelawi.[sic]"*¹⁵⁴

When Sheikh Omar Abdul Rahman delivered the *fatwa*, he stated at that time that the author Salman Rushdie would not have dared to go forward and publish his own infamous book *Satanic Verses*, had Mahfouz been correctly punished for his own 'crimes,' much earlier.¹⁵⁵ Following the release of the *fatwa*, Naguib Mahfouz became the victim of a knife attack by a member of an Islamist group, while he walked along the street in Cairo. It has been reported as:

"Following the issue of this fatwa against Naguib Mahfouz, the author was the victim of an assassination attempt by a

¹⁵² The Egyptian Organization for Human Rights (EOHR), 'Fires of Hell' in *Index on Censorship*, May/June, London, Vol.1/2, 1994, p.118

¹⁵³ EOHR, *ibid.* p.118

¹⁵⁴ Arzt, Donna E., *op.cit.* p.387-454

¹⁵⁵ Article XIX, *op.cit.* p.53

*young Islamist militant. The attack, which resulted in Naguib Mahfouz being stabbed in the neck and seriously wounded, was carried out on 14 October 1994, the sixth anniversary of the date on which he had received the Nobel Prize for Literature. The attempt against his life was felt in Egypt and the Arab world 'like an earthquake.'*¹⁵⁶

After this knife attack, two Islamist group members were arrested and taken to court as the perpetrators. During the trial, one of the defendants is reported to have confessed to the 'assassination attempt', which he had undertaken in order to meet the desires expressed in the *fatwa* recently delivered by Sheikh Omar Abdul Rahman. In March 1995, both men were found guilty of the act. Both then received the death sentence, and were executed. One interesting result, concerning this physical attack on Mahfouz, was that following the trial of the attackers, the Egyptian daily newspaper *al-Ahali*, was allowed to publish *Awlad Haritna* in a 'special edition,' despite the novel's ban. However, although the government accepted this, making no attempt to intervene, several journalists at *al-Ahali* received death threats and, within the Islamist press, they were accused of apostasy and were described as being the enemies of God and the Prophet.¹⁵⁷

6.7 The Case of 'Ala' Hamid

In December 1991 there was another prosecution for the crime of blasphemy in Egypt, against the novelist 'Ala' Hamid, for his book *Masafah fi 'Aql Rajul* (Distance in a Man's Mind). As being very similar to the recent case of Haidar Haidar, as mentioned above, Hamid's case also included the book's publisher, Mohammed Madbouli and the printer, Fathi Fadl, being put on trial. 'Ala' Hamid was sentenced to eight years in prison, as the book was argued to be a fictionalised satirical account of the life of the Prophet Muhammad, and was believed to threaten 'national unity' and 'social peace.'¹⁵⁸

¹⁵⁶ Article XIX, *ibid.* p.53. Also see Arzt, Donna E., *op.cit.* p.387-454

¹⁵⁷ Egyptian Organisation for Human Rights, press release, December 27, 1994, as cited by Article XIX, *The Egyptian Predicament*, *ibid.*, in footnote 58 on p.53

¹⁵⁸ Article XIX, *ibid.* p.59

Both Mohammed Madbouli and Fathi Fadl received similar sentences.¹⁵⁹ The case was heard in a special court in Cairo and the final legal sentences delivered were drawn from the part of law that covers anti-subversion, hence including the publisher and printer as accomplices. The book was originally published in 1988 by Madbouli, a respected publisher in Egypt, and reactions against the book initiated in 1989.¹⁶⁰

The Disciplinary Administrative Prosecutor undertook an investigation, following complaints put forward by one of 'Ala' Hamid's work colleagues, at the taxation office. This resulted in Hamid being suspended from work, as his novel was seen to ridicule religions and mock prophets. Several newspaper articles were then published in both pro-Islamist and semi-official media, where Ahmed Bahgat, an Islamist writer undertook a confrontational attack against Hamid through the *al-Ahram* newspaper columns. Through the campaign, the articles by Ahmed Bahgat were: "*accusing him of blasphemy and heresy and portraying him as 'a second Salman Rushdie in Egypt.'*"¹⁶¹ This campaign resulted in Hamid being summoned to the state security police, for interviews for their further investigations. In March 1990, the Islamic Research Academy (I.R.A.) also condemned 'Ala' Hamid's work for it contained: "*ideas advocating atheism, blasphemy and denial of the heavenly religions,*" and they accused the author of both heresy and atheism.¹⁶² Mohammad Hashim Kamali suggests that the reports of the case indicate that: "*it seems that this case was in many ways similar to that of the British author, Salman Rushdie, who blasphemed against Islam in his novel 'The Satanic Verses.'*"¹⁶³ 'Ala' Hamid's book in question, *Masafah fi 'Aql Rajul* (Distance in a Man's Mind) focused as a story based on a sequence of dreams that are formed in a rather discourteous context, portraying the Prophet Muhammad in a very negative manner. This theme is consistent with that presented by Rushdie in his own book.

