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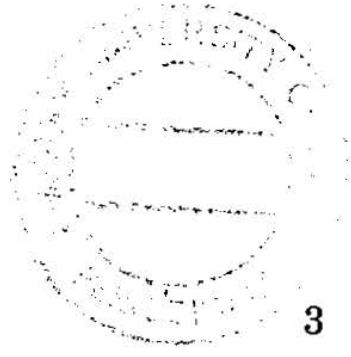
HUMAN RIGHTS AND DIVERSE CULTURAL IDENTITIES IN THE EURO-MEDITERRANEAN AREA



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FOREWORD

CIRO SBAILÒ
Academic Co-ordinator of the Conference

> *"The Mediterranean, beyond its present political divisions, identifies itself with three cultural communities, three civilizations characterized by great vitality and extension, three peculiar ways of thinking, believing, eating, drinking, living... Really, they are three monsters ever ready to show their teeth, three characters with their endless destiny, which have always been present – or at least they have for centuries. Their boundaries cross those of other States, and these – on their side – are but Arlecchino's garments, and such light ones!"*

Thus speaks Fernand Braudel in a memorable introductory text to the History of Mediterranean. In this region, civilization seems to be born from an encounter / clash of cultures. Originally, the concepts of 'human rights' and 'tolerance' developed in this area. And yet in this area there are the most violent clashes between world-views and between philosophies of life. Nowadays, the Mediterranean represents the crossroads of all the main tensions of the Post-Cold War world but this situation is also the test bed of Western civilization in a time of globalization of human rights themselves.

The international conference on "Human rights and Diverse cultural identities in the Euro-Mediterranean area" – held in Naples on 30th-31st January 2003 within the framework of the Mediterranean Master programme in Human Rights and Democratisation of the University of Malta – was an important occasion for debate on such an old and yet still topical subject. It is a very old matter because it concerns the very same roots of the Western civilization. It is also topical since no global governance and no diffusion of democracy on a global scale are thinkable unless they are accompanied by a human rights policy.

The conference was held under the patronage of the European Commission, in collaboration with the University Federico II of Naples (Faculty of Political Sciences and the Department of International Sciences and European political system) the A.R.S.A.E. – Association of Researchers and Scholars on Political Representation in Elective Assemblies) and the C.E.S.D.U. – The Euro-Mediterranean Centre of juridical studies and human rights). The meeting featured many speakers, amongst whom were professors, researchers, representatives of the institutions and of the civil society of the Mediterranean region. Of course, the problems required an interdisciplinary approach and the aim of the conference was that of dealing with a series of 'open' matters, not pretending to suggest any solutions but simply trying to offer a survey which is as wide and detailed as possible.

The multiplication of cultural identities – also beyond the territorial sphere – might imply second thoughts about the policy of human rights, especially with regard to the role of the State. The 'negative' conception of the tutelage of human rights proves to be insufficient whenever there is the need to guarantee to a person the possibility of developing his own personality within a community. And yet, independently from the 'positive' or 'negative' meaning – human rights are both the limit and the foundation of the sovereignty of States, in the sense that the legitimacy of a State depends on the respect and promotion of fundamental human rights. Thus, whereas the right to a cultural identity takes shape as a fundamental right, no State can oppose the development of a multi-ethnic and multi-national society in the name of the unity of the nation-state. The State holds the monopoly of legitimate violence, but it is authorized to use it for its defence only and not for the violation of rights.

Besides being a limit, human rights are also an opportunity for States. The promotion of cultural identities can in fact be an element of social stability in a time when the traditional welfare support provisions are facing a crisis due to the processes of globalization. The internal ethnic and cultural communities in States can offer the weakest people a chance to adjust and integrate. It is necessary to work on two tracks. On one hand, the concept of ethnic community must be separated from that of a 'minority' and in particular from that of a 'linguistic or territorial minority'. On the other hand, every single person must be guaranteed the possibility of relying on some 'state' rules that allow him to assert his identity also 'against' his community.

As regards international politics, in the Post-Cold War world the protection of human rights is also an essential condition to guarantee a civil life and the peaceful living-together of people. Due to the processes of economic integration and increasing migratory flows, a human rights policy must face a complex and dynamic picture of old and new ethnic and cultural identities which demand not only freedom of expression but also the recognition of both their geo-political and social role. The situation appears full of risks and opportunities. The risks are connected to probable incompatibilities between the principles of Western constitutionalism and the fundamental values and habits of some ethnic-cultural groups. The opportunities, on the other hand, regard the chance to develop the workings of a union based on a community of cultural identities for the tutelage and promotion of human rights.

This group of problems concerns Europe both on the internal and external levels. On the external one, the engagement of the Union in the field of human rights in the Mediterranean area must keep into consideration the different ethnic and cultural identities that characterize the region. On the internal level, the migratory flows see to it that in the States of the Union themselves there is the forming of ethnic and cultural identities that are foreign to the Western tradition. Besides, this very same difference between 'external' and 'internal' is continuously tested by the birth of 'diasporical' communities that cannot be included in the traditional territorial parameters.

Nowadays, for this reason, the role of universities and cultural association is decisive: their aim is to maintain and strengthen the network of communications and dialogue between cultures and civilizations; of course this network finds its roots solely in the Mediterranean as a whole.

PAPERS

IDEOLOGICAL MANIPULATION OF CULTURAL RELATIVISM

ATEF AHMED*

A Case for Textual Analysis

My aim in this paper is to show how cultural relativism can be manipulated to justify an authoritarian ideological attitude. I think that this would be better achieved through the analysis of a representative document, which is the "Universal Islamic Declaration of Human Rights" (Issued on 19 September 1981 by the Islamic Council)[1]. It is representative, in my view, first, because it expresses the mental attitude of a vast majority of Muslim intellectuals all over the world, second because it is said to be compiled by eminent, Muslim scholars, jurists and representatives of Islamic movements and thought, third, and maybe more significant, because it expresses the practices exercised by many Islamic states, especially in the Middle East.

The first impression one gets on reading this document is that it has a double message. Its manifest content is to defend and confirm the universal standard concepts of Human Rights, but its hidden

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[1] http://www.Islamonline.net

intent is to legitimize – in the name of religion- the sort of practices characteristic of pre-modern, if not medieval, societies. How can these two contradictory aspects be achieved and out of what problematic do they arise? That is what I am going to talk about.

1. Description of the document

In the very beginning, the document presents a Quranic verse that says: *"This is a declaration for mankind, a guidance and instruction to those who fear God"*. Such a statement, in such a context, has several implications: First, it not only expresses God's Will, but also talks on behalf of Him. This gives the document a unique status as if it were itself the word of God addressing the whole mankind. Second, it ascribes an inferior status to the readers who are supposed to obey its instructions without any critical sense and without any logical argumentation. Third, it tries to nullify the international Human Rights declarations and covenants, as they are all human - and not made by God. This attitude is further affirmed by saying that: *"Islam gave to mankind an ideal code of Human Rights fourteen centuries ago"*, and that: *"Human Rights in Islam are firmly rooted in the belief that God and God alone, is the Law Giver and the Source of all Human Rights,"* which: *"Are an integral part of the overall Islamic order"*. That is why: *"It is obligatory on all Muslim governments and organs of the society to implement them in letter and in spirit within the framework of that order"*. More over: *"By virtue of their Divine source and sanction these rights can neither be curtailed, nor can they be surrendered or alienated"*.

It seems that the document writers are not fully satisfied with all the statements about the Divine Source of Islamic Human Rights. That is why they insist on refusal of rationality as a source for formulation of Human Rights, by saying that: *"Rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul."* It also affirms that: *"Islam represents the quintessence of Divine guidance in its final and perfect form"*. Assuming all these beliefs and notions, human beings are left with nothing but to obey God's teachings, so that *"duties and obligations, should have priority over rights"*. In fact, there would be no room left for rights whatsoever, since duties and rights are contradictory terms that cannot be realized at the same instance.

Nevertheless, the document displays a list of rights including political, civil, and women's rights. It is, however, worth noticing that wherever a certain standard universal right contradicts with a Shari'a rule, the document either keeps silent about it, or uses evasive formulation, or refers to what it calls Islamic Law, which is nothing but the Shari'a. These techniques are most prominent in at least four conflict areas:

1) The institution of slavery,
2) Discrimination on the grounds of gender and religion,
3) Freedom of belief and thought.
4) Participation in political affairs

As regards the slavery institution, although there is no verse in the Qur'an that directly approves enslavement, some verses do that by implication e.g. in "*albaqara*: 178"; *an-nisaa*: 3- 24-25-36". That is why Shari'a recognized slavery in principle, though it sought (as certain verses of the Qur'an did) some measures to restrict the sources of acquisition of slaves and to encourage their emancipation. And that is why the document, despite being a declaration of Human Rights, did not prohibit slavery in a clear-cut way, but considered it just "abhorred", the same as forced labour. Shari'a also discriminates against a non-Muslim man who is not allowed to marry a Muslim woman. Again, a Muslim and non-Muslim are not allowed to inherit one another. There is also discrimination between them in testimony and in criminal penalty of Qasas (equal retaliation).