¹⁵⁹ *ibid.* p.59

¹⁶⁰ *ibid.* p.59

¹⁶¹ *ibid.* p.59

¹⁶² *ibid.* p.59

¹⁶³ Kamali, Mohammad Hashim, *op.cit.* p.290. Also see BBC News Report, *Suspended Sentence for Egyptian 'Blasphemer,'* 8 July 2000, *op.cit.*

After being detained for four months, Hamid, together with Mohammed Madbouli and Fathi Fadl were brought to trial in front of the State Security Court. However, it is interesting to note here that, "*contrary to international fair trial standards, defendants in the State Security Court are denied a right of appeal.*" Although, concerning 'Ala' Hamid's case, newspapers raised the fact that as this case was being heard before the special security courts, this made it a rather unusual location, as the normal practice for security courts in Egypt, was to hear cases that were solely related to political offences, and ones perceived to be threatening to the state.¹⁶⁴ Perhaps also due to these circumstances, any appeals raised against the sentences delivered by the security courts, can only be directed towards the Prime Minister of Egypt, just as the only ratification of the sentences can also, only be delivered by the Prime minister.¹⁶⁵

Referring to how the case of 'Ala' Hamid was anticipated to be dealt with, a BBC World Service news report on the 27th December 1991, stated that no allowance for making any appeal in this case was the generally understood view.¹⁶⁶ This being so, the Egyptian Organization for Human Rights (E.O.H.R.) still worked against the main stream of thought and was reported in *New Straits Times*, a Malaysian newspaper based in Kuala Lumpur, to have made an appeal to the Prime Minister of Egypt, in defence of 'Ala' Hamid.¹⁶⁷ From another perspective it was argued that despite the fact that the very nature of the case involved potential damage to the individual's right to freedom of expression, which the case was clearly based on, nevertheless:

"The response of the Egyptian press to Allaa Hamed [sic] was muted in the extreme. Indeed, shortly after the sentence was pronounced, Tharwat Abaza, President of the Writer's Syndicate, which has generally been seen as a defender of writers, openly attacked Allaa Hamed [sic] in the most extraordinary terms, as 'a superficial boy who dared curse

¹⁶⁴ Kamali, Mohammad Hashim, *ibid.* p.291

¹⁶⁵ *ibid.*, p.290-p.291

¹⁶⁶ BBC World Service radio news report, broadcast on 27 December 1991, personally heard by Mohammad Hashim Kamali, see *ibid.* p.291 and in footnote 7 on p.293

¹⁶⁷ *New Straits Times*, Kuala Lumpur, Malaysia, 6 January, 1992, p.8

*the prophets and offend them, rejecting that the Qur'an is the Word of God...seeking fame by destroying social peace and public security and national unity. Doesn't he deserve to be punished?"*¹⁶⁸

Interestingly enough, Naguib Mahfouz also wrote an article in a newspaper that made reference to the final court verdict upon Hamid. Mahfouz's article declared that he and several other Egyptian writers and intellectuals were astounded by the seemingly harsh and severe nature of the penalty delivered and also the manner in which Hamid had been tried and convicted. In a thoughtful re-assessment of how the case could, or should, have been dealt with, Mahfouz argued that:

*"Would it not have been better to rationally analyse and criticise the book and then shelve it, if you will, among all those other books that have, since the Middle Ages, attacked Islam?"*¹⁶⁹

These comments were reiterated in December 2000, by Samir El-Bagouri; Salaheddin Mohsen's defence lawyer in his recent case, as stated above.

As all security court sentences delivered "*are subject to ratification by the Prime Minister, before they may be implemented, and, to date, such ratification has not been forthcoming,*"¹⁷⁰ this must mean that up until 1997, when the organisation Article XIX published this information in their document, *The Egyptian Predicament: Islamists, The State and Censorship*, no ratification of the sentence on Hamid had been acknowledged so far. However, as that may seem as rather good news for the convicted man, who has been sentenced but has still not yet been put into prison, the story of Hamid's legal case did not end there. While he was living in the permanent fear and expectation of either being imprisoned by the government with the eight-year sentence, or being physically attacked or even killed by Islamist militant groups; in October 1993, he then became involved

¹⁶⁸ Article XIX, *The Egyptian Predicament*, op.cit. and the quote is cited from *Al-Ahram*, 13 January, 1992, see Article XIX ibid., in footnote 74 on p.60

¹⁶⁹ Hashim Kamali, op.cit. p.291

¹⁷⁰ Article XIX, op.cit. p.59

in another court case, concerning his book *al-Firach* (The Bed). The result of this case caused another conviction, and he was sentenced to one year in prison. The court declared that the second book, *al-Firach* (The Bed), included sexually explicit material that presented: “*disrespect for religious clerics and advocates immorality, sexual freedom and the non-commitment to the legitimacy of marriage.*”¹⁷¹ After this second court case, while still not having been imprisoned, although he had been found guilty and had been sentenced to a second prison term, he was dismissed from his employment in the government tax office, because: “*an administrative court ruled that the ideas expressed in al-Firach made him a permanent danger to his female colleagues.*”¹⁷² *Al-Ahram* newspaper also referred to *al-Firach* as the foundation that would lead to “*the destruction of social, religious and moral values.*”¹⁷³ Although he submitted an appeal against the second conviction to the one-year prison sentence, the appeal process rejected the claim in May 1997, and he then started his one-year jail period, at that time.¹⁷⁴