But the major discrimination under Shari'a may be that which is directed against women. Women are considered inferior to men by nature and by the ability of men to earn money to spend on the family. The husband has the unquestionable right to divorce, while the wife can get it only under restricted conditions. On equal terms of relationship, the women would inherit half the portion of men. In criminal testimony, two women would be equal to a man. The woman is generally considered to be a sexual object for the satisfaction of man's desires and has to be paid for that.

How did the document approach these problems? First of all, we find "Law" everywhere. Expressions like: "*in consonance with,*" "*in accordance with*", "*in due process of*", "*except under the authority of the Law*"; are always there to remind the reader that he is subject to religious restrictions which modify and sometimes violate, the core of the original statement. Second, it simply ignores the crucial point,

e.g. the equality statement, excludes discrimination "*by reason of so and so*", but not "*by reason of religion*", which is the significant point. Third, by playing on formulations, it can give a false impression of a desired effect which it does not mean in reality, e.g. article no. XIII concerning the right to freedom of religion says that: "*every person has the right to freedom of conscience and worship*" but then, it adds: "*in accordance with his religious beliefs*", a specification that seriously violates the original statement, if not nullifying it altogether. It is universally agreed upon that freedom of conscience and belief means the right to choose, on maturation, one's attitude towards religion i.e. to have a religion of any kind or to have no religion whatsoever. Furthermore, he/she has the right to freely express his views publicly through all available means of expression. The only restriction here is, as it is everywhere else, that the rights of the others not be encroached upon by humiliating their own beliefs.

The restrictive attitude of the document is confirmed more harshly in article no. XII, which states that: "*Every person has the right to express his thoughts and beliefs: so long as he remains within the limits prescribed by the Law*". But to avoid any misunderstanding, it adds that: "*No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander innuendo or to cast defamatory aspersions on other persons*". The question that may arise here is: who is entitled to define these vague offences?

Political rights are also evasively stated in the Document. Article no. g-ix) states that: "*...the authority to administer (public affairs) shall be exercised after mutual consultation (shura) between the believers qualified to contribute to a decision which would accord well with the Law and the public good.*" Moreover, article no. g-vi states that: "*Obedience shall be rendered only to those commands that are in consonance with the law.*" Of course, the most significant phrases here are: a) "*consultation between believers*", which is the alternative of the general election in modern democracies. It is clear that such a statement keeps silent in relation to the imperative status and the scope of the consultation, and in relation to the non-believer citizens; b) "*obedience to commands*", which is the real demand of any despotic state.

However, it is worth noticing that although all these notions and attitudes have a sound basis in the Qur'an which is the supreme authority in Islam; still it is the outcome of a certain non-historically

oriented reading which does not exclude the possibility of other different readings leading to different outcomes. But, anyhow, elaboration of such a point lies outside the scope of this paper.

2. The problematic

What are the factors that contributed to the situation that lead to the issuing of such a document? I think that we can refer at least to two factors or groups of factors: first, we have those which led to the intermingling between the religious and the political in the early Prophetic society; and which, later on, made the religion of Islam the sole source of political legitimacy for the Caliphate states down to, at least in some and at least in part, the contemporary Muslim states. And, second, we have those factors that led these same societies to be invaded by the modernity in a highly complicated and even contradictory way, at a time when they were still in a traditional medieval state of affairs.

As regards the first group of factors, what concerns us here is how the political need for religious legitimacy led, first, to the establishment of the institution of Shari'a, and, second, to ratify it as of Divine source (the Law). It is well known that the Prophet, after moving to Medina (hijra), had to consolidate and regulate the social, political, and military affairs in and around Medina. This aspect of his activities was not a part of the revealed doctrine. However, during the Prophet's life, the presence of God and His participation in the decision making of the significant communal problems, was a concrete social reality. All believers complied without questioning to the instructions of the Prophet as the messenger of God. Anyhow, this ideal situation changed drastically after the Prophet's death and the cessation of revelation.

The problem of the succession of the Prophet confronted the community of the believers with the first, and may be the most significant, crisis in Islamic history. It represented a point of departure from what was divinely justified to what became apparently profane without sacred covering: an open conflict for possession of power and status. It was not so surprising that the clash was settled on a tribal basis according to the degree of blood relationship to the Prophet's tribe i.e. the *Quraysh*. But then the seeds of the problem of legitimacy were laid down especially for the future generations. Since that time the ruling dynasty has the

obligation to show its worthiness of ruling a Muslim nation through its -at least apparent- adherence to what the people believe to be Islam. This obligation reached its peak with the reign of the *Abbasid* dynasty which overthrew the *Umayyad* dynasty under the banner of Islam. It was not until the early *Abbasid* era, from 750 A.D. onward, that, what has been called since then, "Shari'a" was really developed. This was achieved through consolidation and systemization of the work of certain individual jurists and their students into separate schools on Shari'a[2]. That is why, Shari'a, as known to Muslims today, is not divine in the sense of being considered as direct revelation. Rather, it is the product of a process of interpretation of, and logical derivation from, the text of Qur'an and Sunna (deeds and sayings of the Prophet) and other traditions (Naim, 1990, p11).

The relationship between the Caliphate state and the intellectuals of the time (mainly the jurists) should be further scrutinized in order to determine the role of each partner in the process of the consolidation, and in particular, the attribution of a divine nature to the "Shari'a". It is worth noticing that what the Document referred to as *"the Law"* is nothing but this *"Shari'a"*. That is what the explanatory notes of the Document tell us. Whereas it defines the Shari'a as: *"the totality of ordinances derived from the Qur'an and the Sunna and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence"*.

However, it may be interesting to go on a bit further along those explanatory notes just to see how far the restrictions and limitations imposed upon Human Rights could be. It goes on saying, in note 2: *"Each one of the Human Rights enunciated in this declaration carries a corresponding duty.* And in note 3:

> *"In the exercise and enjoyment of the rights referred to above, every person shall be subject only to such limitations as enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the general welfare of the Community (Ummah)."*

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[2] A.A.An-Naim, *Towards an Islamic Reformation*, 1990, The American University in Cario Press. P17, 11.

That is how the first group of factors lead to the unification of the political and the religious in Islamic states rendering what is political and profane to appear as if it were religious and sacred.

The second group of factors comprises those related to the challenge of modernity and the nature of responses it stimulated in Islamic societies and states. Of course, there are social, political, cultural and developmental differences between different Arabic- Islamic states. But still, they have common religious cultural traditions that shape their intellectual and psychological response to modernity. At the same time, the social solidarity is still based on religious community and patriarchal extended families. And the rural and/or tribal mentality and psychology are still pervading society as a whole. The ruling elites persisted to be authoritative and control the various aspects of the socio-political life. This means that these societies are not predisposed to assimilate the cultural aspects of modernity with its modern values, such as the concept of "the individual" as an autonomous and self-dependent entity equal to all others, and the concept of Human Rights as rights inherent in human nature and defended by the law against any encroaching authority whatsoever.

However, there is another aspect of modernity that is unacceptable to any non-western society. That is the imperialistic hegemonic aspect characteristic of western capitalism. This contradictory aspect of modernity created contradictory attitudes in responding to it. Moreover, the situation, especially in the Arab countries, has been aggravated by their heavy cultural and political heritage. That is why the ruling and intellectual elites in Arab-Muslim states responded to the challenge of modern Human Rights by issuing such an Islamic Declaration. And that is why it had such a double-binded character.

3. Ideology and cultural relativism

Now I think I have to reveal the rationale of my hypothesis, i.e. why I consider this document to be ideological in nature, and why I suppose that there is -under the surface at least- some sort of manipulation of the concept of cultural relativism which has been well known to be held by the mainstream of the contemporary cultural studies, especially in the West. I think it is better to explain how I understand such terms as: ideology, culture, and cultural relativism, before seeing whether they apply to the case at hand.

Brown[3] defines ideologies psychologically as being: generally regarded as systems of beliefs about social issues that have strong effects in structuring and influencing our thought, feelings and behavior. Their foundation is in attitudes and beliefs acquired through learning and socialization, and they are embodied in social movements and in the lives of individuals. While Lichtheim[4] defines its positivistic concept as referring to: any kind of consciousness that can relate to the ongoing activity of a class or group and is effective enough to make some sort of practical difference. The main elements of ideology[5] are considered by many scholars to consist of: (1) patterns (or schemes, systems, syntheses (thoughts, values, convictions, beliefs), (2) characteristic of (or belonging to, adhered to by a group (class, epoch), (3) or characteristic of individuals. Anyhow, in addition to these elements and to the Marxian specification of ideology as referring to a distortion of thought which stems from, and conceals, social contradictions[6], I would like to add one more point i.e. ideological beliefs appear to their holders as if they were universal reality.

But then the question arises: is religion ideology? I think that at least some elements in the religious type of thinking are ideological in the sense mentioned before. However, the document, as we have seen, bears heavily on ideology. It involves: (a) a system of beliefs that is socio-culturally oriented; (b) held by an institution (the Islamic Council) which represents a group of Muslim intellectuals and which is supposed to be financed and directed by some Arab -Muslim organizations and (c) sees these socio-culturally derived beliefs as a universal and ultimate truth that should be adhered to by others. That is why I think that such a document is an ideologically–laden one.

Although ideology can be a part of a culture, they are different concepts. Culture consists of the values the members of a given group hold, the norms they follow, and the material goods they create. While values are abstract ideals, norms are the definite principles or rules which people are expected to observe. Generally speaking, culture refers to the ways of life of the members of a society, or of

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[3] Brown, 1973: L.B. Brown, Ideology, Penguin books, 1973, p 173 on.
[4] George Lichtheim, *The Concept of Ideology*, A vintage Book, 1967, p 46.
[5] Arne Naess et al., *Ideology and Objectivity*, Oslo, University Press, 1956. (Internet).
[6] Ralph Dumain: The Autodidact Project: *Ideology by Jorge Larrain* (Internet).

groups within a society. It includes how they dress, their marriage customs and family life, their patterns of work religious ceremonies and leisure pursuits. It also covers the goods they create and which become meaningful for them - bows and arrows, ploughs, factories and machines, computers, books, dwellings[7]. Values and norms of behavior vary widely from culture to culture, often contrasting in a radical way with what people from Western societies consider 'normal'[8] Culture diversity, seen from another perspective, leads to what is known as cultural relativism.

Cultural relativism involves the notion that each culture should be understood and appreciated in its own terms. What is moral in one culture might be immoral or ethically neutral in another. This attitude resulted from the increased knowledge that was acquired recently and led to or facilitated a deeper understanding and, with it, a finer appreciation of cultures quite different from one's own. Such an increased knowledge led to an understanding that universal needs could be served with culturally diverse means, that worship might assume a variety of forms and that morality consists in conforming to ethical rules of conduct but does not inhere in the rules themselves[9].

4. Conclusion

So far, I have tried to explain how I understand terms like ideology, culture, and cultural relativism. Now, my point is that the writers of 'the Document' are playing on the fact that the mainstream of Western intellectuals adopt the notion of cultural relativism. This means – for them - that there would be a room for their system of ideas in Western thought. I think that this is the reasonable explanation for the fact that the writers translated their Document into English and appealed to Western intellectuals, not only to accept their version of what they call Human Rights, but moreover, to adopt their interpretation of Islam as the ultimate word of God. They are unaware that what they declared is not a version of Human Rights but is rather a bill of duties based upon one, amongst other, reading of Islamic texts.

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[7] Anthony Giddens, *Sociology*, Polity Press1994, p 31.

[8] Ibid, p 38.

[9] *Concepts of cultures* (Internet)

HUMAN RIGHTS AND THE PROTECTION OF DIFFERENT CULTURAL IDENTITIES

SALVO ANDÒ*

Introduction

In the rather confused situation that has arisen after the end of the cold war, human rights have been codified in detail by means of international acts of a general and a particular nature but, due to their frequent violations, they still provoke conflicts, sometimes even of the military type. Many of these conflicts derive from often long-standing political, religious and ethnic rivalry, and in certain regions they have become uncontrollable, especially after the fall of the communist regimes. As a consequence, the problem of cultural identities which ask to be recognized as collective identities has effectively become an emergency in the international scenario.

There's no doubt that the problem did not originate with the end of communism. It has ancient roots. In this interdependent world, marked by the decline of the national State, by ever more rapid economic and cultural exchanges, and therefore by the shrinking of the planet, which is becoming more tightly linked by total communicability, the occasions for contacts with what is "different", ethnically or culturally, have been vastly multiplied and are destined to go on multiplying.

Every day we have to face the ever more complex problems that are brought about by multi-culturalism, regarding which the traditional pluralistic legal systems guaranteed by the national States

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are found to be inadequate. In fact the scenario within which conflicts between ethnic identities were traditionally placed has changed. On one side, the interference of the States and the international communities in the life of individual States for the defence of human rights, on the other the crisis of the national State are elements which can radicalize inter-ethnic conflicts. In fact, where common identity is less protected by national sentiment, the bigger is the need to find defence mechanisms and forms of expression that can safeguard that identity.

When facing the problems, and sometimes indeed social tensions, provoked by multiculturalism, one must avoid proceeding generically, placing all the conflicts and misunderstandings on the same footing. One must distinguish the various aspects of the identities, in order to trace a map of interests in relation to which a group expresses itself collectively, defines itself as a social group, as well as outline the borders within which this difference can express itself and even be promoted. In a few words it is a matter of establishing the limits of tolerance in a multi-cultural society, where the bond of nationality has become rather loose.

As regards identity, general statements are no longer acceptable. In fact generic attitudes will end up producing reactions which sometimes lead to intolerance. Accepting the *chador* is one thing, accepting practices that provoke mutilations that cause inhibitions is another! Particularly, it is necessary to build a scale of identities. First of all, by pointing out the particular elements which may produce social benefits. Secondly, by pointing out the particular elements towards which one may show indifference, thereby creating social and structural foundations for tolerance. Finally, one must identify those particular elements which can seriously mortify human dignity.

With reference to the latter, one must identify the most effective instruments to prevent and suppress discriminatory and violent practices.

1. Identity conflicts in the Mediterranean area

The question of cultural identity in the global world cannot, therefore, be addressed by applying the same approach adopted by Lévi-Strauss more than fifty years ago. In those times it was a matter of reacting, once colonialism was over, to the ethnocentric cultures

that belonged to that experience. It was necessary to overturn the paradigms which had enjoyed a large following in legal culture itself, particularly among experts in international law; paradigms which, in the name of the full sovereignty of the State, prohibited any kind of interference which checked "legality" in the relationship between the State and its citizens. Today one must take into account the role that knowledge and the freedom of movement enjoy in the global world, where individuals and groups can more freely choose the place where they want to live, without the risk of losing their heritage of individual and collective rights which have now become consolidated, whether classical fundamental rights or identity and cultural rights, whose essential nature in the contemporary constitutional State, which has become above all a "cultural State", does not need tiresome proofs.

In any case, in spite of the fact that the meeting and/or clash between different cultural identities, which must coexist within the same national sovereignty, will always be part of the life of States, the conflicts between cultural identities cannot apparently be tackled together, that is separately from the social contexts in which conflict or coexistence take place (a developed society or an under-developed society), and apart from the type of State which is asked to mediate and settle the conflict (a tolerant State, which is neutral in respect of the various ideological and religious convictions, or a State which, otherwise, adopts a particular conviction). This difference in context emerges dramatically in the Mediterranean region, where since time immemorial the three great monotheistic religions and the great Mediterranean cultures face each other. And it has shown up even more dramatically since the end of communism, which has led to a more intense migratory flow from the south to the north.

In the global world, if it is easier to move about and bypass the defence mechanism that the States erect to defend their own sovereignty, threatened by a kind of migration which obeys no rules, since the strict rules of the cold war have melted down and now allow easy movement from ex-communist Europe to western Europe, this does not mean that there is now peaceful coexistence between ethnic groups, cultures and identities within the countries that are marked by an ever more varied ethnic composition. All in all, the world has become more disorderly due to the boiling of national passions that seemed definitively subdued a few years back. All this creates further disorder due to the lack of rules and the absence of

international authorities which could mediate and solve ethnic conflicts. The crisis of the national State and the difficulties that keep arising, on the way to the establishment of a "global governance" system that could be based on a wide consensus, end up by exasperating ethnic conflictualities.

2. Traditional minorities and cultural minorities

Up to now legal systems have considered multiculturalism from the viewpoint of guarantees that are given to the so-called "national minorities", that are not only cultural minorities, but also have a long-standing stable relationship with a specific territory; that on the whole appear as homogeneous internally, and ethnically and culturally different to the majority of the population. These people constitute the majority within the territory where they live, they have common traditions, speak the same language, claim a particular status, strive to obtain forms of political autonomy that are more or less incisive and sometimes, in the name of their being "a different people", make claims from the community of the majority for rights that are recognized by "international law" in favour of peoples, like the right to self-determination.

Well, actually this right, which is well known to multi-national States, does not create particular legal problems. The protection of such minorities, by means of special forms of political autonomy or through the recognition of the right to self-determination, is sometimes guaranteed by other States where that ethnic group is the majority. The problems arising from such phenomena of multi-nationalism are usually questions which are often dealt with by the international Community, which has moved on many occasions to guarantee the right to self-determination. The problem, in any case, is how to reconcile the principle of self-determination with the principle of the "self-sufficiency" of a minority which claims to become a "State", that is to evaluate case by case whether a specific minority is capable of being a State. From this point of view one must establish the limits of the claims that concur to obtain the recognition of a new State, precisely to avoid that every minority would want to become a State, perhaps by subduing other minorities, and therefore giving rise to other identity claims that would dissolve the unified States in an endless process of disassembly of States.

Keeping this in mind, it is not always easy to define a cultural identity.

In the international documents that treat the question of cultural diversity one does not find a clear definition of what it is, and above all a clear distinction between cultural identity and other collective identities. Perhaps on this point the Universal Declaration of UNESCO on cultural diversity is more explicit than other sources. In this document, cultural identity is presumed to be the fundamental element to identify a collective identity; safeguarding it ensures the circulation of knowledge and the exchange of experiences which concern creative activities, and the way of living its values to the full (art. 3). The Declaration therefore refers to social culture, that is to

> *"a culture that confers on the members of the group ways of life endowed with a wide range of human activities, including the social, educational, religious, recreational and economic aspects of life, together with their public and private life" (Kymlicka).*

From this it follows that the main aim of the protection of collective identity is to promote interaction processes between different social groups, guarantee the dynamic unity of the social system through a never definitive balance between differences and unity, and to fully guarantee cultural liberties to everybody. The social well-being that must be protected is, therefore, not the difference in itself, but the difference which communicates with other differences.