7. Conclusion

The concept of blasphemy within the Qur'an is held as the opposition (*muhadadah* or *mushaqaqah*), to insult (*adha*) God and the Prophet, which closely resembles high treason. The prominent political relevance of these offences, during the early days of Islamic establishment, can be identified in the hostile reaction to it, which led to the Prophet to be involved in some eighty-five battles, following his migration to Medina and becoming the head of state.¹⁷⁵ Kamali puts forward the argument that it is now essential to form a distinct separation between the political and religious content of blasphemy. This is based on the fact that there was a predominant political basis to this offence during the early days of Islam – and thus, more so, that it is now no longer a specifically political offence in contemporary times. Blasphemy was seen then as a strong threat to

¹⁷¹ *ibid.* p.48 and p.60

¹⁷² *ibid.* p.60

¹⁷³ Reuter News Service, 13 July, 1994, as cited by *ibid.* in footnote 75 on p.60

¹⁷⁴ Article XIX, *ibid.* p.60

¹⁷⁵ Kamali, Mohammad Hashim, *op.cit.* p.247-248

the continuance of Islam, as it was a 'new faith,' and the newly established state had no firm basis to defend itself from the constant hostility thrust upon it.¹⁷⁶

Making comments on the assessment of the apostasy cases at that time, and concluding them to be a political offence, 'Abd al-Hakim Hasan al-'Ili analysed the cases and promoted the corollary that the Prophet had permitted the death sentence for apostasy under his authority as the political leader at that time. He also had the capacity of discretionary decisions of judgement, so: "*as such, the Prophet himself has treated apostasy as a ta'zir offence.*"¹⁷⁷ It is recorded as evidence that the Prophet exempted several people from the death sentence, who had not just renounced Islam but had also vilified and insulted him. Kamali mentions that throughout this assessment, the word 'apostasy' is used synonymously with 'blasphemy' as most, if not all, of the cases that involved apostasy were interwoven with blasphemous attacks upon Islam or the Prophet. This was such a common occurrence that the two offences became indistinguishable.

Although the crimes committed were politically rebellious, they were also simultaneously inclined towards having a religious emphasis. Islam had no separation between religion and politics, or religious and civil authority, in the very early stages of the Islamic state. In principle it still possesses that structure today, with little or no separation of state and religion. However, Kamali argues that the things that have changed throughout history include the distinction between the crimes that are categorised as having a religious, and those having a political nature. This has been both widely recognised and also widely practised. The political crime of treason has been treated in a different manner than that of blasphemy. The obvious gravity with which treason is regarded has much more weight than the way in which blasphemy is regarded. This can be due to the more modernised structure of the state, compared to the first state that was established in Medina. Kamali succinctly explains this historical change so:

¹⁷⁶ *ibid.* p.248

¹⁷⁷ *ibid.* p.248

*"Whereas the state in Medina under the leadership of the Prophet and the Rightly-Guided Caliphs, was clearly committed to, and rooted in, the ideology and religious law of Islam, and political loyalty was measured by these criteria, this is no longer the case with the nation-state today."*¹⁷⁸

Due to this, the whole consideration of the crimes of apostasy and blasphemy has changed, as they presently do not relate, in any definitive way, to a political motive. If this is the case, it would be more logical to reconsider the penalties and punishments related to the change of the crime's basis. Kamali suggests that, as blasphemy is no longer to be seen as a political crime on the same level as any subversive treason would be, and it is not one of treason's accompanying effects, it is now not allowable to treat it in the same manner that it had to be treated historically, in Medina. However, blasphemy is still a very dangerous offence, openly inciting violence and the loss of life through the chaos it creates. It seems to: *"pose a threat to law and order in society, as was seen in the aftermath of Salman Rushdie's misguided venture. But even so, blasphemy today can in no sense threaten the existence or continuity of Islam as a great religion, a legal system and a major civilisation"*¹⁷⁹

Kamali argues that, historically: *"The scholastic doctrines of the madhahib treated blasphemy and apostasy on the same footing and viewed blasphemy as an extension of apostasy, a position which is no longer justified."*¹⁸⁰ He clearly concludes that blasphemy should be categorised as a *ta'zir* crime, that allows the judge who is considering any case, to have the discretion of what sentence to deliver, depending on the surrounding circumstances in each individual case. His final words explain that a clearer definition of the crime itself, should also be achieved, to overcome any ambiguity and confusion that may exist:

"Based on this appraisal, the precise definition of blasphemy, the acts and words that incur this offence, and

¹⁷⁸ *ibid.* p.249

¹⁷⁹ *ibid.* p.249

¹⁸⁰ *ibid.* p.250

then the quantum of the punishment, may be determined and specified, or amended and refined as the case may be, by the legitimate political authority and legislative organ of the state in modern times."¹⁸¹

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CONFERENCE REPORT

TEACHING HUMAN RIGHTS: AN ASSESSMENT OF THE M.A. IN "HUMAN RIGHTS IN CONTEMPORARY REALITY"

ISABELLA RAUTI

The Masters course in "Human Rights in Contemporary Reality", sponsored by the Ministero dell'Università (Ministry of the Universities and Scientific Research and Technology) and organized by the Libera Università degli Studi "S. Pio V" in collaboration with the University of Malta, concluded in December 2001. The eight-month course was divided into 5 modules of 90 hours and was accompanied by two interdisciplinary seminars lasting for a total of 10 hours. Participating in the course were Italian and foreign university professors and experts on issues concerning the theory of human rights. One of the objectives of the course – for graduates in Political Science, Law, Economy, and Liberal Arts – was to provide participants with advanced training in order to form international operators and facilitate their integration in national and international organizations which are engaged in cultural, economic and development cooperation. Moreover the aim of the M. A. was to analyse the situation regarding the protection of human rights today and to study methods to promote the dissemination and the entrenchment of human rights in the scenarios of social, economic and political conflicts. Finally, one of the intended results of the

¹ Schmidt had already theorized, with the thesis of inequality among sovereign states, the right of the strongest power to wage war against other states.