One may therefore say that cultural rights, which form an integral part of the legal system of man, show the set of rights whose aim is to protect and make the best use possible of that identity, considered as the recognition of singular features which in some way reveal the appurtenance of the individual to a group. And if human rights are by their nature the rights of "the other", this is particularly true of cultural rights which are rights that allow communication with "the other".

These may be individual or collective rights, when exercising them necessarily implies the respect for and the full utilization of a community or institution or common heritage. The concept of collective rights, that is of rights given to and exercised by a collectivity, appears to some people as an ambiguous concept, in the sense that the same rights are then exercised by individuals.

In any case the question about who will exercise these rights is not the fundamental problem. The important problem is to

understand why some rights are conceded to specific groups, that is why the members of particular groups have rights concerning territory, language, representation and so on, while the members of other groups do not have them.

Cultural minorities, unlike other minorities, share memories and values but they don't always share institutions, but most of all they do not ask to become a State; they do not ask international law to treat them as antagonistic communities towards the majority of the population, with a particular statute of their own political rights. They only ask not to be assimilated within the national majority, not to be absorbed into its culture. They do not challenge the way of life of the countries that host them, but they assert that they have a right to keep their own cultural roots not only in the private exercise of their freedom, but also in its collective form.

What European immigrants more often challenge are the policies of integration, based on the approach of assimilation; this approach certainly prevailed in the Democratic state, as against the one which aimed at the cultural submission of minorities that was typical of the authoritarian State, which considered every form of utilization of the collective identity of minorities as a threat to nationality, or maybe as altering the nature of its fundamental features.

All this comprises the need to overcome the traditional forms of the legal protection of minorities, which were devised with reference to minorities on a territory, precisely because these forms of protection are no longer able to solve the problems arising from the new communities "of the diaspora" and "deprived of a territory", which are widespread communities and "move across" the society that hosts them, infect it culturally and have a tendency to keep growing. This is especially true of religious communities; one may think of the Islamic community, which is so numerous in Europe and now also includes converted European citizens. This element annuls the criteria which distinguish between collective identities based on citizenship.

3. The legal system and "different" collective identities

Those examined here are questions which the States and the international Community have failed to address for a long time, and which in the past decades they have tried to deal with by means of the Charter of rights and international documents devoted to the

protection of minorities and cultural freedom, as well as by means of the instruments that national Constitutions possess regarding the promotion of a "cultural State".

For centuries, the international Community has only recognized the national States as political units which can legitimately make up the international society. The international Community was certainly aware that the populations of the national States were not culturally homogeneous, but nonetheless it only entrusted one group with the task of organizing life in common, thereby "writing" collective history on behalf of everybody else and using its own cultural categories as the parameter to understand and protect diversity.

And, since the national States have never been completely neutral when facing the phenomenon of multiple cultures (each State, in a more or less flexible way, watches over the reproduction of the social model with which it identifies itself) it is easy to understand why the international Community did not particularly exert itself to guarantee the cultural identity of minority groups (not even when the protection of fundamental rights was established as its essential task). However, something has changed in recent years.

In the last decades international documents that deal with the protection of minorities have been produced in quick succession and increasing tempo since 1966, the year when the Convention of the United Nations on civil and political rights was born. This Convention finally recognizes that the member of a minority (whose fundamental rights had already been recognized by the Universal declaration) also possesses cultural identity, like everybody else; he is therefore protected not as an individual but as a member of a community. And since then, by means of numerous Declarations and Treaties, religion, culture, common language are protected as features which identify a community.

Similarly to what happened to the international Community, even national States have, for centuries, more or less "tolerated" minorities, from time to time conceding the same rights that their citizens enjoyed to individual members of the minority groups, that is allowing them gradually to obtain citizenship. But tolerance for someone who is "different" has been displayed and codified as motivated always by his consideration as a common citizen and not as a member of a minority group.

This has happened mostly in France, a country where immigration

is of such social relevance that it is unequalled in Europe. And yet, although French society comprises substantial minority ethnic groups, the process of social integration has been promoted with all sorts of incentives and with great determination. France therefore considers itself not as a pluralist society but as a homogeneous one. The explanation of this anomaly – "physical presence on one side, the absence of cultural differences on the other" (Walzer) – has been sought by many in French history, and especially in the kind of State that was created by the Revolution, a State founded on a republican conscience that was formed by struggles with the Church and the *ancien régime*. Consequently, the French population was not kept together by common points of reference like religion, ethnicity or history, but by simply belonging to the Republic. To become French one only had to become a republican and learn French. All this meant that cultural and ethnic differences could be tolerated only if they were expressed in private.

Religion, culture and the history of the minority are relevant in so far as they belong to the "private collective", towards which the public collective, that is the national State, has also been very reluctant to recognize the public exercise of rights connected with diversity. This means that the promotion of assimilation was preferred to the promotion of the minority group's culture.

The trend in favour of assimilation, in France and in other European countries, has shown up in linguistic policies, even when it concerned sizable national minorities that were settled in a particular territory. The use of a language which was different to the national one is actually considered a threat to the process of cultural unification promoted by "the national majority". This attitude did not change, not even when the minority language had strongly influenced the evolution of the national language. The case of language is symptomatic in order to understand how the State – as will be better explained further on – is not indifferent to cultural identities, and cannot fail to decide which social cultures to support. It happened that the defence of the majority language in the schools and in public offices, where bilingual or multilingual situations prevailed, no longer required the refusal, dictated by an exclusive concept of nationality, of the official recognition of minority languages for fear of the separation of the State and the ethnic group.

It seems to us that the legal scenario, at least, regarding minority

rights has already changed in these last years and is destined to change even further; the prevalent trend is towards the concession of more protection to minorities, in spite of signs of social intolerance that show up against the new laws that are enacted in this field.

4. Tolerance towards the "different group" and its limits

These problems need to be treated by reconciling the principles of legal civilization, that are the pride of European societies, with the exigencies of social defence, that cannot be given up in any well-ordered society – exigencies that are not limited to collective security but also concern the safeguard of weaker subjects from various forms of psychological influence (like the forming of sects).

To tackle the claims for full recognition of the right to be different, limits must be established that will allow the assertion of minority collective identities, however without bringing about a real crisis in the cultural identity of the host countries.

Above all it does not seem possible to move on from an absolutely relativist approach to the problems raised by multi-culturalism, with particular reference to the need to reorganize the social State, to guarantee the effective functioning of a multi-cultural society.

One thing is declaring and effecting the principles of cultural pluralism, another thing is to move away, when tackling the problems of the compatibility of different social cultures, from a position of indifference that is happy to let cultures exist side by side without promoting coexistence, that is cultural exchanges, on the basis of common principles that regulate the relations between different ethnic groups and cultures.

It has been rightly observed that an attitude of kind indifference in this field would not only show the State's indifference to the promotion of values on which its own society is founded, and to the promotion of human dignity, above all, but it would also prejudice equality, because "the acceptance of differences is the essence of true equality" (Kymlicka). In this field one must avoid impossible comparisons between religion and culture. It is not possible to maintain that, just as the State should be equidistant from religions it should also be impartial about culture, because a:

> *"State may not have an official religion, but it cannot help legitimizing, at least in part, a culture when it decides to*

use its language in public schooling or in providing public services" (Kymlicka).

All in all, the recognition of the right to different identities, both in the global world, which is certainly not governed by one ideology, and within multi-ethnic States, which have become the rule, or almost, in Europe, does certainly not mean placing values and non-values on the same plane. The State cannot give civil society and its fragmentation "a look from nowhere", as Nagel put it.

In this field Europe cannot forget its own cultural heritage, which is expressed in the synthesis of tradition and secularization, and above all of its own legal culture, which is founded on values that are typical of rational thought.

The characteristic feature of European culture is not cultural relativism, but tolerance as respect for difference. This leads not only to tolerate pluralism, but also to its promotion in all its forms. If diversity is wealth, pluralism is the natural way in which this wealth must be preserved and increased. But at the basis of the different cultural worlds that must coexist, there's a need for a nucleus of values, which cannot help being common to all, and in Europe's case cannot but be represented by the primary values which are essential to the full development of the human person.

Our idea of freedom keeps the individual in mind, the individual as a person, that is at the centre of social relations. European pluralism is therefore different from that of Asia, which is of the pantheistic type and expresses social models based on the family and collectivity. Ours is a personalistic type of pluralism.

Besides, the prevalent opinion among the constituents that worked on the European constitutions after the second World War was that it was necessary to beware both secularized indifference, which considers faith as a useless nuisance, and the integralist assertion of faith, which produces social divisions that are even more dangerous in a multi-cultural society. Those constituents maintained that citizenship must be lay, in that it refers to the individual, to whom equality before the law must be guaranteed. But the individual, as a subject of rights, refers to the person, whose dignity is promoted also with reference to its ability to relate with other individuals.

All the fundamental European Charters, whether they contain an introduction that praises superior values or not, identify the constitutional absolute with the dignity of man, which is the value

that cannot be relativized, not even in the most solemn recognition of the forms of pluralism, which must all be interpreted as functional to the development of the human person and not as obstacles placed in its path.

In any case, the fact that values different to these can be shared by communities that may be even more numerous does not legitimize such communities to refuse values on which the social order of a given country is based, nor to claim forms of restriction that can rebut every possibility of exchange between cultures, every possibility of social integration.

It is to our intention here to tackle the difficult topic of tolerance when facing intolerant persons. We only wish to underline that it is necessary to establish an acceptable point of balance between individual autonomy and the social group's autonomy (to fully guarantee freedom of conscience as an essential liberty to the assertion of human dignity).

The protection of cultural identity, therefore, stops when facing discriminatory practices that have been introduced at the expense of the group's members. The social law State, on the contrary, in so far as it pursues the objective of substantial equality, cannot fail to consider cultural identities, whenever they depress, instead of promoting, human dignity by discriminatory practices, as one of the obstacles that must be overcome to guarantee the full development of the human person; an obstacle that should be considered on the same level as those that are provided for by the Italian Constitution in article 3, second comma. In fact a multicultural society can create barriers that are as high as those created by economic conditions. In actual fact, cultural rights occupy a central position in the context of social rights; and social rights originated precisely as:

> *"suitable structures for defending the equal dignity of citizens against the consequences that it could suffer when conditions arise that may define the forms of the difference endured" (Salazar),*

even as a consequence of collective identity. Anyway, a liberal concept of minority rights should contextually guarantee freedom within the minority group and the equality of minority groups. One minority cannot unilaterally decide to suspend the liberal principles of individual freedom that apply to all citizens. Social plurality can be a threat to liberal liberties if it does not respect individual autonomy.

Keeping in mind the fact that European Constitutions are all centred on the human person, a balance between different values – and the right to difference is one of the values on which a pluralistic society is founded – and a balance between incompatible principles are certainly not easy objectives to reach. Such a balance is particularly difficult when cultural conflict concerns general visions of man and society, when legal regulation concerns essential aspects of private freedom that deeply connotate the "cultural peculiarity" of individuals and social groups. One could mention here the right of the family (particularly the right of admission claimed by, for example, the second wife of Muslim workers residing in a European country, and its compatibility with the constitutional rights that protect the family), the condition of women, religious freedom and the liberties connected with it (all the liberties concerning education, and particularly that of religious instruction), the right to health and the requests for medical care in public structures that would violate the physical integrity of the person or could place his/her life at risk (in this sense one must mention the prohibition of blood transfusions). In such cases conflict cannot be solved on the basis of the criterion by which the "superior" value prevails, because such superiority would express an ethnocentric attitude which goes against the values which are intrinsic to the principle of pluralism.

In fact intercultural dialogue will certainly not be put into effect by the imposition of respect for a particular culture, or a system of values which are favourably considered by the State, because these are values with which a national society identifies itself. However, there are elements in the constitutional pact, constitutional principles drawn from social culture, with respect to which the State cannot fail to adapt itself by defending them to the hilt, considering that should they fail then the whole social order might disintegrate.

From this point of view, defending the constitutional pact does not mean promoting policies of exclusion, it does not mean guaranteeing the freedom of others, the different ones, by imposing upon them whole contexts of values that are extraneous to their culture. In this sense the incident of the Islamic veil is emblematic, an incident which has provoked passionately controversial debates in France. The French Government prohibited the wearing of the veil by Islamic girls in public schools. The question of principle that was invoked was the protection, not only of the freedom of the "other" citizens which could see a form of pressure or unlawful proselytism

in the external signs of religious adherence or of belonging to an ethnic group, but the freedom of those who profess a certain religion or claim to belong to a particular identity in such ways that would objectively dent one's dignity at the moment they accepted a barrier to be raised between them and the majority of the population. They therefore held that acts of coercion that make interpersonal relationships more difficult, and therefore create problems in the development of the human person in its social dimension, should be abolished.

The question was then asked whether the State can guarantee the process of socialization, which should involve all the new citizens, against their will. Now, by wearing the veil these girls did not ask to be treated differently in order to annul these differences but to stress them. They wanted to assert their right not to be "Frenchified" in the way they dressed, in opposition to the students' community. This is a problem that arises in all claims for identity, especially when these bring about social subsystems that are strongly structured and can limit the fundamental rights that are recognized in the same form and measure to all citizens. In France this problem was highly strung because of the monocultural character of the Republic, as I explained above. The French approach to the problems of the social integration of non-EU immigrants has always been paternalistic; and this makes the conflict between cultures even sharper. It is not possible to impose upon citizens coming from a civilization different to the European one to be "free", according to the West's criteria of freedom, against their will.

When facing these problems Europe must give proof of long-term tolerance. On one side it must carefully preserve the full consciousness of the historical, cultural, religious roots that define its identity (not only, it can also show pride in such roots) and, on the other side, it must guarantee social cohesion among its multi-ethnic societies, by creating common values that the State cannot impose from above, but should draw from the web of social relations which are in a continuous state of evolution. Because values are not created by the State. Values are created by consensus.

When we speak of the creation of common values, and of the decisive role of the State in creating the right conditions for intercultural dialogue, we do not mean to affirm that the State should promote values or identify itself with them. The State creates conditions for intercultural dialogue by promoting, for example,

teaching inspired by the values of other cultures. This is an integrationist culture, and nothing else. The State supports the formation of new values by giving scope to research, to cultural liberties, to the scientific community, to local communities that often have at their disposal more efficient services than those available to the State for protecting cultural identities. That is, operating as a "Cultural State", on one side it promotes cultural liberties, on the other it establishes the insurmountable boundaries beyond which cultural liberties cannot go.

By strengthening cultural freedom, in so far as it allows the knowledge of different cultural worlds, the right conditions are created for true coexistence among different groups. Just think of the role that the right to education may play in this field, together with the parents' right to teach and educate their children, to express cultural diversity. If one does not believe that it is possible to compel respect for morality, the sharing of common values, even on the part of groups that claim that they are totally alien to the majority group, can only be based on the freedom to doubt certain faiths, to examine them in the light of any kind of information and arguments that culture can produce. Individuals must therefore have available the right conditions for becoming aware of the different concepts about living well and the ability to examine these concepts in an intelligent way.

Thanks to education and freedom of expression we are in a position to evaluate what has a value and to learn something about other ways of life. Freedom sometimes inevitably interferes even with religious freedom. Religious freedom does not only imply the freedom to practice one's religion, but also the freedom to proselytize, simply because each person should be in a position to know and compare different faiths to be able to change his religion. Minority groups and their different cultural identities enrich society because these cultures influence one another, making it possible for each individual to shift from one culture to the other, where no social or legal barriers prohibit it.

The necessary policy for governing multicultural societies, therefore, must on one hand strengthen the cultural freedom of all the ethnic groups, on the other, however, it must guarantee legality, that is the coexistence of values, respect for different cultural identities and so, obviously, even respect for the identity of the majority.

This point must not be misunderstood. At the centre of our system for the protection of rights, in Europe, one finds the value of the dignity of man, as has been said. This value was not created by our Constitutions, it is a value which identifies the social conscience of our peoples. And this value is also expressed through the principle of democracy, but it is not put into effect only by means of the principle of democracy.

Now, if we conceive human dignity as a premise of cultural anthropology of a community of law, and democracy is conceived as its "organizational consequence" (Häberle), without any doubt it is inconceivable that the State could take up a position, in its ways of understanding and protecting human dignity, which could override or annul the free self-determination of man and the principle of consensus that derives from it. The State in Europe is a "State of culture", that is a State which conceives the strengthening of human dignity above all through its cultural dimension; through the accomplishment of such a dimension the prohibition of degrading man to a simple object is given substance. Taking this into account, it is unthinkable that common values could be created by the State by means of its Constitution, or by means of other laws, nor can they be imposed by a European Constitution, eventually.

Häberle is right when he states that the Constitution is a book of culture that represents a people's identity but does not construct it; it only defines it at a given point in history. So that every people certainly possesses a Constitution, but above all "it is in a Constitution", which means that normally it is the civic ethos which is translated into constitutional laws; it is the people's culture that becomes a Constitution. If the Constitution is to allow the cultural self-representation of a people, it can only be a system which encompasses a number of fundamental values which are constantly developing, is open to the recognition of new rights and to provide new definitions for the old ones, as the cultural dimension of society changes. As such, the Constitution is a "public process".

For the new citizens of Europe, the acceptance of the founding values of a State's Constitution does not mean enduring these values but understanding them, living them, and therefore helping to update them and integrate them with different values that were previously not sufficiently protected.

If social rights, and therefore cultural rights, are traced back to the principle of substantial equality, we cannot then fail to proceed

to their evolutionary interpretation, especially of article 3 comma 2, because the goal is one that can be said to be reached only when an acceptable social justice will have been accomplished. When the less well-off are joined by cultural minorities, without any doubt the efforts for their promotion must be based on a range of measures which take into account the difficulties that hinder their full social integration.