M.A. program was to raise students' awareness of issues regarding human rights and to clearly define the geopolitical contexts where human rights are contested and denied.

Among other activities, during the month of October, some of the scheduled lessons of the program were held at the Faculty of Laws of the University of Malta. These were seminars coordinated by the Dean of the College, Professor Refalo and by Professor Andò, "visiting professor of Public Law" at the University of Malta. During the seminars – characterised by lively debates with the students – essential topics emerged concerning the fundamental importance of human rights in the Mediterranean regional context. After the terrorist attacks last September 11 in the United States, particular reference was made to the opportunities for dialogue regarding human rights, and to the indivisible bond which keeps human rights closely linked to international security cooperation.

The analysis of international security – which suddenly dominated the world scene after the terrorist attacks in New York City – took up a good part of the lessons during the year. The analysis began with the post-war period when, with the participation of the United States in the world conflict, the war scenario extended beyond the European scene (the participating nations were initially European as were the theatres of war) and transcended the concept of international law (*ius publicum europeum*). What had changed was the concept of war: from sovereign rights¹ to crime. In legal terms, the post-war order denied the *ius ad bellum*, the right to "wage war" and national sovereignty was utilised as a legal instrument to express the absolute prohibition to use war except in cases of self-defence. In all international documents, the right to "wage war" as the basis of international order is negated; in international post-war law the use of force is denied, in international relations the use of force as a threat is also illegal.

The new culture of human rights and the recourse to force to defend human rights again puts the Mediterranean area at the centre of world attention; it is here in this very region that cultures of human rights and social models, which are difficult to reconcile, confront one another. The presence of three contrasting monotheist religions is also important to the geo-historical value of the Mediterranean area. This brings up an additional problem, which is the conflicting dialectic between religion, religious liberty and human rights. In the course of time many religions have violated human

rights by maintaining that they alone possessed absolute truth and requiring unconditional submission to that truth. Indeed, some religions have claimed to be the one and only true religion and have therefore tried to exclude other religions. All this can be seen as reflecting antagonism towards the rights of man, foremost among which are freedom of creed and freedom of conscience. Moreover, the manipulation of religion to express national identity has compromised the peaceful cohabitation amongst peoples of different faiths; national political logic has even utilised religions as a weapon against the civilisation of cohabitation (clash of religions).

Another controversial aspect of human rights was analysed during the lessons: are they fundamental, absolute, or relative? Human rights are never absolute but relative, albeit universal. Rights are relative and universal but not absolute. The concept of relativity does not imply that they change according to the context but rather that every right is conditioned and limited by other rights, by the rights of others. Rights are fundamental in a philosophical sense because they are important for the dignity of man, and in a juridical sense because they are the basis of law. All people have human rights and therefore they cannot be absolute; the relativism of rights revolves around the basic concept which is, and will remain, the dignity of humanity. But the concept of the dignity of man differs according to religious beliefs and thus cannot be viewed in the same way by Christianity (which emphasises the fundamental importance of man) *and* by Islam (the predominance of divinity). But the concept of human dignity is difficult to establish universally. The lay and non-confessional state guarantees the indissolubility of human rights in a way that can be summarized as: 'rights for all people',

Even from a political point of view, as well as from a religious one, the Mediterranean area represents a crucial area; in fact, here the most evolved democratic regimes co-exist with the most authoritarian ones in the world. This observation poses a twofold problem of the relationship between democracy and religion (democracy being seen as an antidote to fanaticism) and the equally complex one between democracy and human rights. In the relationship between religion and democracy there are question marks regarding the capability of the democratic process to stop the rise of theocratic regimes to power or to overthrow them wherever they have already consolidated their power. In the debate following the lessons, several fundamental questions and issues emerged which

are still open to discussion. Do all religions lead to democracy? Can religious fundamentalism, which denies all other faiths, be reconcilable with democracy? Another question: Do human rights lead to democracy or is the contrary true?

Without expecting to answer these fundamental questions one can argue that religious pluralism accompanies political pluralism. And pluralism is necessary. It is just as necessary as guaranteeing the representation of all by attributing governability and decision-making to the majority. But this introduces another controversial question; that is, whether it is legitimate to defend democracy by any means when it is threatened by a bellicose minority. Can we put democracy at risk? Democracy is a method and not an end; what must be saved is the democratic method more than its result. In substance it is democratic procedure and process that must be saved.

The lessons of the M.A. course were also held during the months following the September 11th events and inevitably the discussion on human rights and the Mediterranean area was conditioned by the "winds of war" and by the modified international scenario. A different political horizon which, while maintaining unaltered the importance of the Mediterranean area, now sees the equilibrium changing between Europe and the United States as well as shifts in the relations between the so-called "*fluid continent*" and America. The United States can colonize the Mediterranean area but they cannot understand it in its diversity. Only Europe can understand the diversity of the Mediterranean and share its civilization based on solidarity and its profound vocation for social cohesion. The changed political scenario opens new perspectives. Today it is possible to build a different and more balanced Euro-Atlantic reality, conceived as a bridge resting on two pillars and thus prevailing over the idea of America as the only pillar on which to base world geopolitical equilibriums.

The war by terrorists against the Western world is defined as a "holy war", therefore a war of religions due to religious reasons. Or, according to the well-known thesis expressed by Huntington, this is not a political conflict but a war of civilizations. The theory of a conflict of civilizations wants to demonstrate that American supremacy is irreversible and wants to push us towards an alliance with America, when faced with an enemy who appears to be drawing closer and closer. The aim is to define the principal enemy by reconstructing a new "dual bloc logic". But this outline is not

sufficient to summarize a more complex scenario. Instead, there is a sort of multiplicity, above all, a cultural one. There is a multiplicity also in the Euro-Atlantic Mediterranean region where situations of contrasting alliances and civilizations co-exist with regard to the United States. Moreover, on the other front, the so-called Islamic enemy, is fractured and not united; "moderation" and Islamic extremism co-exist, just as Western moderation and extremism do. On both sides there are doves and hawks.

The theory of the conflict of civilizations is a "false problem"; the war now in progress is a political conflict and above all an economic one. It is a conflict within civilizations, between two concepts of wealth and poverty; a conflict which has grown and matured in a context of poverty, underdevelopment and social exclusion; a context and an environment where Islam is present. An emerging idea is that building a new world order will not depend on the supremacy of one civilization over another but on a transversal alliance between civilizations, which also sees as protagonists those areas of the Arab world which refuse to be attracted to theocracy and aim to create states based on the rule of law. Only by widening their borders can democratic regimes bring about a political solution to the conflict and obtain the collaboration of the international community, which should not tolerate violations of fundamental human rights.

معاصي التجديف ضد الاسلام من قبل مسلمين في مصر: هل ينص القرآن الكريم على عقوبة الإعدام ؟

دكلان أو ساليقان

يفتح البحث بمدخل يتعلق بتحديد التجديف في الإسلام وكيفية تحديد هذا المفهوم قانونيا في شق أنواعه. كما يحلل بإيجاز وجهة نظر مختلف المذاهب الشرعية حول ما إذا يمكن للمتهم أن يتسبب عن معاصيه قبل أن تؤدي التهمة الى إقامة دعوى. وتم الإشارة الى تفسير الأحاديث من طرف العلماء المسلمين بغية إقرار العقوبات الشرعية لتهمة التجديف. ويمضي البحث الى تقييم مفصل يعالج قضية إختيار بعض الآيات القرآنية من طرف المفسرين لتبرير عقوبة الإعدام كالمجازاة المعترف بها في حالات التجديف. كما يشير البحث الى العلماء الذين يرفضون هذا التفسير ويؤمنون أنه لا يعكس الرسالة القرآنية. وفي الختام يتم تقييم بعض حالات التجديف حصلت في مصر مؤخرا بما في ذلك قضية الكاتبة نوال السعداوي، نصيرة مبدأ المساواة بين الجنسين، وقضية صلاح الدين محسن الذي حبس عام 2001. كما يشير البحث الى قضية فرج فوضى الذي سجن بتهمة التجديف ثم فتحت عليه النار في الشارع وأردى قتيلا عام 1992، بالإضافة الى قضية نجيب محفوظ، المصري الأول الذي فاز بجائزة نوبل، والذي كان متهما بالتجديف ثم طعن في عتقه عام 1994، وقضايا أخرى يعالجها البحث. والفقرة الختامية عبارة عن ملخص للوضع الراهن في مصر وفي الشريعة بشكل عام. ثم يتساءل البحث كيف يمكن للتفسير التاريخي للقرآن الكريم وللمستندات القضائية لمختلف مذاهب التشريع الإسلامية أن تستجيب للحاجة الى التغيير في الطريقة التي يطبق بها حاليا قانون مجازاة التجديف.

حماية الحرية الدينية للأقليات في اسرائيل

موسى أبو رمضان

ما هو قدر الاهتمام التي توليه دولة اسرائيل للحرية الدينية؟ وما هي المعاملة التي يُخصصها النظام القانوني للدولة اليهودية للأقليات الدينية، المسلمة والمسيحية على وجه الخصوص؟ هذه هي التساؤلات المركزية التي يعالجها هذا البحث. ويشير البحث في بدايته الى معنى الحرية الدينية حسب موثيق دولية، ثم يسلط الضوء على الأهمية التي يوليها القانون الإسرائيلي للحرية الدينية والذي يعتبرها مبدأ أساسيا لدولة إسرائيل. غير أن حماية هذه الحرية بطريقة فعالة يقتضي حماية الأقليات وخاصة عندما لا تكون هذه المجموعات أقليات دينية فقط ولكن أقليات عرقية ولغوية وقومية أيضا. وقضية حماية الحرية الدينية للأقليات في إسرائيل تصبح أكثر تعقيدا عندما تصبح بعض الوسائل المحددة والأساسية للتعبير عن هذا المبدأ معرضة للخطر كحق اختيار الديانة وحق اعتناق دين جديد وحق التعبير عن الانتماء الديني. كما يحلّل البحث تلك الحالات حيث تؤدي حماية الحرية الدينية للأقليات الى نزاعات مع ديانة الأغلبية ويسجّل الباحث الميل السائد نحو تفضيل الديانة اليهودية. وبشكل خاص، يستتكر الباحث ما تبديه قرارات المحاكم الإسرائيلية من جهل فيما يتعلق بالمبادئ الدينية الإسلامية. ويختتم البحث بتحليل مفصّل ومدعوم بالحقائق التاريخية للحماية القانونية الممنوحة للأقلية المسيحية.