The creation of the right conditions for the formation of common values must therefore start with the establishment of a model of freedom which is typical of the West, based on the equation between equality and individual freedom. However, neither should it start with the idea that social groups must necessarily open up to dialogue, otherwise they will be faced with policies of exclusion. Communication cannot be imposed; contact with the outside world, communication between groups must be given incentives and made easier. And one cannot be forced to know other cultures in order to look at one's own with a relativistic approach (on this point see the historic sentence of the American Supreme Court which recognized that the Amish have a right to be exempted from compulsory schooling, precisely to avoid their "opening up" to the world). And it also cannot start with the idea that citizens' rights be guaranteed according to minimum quantitative and qualitative standards which do not take into account cultural diversity.

On this last point of view it is a question of accomplishing in the first place some form of flexibility for the social State. We consider that the English model, which is pragmatic, is preferable to the French model which is normative, when a strategy for dialogue and integration between cultures must be drawn up.

5. The social State and multiculturalism

On the whole the problem of pluralism in identities must not be tackled according to obsolete models but needs surgical precision. Some cultural conflicts are artificial and can easily be overcome, while more serious problems of conflict can then be tackled, needing consensual efforts of mediation through the participation of different identity groups.

Europe is going through a period of increasing intolerance towards immigrants. Many parties are showing strong signs of concern on this point. Many of these worries are due to the fact that recent

migrations coincide with the serious financial crisis of the Welfare State. Many European governments are finding it impossible to reconcile the necessary fiscal pressure on the welfare system with an increasingly disorderly kind of economic competition.

Marconi rightly points out that "sometimes" an overloaded welfare system multiplies the difficulties for a multi-cultural policy. In some European countries social regulations that are too sharp aggravate conflict with the incoming communities. A nation which wants to protect the individual from the cradle to the grave rarely succeeds to include "different" individuals marked by a deep existential identity that includes birth, socialization, gender relations, roles, education and destiny itself unqualified by adjectives.

Many of the problems concerning integration are like prophecies that come true by themselves. Rejoining the family is difficult in a society which considers habitation standards as inadequate, although they are equal to or even better than those which the immigrants had in their country of origin. An immigrant from the ex Soviet Union will never understand why bringing his family over is denied on the grounds that his present abode is below standard. Even if this happens to be an independent flat equal in size to the place where a larger number of persons have lived for 50 years in Moscow or Kiev (moreover sharing it with others).

And again, "the State that aims at guaranteeing the full development of the human person is often found to be unable to accept diversity, not only when faced with requests for different social services, but also when it must interpret the typical expressions of normal life. It is enough to mention married life and the age limits established in Western Europe for matrimony. These limits are incomprehensible for a good part of the world population. They are perhaps valid in areas where the age of fertility develops later than in other areas, and where, above all, the life span is much higher than that in other countries. One must not forget that the life span can differ by as much as 100% in different parts of the world; from 40 years in some Islamic countries to 80 years in Europe. People who are born where one expects life to be short will consider the limits placed on their self expression by the culture of the developed nations as being a form of violence".

As a consequence, an approach which is not very pragmatic to these problems will end up by interfering with the internalization of the values which cannot be ruled by the State. It is not possible to

influence the personality of a person who is "different" by threatening his exclusion.

The *chador* can certainly hamper the freedom of Islamic girls, because it may not be a free choice but imposed by the group and/or the family, however it can also be an accepted rule. Freedom requires above all else an education for it. One should remember the remarks of Passerin d'Entrèves, when he recognized the most worrying of the thoughts of Rousseau in the pretence of forcing a man to be free.

Taking all this into account, artificial conflicts can be solved by forcing the receiving cultures to relinquish those regulations that penetrate deeply into fundamental ways of life.

Marconi is right when he points out that Western cultures, especially European ones,

> *"while claiming to guarantee protection from the cradle to the grave, have ended up by transforming normal life (family, primary relations, sentiments, education, socialization, vocations) into a cage of restrictive rules. Easing regulations and prohibitions would help coexistence and groups peacefully living side by side".*

This problem emerges even more dramatically when one considers the laws that govern the labour market. It is a well-known fact that immigrants into Europe are normally placed in the margins of the labour market (which actually needs new labourers, especially for socially unpleasant jobs), and therefore are forced into illegal working conditions by laws that are not so strict.

This problem is particularly felt in countries like Italy. One can see how unfavourably "part-time work" is looked upon, since it is of marginal importance in the labour market. A labour market that would be hampered less by regulations, and above all would be subject to less taxes, would not feel the need to resort to illegal labour conditions, which are increasingly fanned by the availability of non-EU workers.

The problem in question becomes even more difficult, owing to the fact that mediation between the different identity groups becomes more problematic, when such identity groups influence certain aspects of the fundamental rights that characterize the constitutional State in Europe, like equality, physical integrity, the freedom to manage one's own body and emotions, free choice of training and

job, the right to follow one's vocation. One cannot mediate on conflict between identity and fundamental rights, in the sense that the latter must always prevail on the former.

In many cases identity has serious effects on the person and on personal dignity, which cannot be ignored. The culture of gender discrimination condemn certain societies to eternal underdevelopment.

There's no doubt that the exclusion of women from education, research, work and social life hinders the possibility of a society to grow. Practices that bring about physical mutilation or legal discrimination often confine women to roles that are incompatible with the principles of Western societies that nowadays receive immigrants. When host societies tolerate physical practices that emphasize differences and the lack of autonomy of whoever suffers them (e.g. infibulation) may bring about devastating harm and a crisis in the principle of equality.

There is no doubt that when one belongs to a society that is organized on the principles of the State of law, founded on pluralism, this type of hereditary bond with appurtenance to a different group becomes unacceptable.

In fact the State must protect the individual even from the ethnic group to which he belongs. This problem has always brought strong ideological contrasts and has been invoked by those who oppose the recognition of minority groups' requests (meaning that more protection of minority groups, in the case of non liberal ethnic groups, would limit the freedom of their members). As we were saying, one must reconcile individual autonomy, which is expressed through full freedom of conscience, and the group's autonomy, through the protection of which a pluralist social system is accomplished. If human dignity is the constitutional absolute, if its ulterior content is defined in contemporary Constitutions by the use of various formulas that more or less coincide – from the right to seek happiness in the American Constitution to the "full development of the human person in the Italian Constitution" or the "free development of one's personality" of the German Constitution – there's no doubt, however, that the values at the foundation of such formulas cannot but prevail over those of the collective identity. But, admitting that in all these cases one can always speak of a right to seek happiness and that this prevails over the appurtenance to a group, how can one solve the conflict between the group's rights and the fundamental rights

that are exercised within the group when the former are spontaneously shared by each member of the group? That is, when practices like physical mutilation or wearing distinctive "apparel" are accepted so that a woman or mother can feel fully accomplished; when the right to group identity is interiorized in such a way that being fully accepted by the group is a condition of personal happiness. This does not mean that the individual possesses inviolable rights, but that the right to happiness cannot certainly be invoked when one is forced to be free against one's will.

Even when the individual is a member of a liberal group, he/she can live his life well, because he thinks that such membership gives value to his/her life, in spite of the discriminations and the punishment that he/she suffers.

6. Dialogue between cultural identities and the insurmountable limits of fundamental rights

Even though one can only belong to a collective identity on a voluntary basis, one has to be strict on this point of placing limits on the group's autonomy to defend individual autonomy. A pragmatic approach to this problem is impossible when the person's inviolable rights are at risk. And yet, I repeat, one cannot support intercultural dialogue without making efforts to understand the reasons for which something which is "natural" in the West, regarding the recognition of a right, is not necessarily so in other civilizations.

The universal character of rights does not imply a sort of ideological neutrality of the same rights. The concept itself of universal rights is linked to certain cultural processes which are typically European.

In spite of this difficulty, there's no doubt that the aim of fostering the formation of common values needs picking an observation point that is equidistant between different worlds, so that the cultural processes that give rise to rules and lifestyles that are presumed to be alternative can be understood. This may allow tackling ideological conflicts that are otherwise unsolveable. A case in point is the priority given to the individualistic element over the group's rights that is typically Western, while the latter are central to societies that are organized along the traditional model. Another case is the priority of conscience over action, which is typically Western; or the priority of intentions on fact; or our laws' insistence on the concept of

individual responsibility. These are all typical values of Western civilization that have been embedded in Charters of rights approved by the international Community. One can also keep in mind aspects of religious freedom that give or can give rise to civilization conflicts, that is to problems in cultural communications; particularly the statement, in some Charters of rights of the Arab world, that Islam is the "natural religion" of man; hence if it is the "natural religion" it cannot be placed at the basis of the Universal Declaration of Rights. But if Islam is the "natural religion" it would not be possible to organize contemporary society on the basis of the principles of cultural pluralism.

The truth is that this conflict between "natural" religion and universal rights has been perhaps provoked by the typically Western attitude of forcing the Arab world to recognize fundamental rights in writing. This attitude is natural for a culture like ours, a Eurocontinental one, whose rationalistic heritage imposes the principle of the hierarchy of homogeneous sources, in the sense that a rule always presupposes another rule. But this claim can rarely be shared by a culture which has not grappled first with Descartes and then with formal rationalization and the positivization of law.

Probably the conflict between "natural religion" and universal rights would have been less evident if the comparison between the Charters had been avoided.

Keeping this difficulty in mind, then, how can a process of collaboration be developed between States, peoples and cultures with different concepts regarding the protection of human rights? Certainly not by limiting one's actions to making the list of countries that adhere to the universal Charters longer, since these Charters always risk being drained of their substance whenever they are applied. The problem is apparently a cultural one, in the wider meaning of the term. Without a universal culture of human rights, no Charter can survive. On this point Benedetto Croce was probably right when he said that, in order to unite the world, UNESCO can be more effective than the UN Declaration of rights. From this point of view it is a matter of exploiting the irreplaceable role of the State as a "cultural State", that is a system of institutions that promote the integration of communities, that respect the differences between them and on the basis of a potentially universal political project.

7. The "State of culture" and education in tolerance

Is the State in a position to carry out this task? The idea according to which globalization processes would have rendered the national State inadequate to govern both international and internal conflicts, and that therefore other supranational authorities should *de facto* take its place, besides giving excessive priority to an economic approach to the problems of development and social integration, frankly appears as unrealistic, considering the problems it ought to solve.

If the State, and often the international Community as well, shows scarce ability in influencing international and internal conflicts because it has little hold on the factors that produce conflict, the traditional instruments of the State that guarantee social cohesion are irreplaceable in the field of identity conflicts which have to be tackled.

Today the State's role is essential for guaranteeing public order, to define and guarantee the condition for access to citizenship, to control the flow of migration. But the State is most of all irreplaceable as a "State of culture", that is as guarantor of cultural pluralism and of the policies that promote it.

If one agrees on all this, one cannot but agree that the multicultural society requires a stronger State, to guarantee equality, by removing the obstacles that hinder the full development of the human person, by the cultural liberties that can also be exercised collectively. And one cannot help agreeing on the fact that if the State "withdraws" from its traditional areas of intervention it would be impossible to effect a policy of equal opportunities that could integrate minorities in European society. One can here remember that "Affirmative Action" (the European version of positive action) was invented in the USA – in the wake of the Civil Rights Act of 1964 – for the express purpose of making up for the historical prejudices against coloured citizens. It has therefore been the favoured instrument for guaranteeing minorities; up to the extent that American public policies have set down, for instance, "quotas" for admitting Afro-American students at university and for employing them in various labour sectors. "Affirmative Action" has also been experimented to help women. All in all, the policy of equality in race and gender would have been unthinkable without the willful action undertaken by the State in these areas to "promote" the human person.

This is a commitment to guarantee equality among citizens and above all "equal members" which, considering the characteristics of the larger immigrant communities in Europe, and considering also that there are no limits on the free circulation of residents in Europe – and that it is difficult to control illegal immigration from this point of view –, needs a European policy on immigration that would be able to tackle the problems of reception and of social integration in a unified manner.

It seems that in this field Europe has not taken any significant initiatives yet, but above all it has not identified criteria, parameters and principles on the basis of which the social policies of the States can be carried out. A few timid steps forward in this sense have been taken by the Treaty of Amsterdam which mentions social rights in its preamble, and refers to the European Social Charter (1961) and the Charter on the fundamental social rights of workers (1989), and incorporates the Agreement on social policy.

8. The disappointing European Rights Charter

On the contrary, the European Rights Charter says little or nothing about the question of safeguarding and promoting collective identities. The protection of rights is obviously stated in the Charter, according to the directions followed by all the Constitutions of the member Countries, but there is no mention of their collective dimension, nor of the commitment to remove the obstacles that hinder the development of the human person, except for some references to sexual discrimination.

However it must be said that the European Rights Charter does not tackle these problems, because actually these were not among its objectives. In fact the Charter is not a Constitution but a document that recognizes those rights, that solemnly affirms what has already been consolidated in the national legal systems, what indisputably constitutes the "common tradition" of European States.

The Charter addresses the problem of cultural diversity directly and indirectly in three distinct articles. Indirectly in articles 20 and 21, ratifying the equality of persons before the law and the prohibition of discrimination based among other things on ethnic origins, language, religion and personal convictions, etc.; directly in article 22, where it confirms that "the Union respects cultural, religious and linguistic diversity". But it does not specify whether cultural

diversity refers to the rights exercised by the individual members of the "different" group or to the collective rights of the community without distinction, not even in the more explicit formulation of article 22.

Such recognition of diversity is therefore ambiguous, and may appear obvious in so far as it enriches the recognition of fundamental individual rights that make up the traditional lists of rights contained in international documents and in State Constitutions. In fact the latter, with some exceptions, identify the minority groups' right to a common cultural identity in the possibility that is conceded to the community's individual members to use the markers of that cultural identity, as common citizens on the level of interpersonal relations. However the protection and the promotion of collective cultural identity is lacking, except for a reference to language use. All in all, cultural diversity, as to its legal protection, is identified and stops with the use of one's native tongue, just as it happens in most European States with few exceptions. Common traditions, social customs, legally relevant habits, the control of a few institutions drawn from their native country that survive in the community they have entered, are not objects of legal protection.

The silence of the Charter on these points is unjustifiable, anyway. The Charter does not show the commitment to create a new European society, organized around those values of solidarity on which the societies of the European nations are founded.

Consequently there cannot be a plan for European integration that would be able to unite all the citizens of Europe that came from cultures and societies that differ greatly from European society as to the values on which they are founded, through the use of, for example, social rights for this purpose.

In the Charter one does not find the commitment to create new European societies by strengthening social rights, and especially cultural rights, by promoting collective rights and social formations, by recognizing the right to diversity, even by promoting it, by means of a policy of granting equal opportunities which would place all citizens, old and new, on the same plane. From all this one deduces that there is no one European social model (which is anyway "improbable" so long as the nucleus of fundamental social rights that can be invoked before a Court of Laws is not recognized).

From this point of view the Charter certainly cannot be considered a step forward regarding the rights ratified by State Constitutions.

Perhaps the Charter "extends" the areas reserved for fundamental rights with respect to State Constitutions only in article 21, where the prohibition of discrimination also refers to other elements apart from those expressed in article 3.1.c of the Italian Constitution.

The little attention that the Charter gives to social rights, that could be used as shock absorbers in ethnic conflicts, is due to the fact that the Charter is apparently imbued with the individual culture of the liberal kind; we therefore have before us, from this point of view, a Charter of Rights that is typical of the Nineteenth century.

We have had the opportunity to stress that the topics of collective freedom and of necessity are not central in the Charter, contrary to their position in European Constitutions, because the Charter gives priority to claims for freedom "of the flexible man" (Ridola); which means that necessities concerning work tend to be pushed behind the claims for the quality of life. Class struggles take second place to those that are based on values (ethnic, religious and cultural) which distinguish "only the citizen".

Consequently there is no attempt in the Charter to reconsider the social State, on the basis of the criticism of a merely quantitative and disproportionate idea of it. There are however other reasons of a more topical nature which explain why the Charter says nothing about the values which should be the basis for a European cultural identity.

First of all, the one according to which the construction of a European legal area is a long process, which will go on by fits and starts. This process will be mainly entrusted to legal activity. This is what happened in the recent past, since 1969, as to fundamental rights, which were not included in any Treaty and which entered the life of the Community through the creative activity of the Court of Law, that has gradually invented the parameters on which the principles for its reference have been codified. In all probability the same thing will happen to collective rights (as the experience of the Italian Constitutional Court shows) that happened to the individual's fundamental rights. The interpretation of the Charter by the Court of Justice, keeping in mind the traditions common to the member States, will probably come about in such terms as to increase the guarantees in their collective dimension.

Besides, in the field of fundamental rights the Court of Law has established a veritable unwritten "bill of rights", in spite of the fact that it operates with reference to the usual tasks defined in the so-

called column 1. This will probably also happen in the next years to collective rights, like those arising from the protection of cultural identity. This means that, being a minimum statute of rights, the Charter may gradually be integrated into the community's and the nation's legal system. For this objective it would have perhaps been preferable that the Charter would not include a list of rights that is, in a certain way, closed and unmodifiable. Since European multicultural society is evolving continuously, it would have been better that the rights provided for in the Charter were an open-ended list, as, for example, in article 2 of the Italian Constitution. Since the human person, in most European Constitutions and in the Charter itself, is the ultimate objective for the actions performed by the institutions, it is clear that not only the interests to be protected but also the forms of protection should be open to evolution in time.

9. The protection of minority groups in "European common constitutional law"

Notwithstanding the limits mentioned above, one cannot say that, with reference to Treaties and the Charter of Rights itself regarding laws for the protection of minority groups, there has absolutely not been a European policy for the protection of minority groups, and particularly that it is not possible to build up a univocal position in this field concerning a common European constitutional legal system. One only has to mention the Treaty setting up the EC (article 151) which ratifies that the Community contributes "to the full development of member States in the respect for their national and regional diversities", thus highlighting the common cultural heritage. And European States do not only share the origins of the national State and its relative legal system, marked by the monopoly of legitimate power. All the European constitutional States belong to the same type of constitutional State, even though the elements that make it up vary. One may therefore say that the cultural pluralism of the national legal systems is "*an element of European legal culture*" (Häberle). Europe embraces many different cultures in its common cultural framework. One only has to read the European Constitutions to see that each one is a synthesis of national identification, a cultural book as Häberle says. France pins its identity on the "nation" and on the "republic", Switzerland on

federalism, Spain on its "monarchy" and on the "autonomous communities". Therefore the unity of legal culture thrives on living pluralism. Which means that "the European cultural identity is a dialectic game of contextual unity and plurality".