حقوق الإنسان وملاءمة الظروف السياسية والحرب ضد الإرهاب: تضمنات للمغرب

توم بيار بنجم

أصبحت قضية حقوق الإنسان خلال العقد الأخير محط الأنظار في العالم النامي وذلك ناتج عن عملية العولمة في الاقتصاد العالمي بشكل متزايد والهيمنة الساحقة للقوى الغربية الرئيسية وخاصة منذ حلّ الإتحاد السوفياتي في أوائل التسعينات. ورغم أننا لا يمكننا أن ننكر أنه حصلت بعض التطورات الإيجابية في مجال حقوق الإنسان، إلا أن طبيعة عملية العولمة نفسها وتعاطيها مع هؤلاء التطورات هي أكثر تعقيدا وغموضا مما يبدو أن يتصور الكثير من المرافقين. وفي حقيقة الأمر، فإنني أشعر أن الحقائق من معظم الدول النامية تشير الى أن قضية حقوق الإنسان ومشروع التحرر السياسي قد خضعت بشكل مستمر لمبدأ يمكن تعريفه بمبدأ ملاءمة الظروف السياسية. وفحوى ذلك أن أصحاب القرار الغربيون والإقليميون قد إكتفوا بتقدم مشروع إصلاحات عندما يؤيد ذلك مصالح إقتصادية وأمنية هامة، أو على الأقل لا يصطدم ذلك المشروع بهذه المصالح بشكل ملحوظ. أما في الحالات التي تعرّضت فيها هذه المصالح الحاسمة للتهديد فتجاوب أصحاب القرار المختلفون بشكل شبه دائم بإنتفاص أهمية هذا العنصر من عملية العولمة أو حتى إبطاله. ولذا فلانني أتوقع أن بعد الهجمات الإرهابية على الولايات المتحدة في 11 أيلول \ سبتمبر 2001 من الأرجح، وفي المستقبل القريب، أن تصبح عملية التحرر السياسي وربما قضية حقوق الإنسان بشكل خاص خاضعة لهوموم أمنية. والهدف وراء بحثي هذا مزدوج: أولا - أودّ أن أبلدي بعض الملاحظات العامة عن دور مبدأ ملاءمة الظروف السياسية في تكوين ديناميكية العولمة وبخاصة فيما يتعلق بقضية حقوق الإنسان، وثانيا - أبحث أهمية مبدأ ملاءمة الظروف السياسية من أجل فهم التطورات الأخيرة والأوضاع الراهنة في دولة من دول الشرق الأوسط وشمال أفريقيا. ولقد إخترت المغرب ليكون موضوع دراستي نظرا لإنشغاله الملحوظ في عملية العولمة وكذلك نظرا لصدارة قضية حقوق الإنسان في النقاش السياسي الذي دار في البلد في السنوات الأخيرة ولا سيما منذ وصول الملك محمد السادس الى العرش الملكي في تموز \ يوليو 1999.

حقوق الإنسان في تونس: خيارات صعبة للإتحاد الأوروبي.

إمه سي ميري

أعرب الإتحاد الأوروبي في أكثر من مناسبة عن إهتمامه بأنه على الدول الشركاء في جنوب البحر المتوسط أن تشجع وتحمي حقوق الإنسان كما تم تحديدها في إعلان الأمم المتحدة حول حقوق الإنسان والمعترف بها من قبل دول إعلان برشلونا لعام 1995. وإهتمام أوروبا هذا من نوعين: معياري من ناحية، إذ أنه يعرب عن مبدأ الإيمان بالتطبيق الشامل لحقوق الإنسان، وعملي من ناحية أخرى نظرا للدور الفعال لحقوق الإنسان والديمقراطية في الإصلاح الإقتصادي والتنمية.

وفي عام 1996 أصبحت إتفاقية الشراكة بين تونس وأوروبا سارية المفعول عبر مجموعة من الإتفاقات الإقتصادية والأمنية والسياسية، أو ما يسمى: "جداول أعمال" مشتركة. واعتبرت أوروبا حقوق الإنسان وتبني النظام الديمقراطي شرطا أساسيا لمنح المساعدة الإقتصادية وفتح الأسواق الأوروبية للمنتجات التونسية. ومع أن تونس تدعي أنها عملت في صالح تشجيع وتطوير حقوق الإنسان بشكل ملحوظ، بل أنها أوجدت مستوى من التعددية السياسية لم يسبق له مثيل منذ إعلان الإستقلال، إلا أن النظام التونسي تعرض للإنتقاد المستمر من قبل منظمات حقوق الإنسان وحتى من الإتحاد الأوروبي نفسه بسبب الإتهامات لتلك الحقوق وبسبب مركزية السلطة السياسية المتزايدة.

وتبحث هذه الدراسة الإتهامات الموجهة الى تونس ورد النظام التونسي عليها وذلك عبر عدسة التاريخ السياسي التونسي. ويثير البحث قضايا مهمة بالنسبة للإتحاد الأوروبي وذلك فيما يخص الإلتباسات والتناقضات التي تتسم بها عملياته السياسية.

مبّرر للسلام كحق من حقوق الانسان

باتريك هايدن

شاهدت السنوات الأخيرة حواراً مكثفاً حول دور حقوق الإنسان في خلق الظروف السلمية. غير أنه لم يُنتبه بما فيه الكفاية الى الإدعاء القائل إن السلام بحدّ ذاته حق من حقوق الإنسان. ويزعم بعض الناقدين أن التركيز على الحقوق يؤدي الى معالجة شرعية للسلام على حساب مفهوم أصحّ للسلام الإيجابي، بينما يزعم آخرون أنه لا بد من الإطار القانوني للحقوق للتخلص من النزاع العنيف. وفي هذا البحث أتبنى موقفاً بين هتين الفكرتين وأطوّر دفاعاً معيارياً للحق الإنساني للسلام ضمن معالجة أوسع للعدالة الاجتماعية، كما أشرح أن الحق للسلام عبارة عن حق إنساني أصيل لأنه يرضي الإختبارات التبريرية وبما في ذلك تلك التي تخصّ مجاله والواجبات المترتبة عليه وقابليته الإقتصادية.

السلطان القضائي الدستوي ودور المحكمة الأوروبية للعدل: مبادئ رئيسية لفهم قانون المجموعة الأوروبية وتطوره.

اطونيو لا برغولا

إن النظام القانوني الحالي للمجموعة الأوروبية ناتج عن سبب القرارات القضائية طويلة فترة زمنية طويلة. وكان تطور قانون المجموعة عبر السنين مميزاً بقرارات المحكمة الأوروبية للعدل. ولذلك، فإن النظام القانوني كما تم تحديده من قبل محكمة العدل قد حتم أن يكون دور قاضي المجموعة مشاهماً للدور أي قاض في نظام قانوني وطني. ويهدف المقال الى توضيح ومناقشة هذا الأمر.

ومنذ عام 1951 زودت قرارات المحاكم والبحوث العلمية العديد من التفسيرات لهذا المعيار، مما يدل على الحرص على إيجاد تحديد واضح تجنباً لإضعاف مفهوم اللاجئ نفسه. ويعالج الأستاذ بن برنو في هذا البحث الحاجة إلى تحديد هذا المعيار وذلك عبر المراحل التالية: أولاً- تحليل التطور التاريخي للمفهوم، وثانياً - تحليل شتى للتفسيرات النظرية، وثالثاً- تحليل قرارات المحاكم. وهكذا، يبني الباحث تحديداً واضحاً لهذا المفهوم بطريقة تركز الأضواء على مهمته المتقدمة، ذلك لأنه المعيار الوحيد الذي يمكنه أن يشمل حالات جديدة لم تكن في حساب المسؤولين على صياغة الإتفاقية. ويبدو أن نظرية "من نوع واحد" توفر أفضل تفسير لهذا المعيار الذي يرضى الصرامة العلمية من ناحية والحاجات الإنسانية من ناحية أخرى. ويقوم الإضطهاد بدافع "العضوية في مجموعة إجتماعية معينة" عندما تهدد الصفات المميزة الفطرية والثابتة أو أية ناحية جوهرية في هوية المجموعة، ويشكل الضغط على أعضائها للتخلي عنها إنتهاكاً لحقوقهم الإنسانية الأساسية.

توثيق حقوق الإنسان في مالطا.

ج.ج. كريمونا

يتوسع البحث في عدد من الوثائق المالطية المتعلقة بحقوق الإنسان تم عرضها في مدينة فيينا (النمسا) بمناسبة حوار دولي حول حقوق الإنسان نظمه مجلس أوروبا. ويسلط البحث الضوء على الأهمية الخاصة لتلك الوثائق في تشجيع وحماية حقوق الإنسان في مالطا. ويتم التركيز في الختام على قانون الإتفاقية الأوروبية لعام 1987، ويضم القانون المالطي الشروط الأساسية للإتفاقية الأوروبية حول حقوق الإنسان وإتفاقيتها الإضافية الأولى، كما أصبحت قرارات المحكمة الأوروبية لحقوق الإنسان ضد مالطا صالحة التنفيذ من قبل المحكمة الدستورية المالطية بنفس الطريقة كما لو كانت قرارات صادرة عنها. وبغض النظر عن التركيز على الآثار الهامة لهذا التشريع، يتطرق البحث إلى بعض القضايا المتصلة.

الأمن والثقافة: بحث مقارن بين الوحدة الأوروبية والصين

فولفيو أتينا

جو غويتشانغ

تشهد دول العالم تحولات هامة في أمنها. ومن بين أهم هذه التحولات، تأسيس الثقافة الأمنية الجديدة على مستوى الدولة الوحيدة وعلى مستوى مجموعة من الدول بالإضافة الى خلق جيل جديد من الترتيبات الأمنية الإقليمية. فالثقافة الأمنية الجديدة تتأسس على مفاهيم الأمن التعاوني والشامل، أما الجيل الجديد من الترتيبات الأمنية الإقليمية فيتأسس على استبدال الأحلاف العسكرية باتفاقيات الشراكة الأمنية. ويسلط هذا البحث الضوء على الثقافات الأمنية الجديدة في الوحدة الأوروبية والصين وعلى دور الوحدة الأوروبية والصين في المرحلة الحالية من بناء أنظمة الأمن الإقليمية في كل من أوروبا وآسيا.

معيار "العضوية في مجموعة إجتماعية خاصة" في إتفاقية 1951 حول وضع اللاجئين.

حاج صحراوي بن برنو

إن الحاجة الى تحديد واضح لمفهوم "اللاجئ" قد قامت بصورة ملحة إثر الزيادة الملحوظة في تدفق اللاجئين الذي أعقب الحرب العالمية الثانية. وسدت إتفاقية 1951 حول وضع اللاجئين هذه الحاجة إذ أنها وفرت المعايير اللازمة لتعيين هؤلاء الأفراد الذين يمكن تصنيفهم كلاجئين. وتحدد الإتفاقية الاعتراف بوضع اللاجئ على هؤلاء الأفراد الذين: "لم خوف مبرر من الإضطهاد لأسباب عرقية ودينية وقومية وبسبب العضوية في مجموعة إجتماعية خاصة أو لأسباب سياسية". وعلى نقيض المعايير الأخرى، فإن معنى "العضوية في مجموعة إجتماعية خاصة" قد ظل غامضاً.

ويرفض الباحث هذه الأفكار المشوبة بالتحيز وذلك عبر الإشارة الى الكثير من الطرق التي سمحت لهذين النظامين القانونيين، اللذين يدوان أهما في عزلة عن بعضهما، أن يكونا في حقيقة الأمر على إتصال مستمر. وبشكل خاص، تتم الإشارة المفصلة الى القدر الباهظ من الأعمال القانونية للمؤلفين البريطانيين التي تم ترجمتها في القارة الأوروبية عبر القرون والتي إحتفظت بشعبيتها في أوساط العلماء القانونيين والمفكرين الأوروبيين منذ ذلك الحين. كما يحلل البحث التبادل بين هذين النظامين القانونيين في مجالات قانونية معينة، كالقانون البحري والقانون التجاري والقانون العمومي وقانون العقود.

التدخل الإنساني والحياد والديمقراطية الدولية في الفترة ما بعد الحرب الباردة.

سالفو انسلو

لا يمكن عزل مفهوم الحياد عن فكرة سيادة الدولة ونموها في الفترة ما بعد الحرب الباردة. ومع مرّ السنين، تغيّر مفهوم سيادة الدولة كما تغيّرت العلاقات الدولية. وبالتالي تغيّر مفهوم الحرب أيضاً. ويحرص المجتمع الدولي على ضمان السلام بأية وسيلة ممكنة. ومع ذلك، فكان هناك تصعيد للإنتهاكات بين عدد من الدول دون أن يؤدي ذلك الى إعلان حالة الحرب بينها. وبالإضافة الى ذلك، حصل تصعيد خطر للعمليات الإرهابية من النوع التي لا تمثل أية أيديولوجية سياسية بين الدول أو بين الشعوب. فلا يمكن تسمية هذا النوع من الصراع حرباً ولكن يجوز تسميته "حرباً خاصة". ولذلك يمكن الإشارة الى "حرب جديدة". وليس المقصود منها الحروب بين الدول أو الحرب الهادفة الى تحرير الدول. أما هذه الحقيقة الجديدة فلا بد من معالجتها عبر التعاون الدولي. ولذا يجب خلق نظام قانوني دولي جديد مؤسس على حقوق معترف بها دولياً تضمن الكرامة الإنسانية.

الديمقراطية المحاصرة

تشيرو سبيلو

رغم الإصطدامات في مدينة جنينا الإيطالية، يجب على المنظمات المناوئة للعولمة من جهة والحكومات الديمقراطية من جهة أخرى أن تتعاون بغية حماية العالم من نشوب نزاع بين "ماك دنيا" و"الجهاد". وللمجموعتين أهداف متشابهة جدا وخاصة فيما يتعلق بحماية حقوق الإنسان وحماية الدول الفقيرة من سلطة الشركات الكبرى المتزايدة. ولا سبيل لتحقيق توزيع عادل للمصادر وتحقيق المساواة العالمية خارج العلاقة القريبة بين الحكومات الديمقراطية والحركة المناوئة للعولمة. ذلك أن هذه الحركة أكثر حِفْظاً وشعبية من الحكومات الديمقراطية. غير أن الحكومات الديمقراطية أكثر سلطة وقوة من المنظمات المناوئة للعولمة. وأصبح هذا "الحلف المقدس" ضرورة عقب أحداث الحادي عشر من أيلول \ سبتمبر الماضي.

"في ديار إنكلترا": انعكاسات للـ"قانون العادي" في الثقافة القانونية الإيطالية

جويلو الببا

يحلل هذا البحث بوجه الخصوص، ومن الناحية التاريخية، نظامين قانونيين مختلفين جدا، أي القانون المدني الأوروبي وأنظمة القانون العادي الأنغلو-ساكسوني. ويشير الباحث الى العديد من الأفكار الخاطئة التي أكتنها العلماء القانونيين من كلي الطرفين، ولقرون عدة، فيما يخص النظام القانوني المعمول به على الضفة الأخرى من بحر المنش. ومن أهم مثل هذه الأفكار الخاطئة الاعتقاد بأن نظام القانون العادي و أنظمة القانون المدني قد سلكت مسالك موازية لم تلتق قط، أي فكرة نظامين قانونيين دار كل واحد منهما في مداره الخاص دون أن يؤثر بعضهما البعض.

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