It is therefore right to stress that there is a common constitutional law in Europe, made up of the Constitutions of the member States and the Treaties signed by the European States, as well as by the legal system of the European Courts which recognizes the fundamental rights as a common European cultural heritage, and particularly recognizes the rights of minority groups as fundamental rights. In this sense one must stress that the Council of Europe has not only carried out an important legal activity, but it has also worked hard to make the individual States protect minority groups effectively. And the States have accepted these recommendations and have developed them and significantly widened their scope; there are even trends in certain countries towards the recognition of double citizenship. One must also remember, as secondary elements of this European constitutional right in a wider sense, important Treaties like the CEDU of 1950, the European Convention on cultural heritage of 1954; and then the legal system of the European Court at Strasbourg and the Court of Justice of Luxemburg; and then the Declarations of the OECD. All these sources have Europeanized the national legal systems in matters regarding fundamental rights (fundamental rights that constitute the general principles of the European legal system, according to the legal system of the European Court of Justice which is now over thirty years old).

However it seems that the policy of the EU on the protection and the best utilization of national minority groups and their cultural identities has not only been entrusted to the laws contained in Treaties and in the European Charter of Rights; it has also been entrusted to negotiations, on the basis of which the EU has from time to time checked the democratic quality and the pluralistic set-up of the societies in countries that wish to join the EU, or, in only one case up to now, checked the policies followed in this field by the government of a member State (Austria and the "Heider case"). This problem, for example, has been considered and is still considered in the case of Turkey. The difficulties which hinder the accession of this country into the EU are actually an efficient test-case to evaluate the consideration in which the "old" members of the EU hold certain values on which the social life of the Union's member countries is

based, in such a way that, before proceeding with new accessions, their compatibility with the values of the political and social organization of applicant countries is checked.

It is not surprising therefore to see that one of the obstacles hindering the admission of Turkey is not so much the religion practiced by its population, but rather the question of the lack of recognition of the rights of minority groups, especially of the Kurdish minority.

10. Conclusion

One last observation. When the right to belong or not belong to a cultural community can only be an expression of individual choice, it is clear that this choice must be reversible. This problem has arisen mostly with regard to membership of a religious group, and has understandably provoked controversies on Islam which does not allow changing one's religion or choosing atheism. But the question must be considered in a wider context. We must keep in mind that our own identity, as Westerners, our laws and our knowledge can undergo changes, and normally do.

Speaking of changing identities may seem to be contradictory, considering that the etymology of the word refers to what repeats itself. But in identity it is not an ontological datum, a definite reality, but a model, a project. Identities are not given by nature. They are cultural constructions that find accomplishment through a political project, and therefore they cannot be considered as elements marked by irreversible separateness.

In fact our legal system is based on this concept of identity: by imposing change, the law "coerces" on one hand, and on the other it allows space within which one is free to interpret the precedent.

It is therefore incongruous to establish rules, fix boundaries that tend to enumerate the members of a group to consider them as linked forever with that group. In the same way it is incongruous to fix once and for all the cultural features that identify an ethnic group. History shows that social cultures are not permanent, nor unchangeable (if they were so they would not need to be protected by the rights that are attributed specificially for members of that group). Some native social cultures (deprived of the right to safeguard their institutions) have been eliminated, or almost.

All these relations between the different collective identities are

not carried out – keeping in mind what has been said above – outside the common context of values, in a kind of ethical no man's land. This is why it seems right to speak again of a pluralist culture and not of a relativistic culture, with reference to European society; because Europe, as Cacciari remarked, has always tried to establish moral laws that, without suppressing freedom (which is what happens where divine laws are also civil laws), hold civilization back from becoming a field of pure violence. Truly, here lies the greatness of Europe, in this effort lasting over a thousand years, that tends to produce a kind of freedom which is always ready to "rave", but which is systematically held back by a common moral sense.

Understood in this way, as I have tried to explain the matter, cultural diversity does not limit the range of human rights, which are universal, but it helps to explain the universal foundations of those rights.

The individuality of cultures, that is, cannot compress the import of those rights, but should be committed to discover ways of exercising those rights that are compatible with different cultural models.

This type of compatibility should be encouraged, given incentives through cultural communication, by means of processes of social integration which are obviously easier at the national level, but very difficult at the international level. Making this effort is the duty of all States, but obviously it is most of all the duty of democratic States, that are based on pluralism and that must be able to mediate, by promoting cultural freedom, even among those who declare themselves as unrelenting ideological enemies.

All this should emerge quite clearly from the European Constitution which is being drawn up. A new European Constitution should say something new about European cultural identity. It must overcome the silence of the Charter of Rights. However the debate on these topics cannot be bogged down by the dispute on Europe's Christian roots, or rather on the need or otherwise that these roots be mentioned in the Constitution – as some members of the Convention wish – as if the whole question of the values of European civilization depends on that mention.

Rusconi is right when he writes that Europe has evident Christian roots, but "politically it lives on lay reasons, from family policy to multicultural comparison".

The formula "Christian roots - lay reasons" suggests the dialectic of continuity and conflict which is typical of European

history. To mention God, or the values of believers, that is the values of faith, in the Constitutions – it has been rightly said – creates a hierarchy between believers and non-believers, and therefore between the community of believers and that of non-believers. The essence of European lay culture must be identified precisely in the ability to guarantee equality, among all the ethnic ways of thought. And therefore the morality of unbelievers must not be considered as "inferior" to the one of the believers. The principle that the moral values of the different ethnic conceptions are equal must be the foundation on which the multi-cultural society shall be built, with its common values of tolerance that derives from the virtue of doubt and the acceptance of the democratic process.

In this field European identity can give of its very best (and keep its Christian roots). We will stand up to Islamic fundamentalism not by opposing "our" religion to it but by building common values based on the rejection of all kinds of fundamentalism, since these are incompatible with the democratic process and with the idea that all cultural identities, under the conditions considered here, can contribute to accomplish the common good if they are placed in a position where they can express themselves fully.

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THE INDIVIDUAL'S FUNDAMENTAL RIGHTS: THE RIGHT TO ONE'S IDENTITY

SILVANO LABRIOLA*

1. The topic

The idea of an individual's right to his/her own identity and the question of its recognition as a personal fundamental right are nowadays coming rapidly to the fore in the evolution of constitutionalism in societies which belong to the Western political culture. Various conceptual difficulties are still evident in the reconstructive analysis of this specific subjective juridical situation, and even more so in the systematic setup of positive law.

These difficulties are undoubtedly due to the highly innovative character of the right to one's own identity, on both the theoretical and practical levels, and concern its actual and coherent establishment in the regulations of the State, in those of supranational organizations and of international law itself. The problems connected to it are therefore quite complex, as expected, if one agrees on the origins of the idea of one's right to an identity, which go back to the momentous change of politically organized societies in the West, which are in the process of becoming multi-ethnic communities, and which can also be traced back to the transformation of the relations between rich countries and under-developed countries.

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In this framework, which is barely mentioned here (the reader is implicitly referred to the ample bibliography on the topic), constitutionalism, having evolved from the great liberal revolution to the mature democratic style of government of Western countries, has to address topics which were previously unheard of, which influence directly the condition of the person in the system of public law. All this naturally has a structural relationship with the concept of a State that was dominant up to the Second World War: the national State, with characteristics of its identity which, if not exclusive to it, were certainly largely dominant.

The assertion of the person's right to his/her own identity, which is recognized to the citizen and to whoever has a relationship with the sovereignty of a State, derives from the crisis of such a notion, and in its establishment accelerates this crisis, and creates a deeply different concept. Consequently the right to an identity brings about a qualitative change in the fundamental rights of the human person, but it also determines an equally innovative effect on the concept of the State.

Given the definition of the concept of identity, it will be necessary to define the meaning of nature and content of the person's right to an identity, the concept of society to which the right refers, and finally the constitutional outlines of the system that governs such a right, not forgetting the constraints that public authorities derive from it.

The topic also influences aspects of the form of government, and therefore it is not confined to the boundaries of the form of the State and the individual's fundamental rights: in fact it involves aspects of representation which is the regulating principle of the form of government in Western democracies. A symptom of this has already been seen in Italy, regarding the protection of a number of linguistic minorities.

2. The concept of identity

Besides the intuitive definition of the concept of identity, it is necessary to focus on this concept from the formal juridical viewpoint, which is the only one that qualifies the subjective idea of the right to an identity.

The first step towards the solution of the problem comes from the cultural and political tradition of the concept of equality, which brings

together modern and contemporary theories about the constitutionalism of Western and European societies. The principle of equality, and of being treated equally, contains not only the prohibition of the *ius singulare* in favour of (a privilege) some against (all) others, but also the duty of equal treatment in equal juridical situations. On the strength of the principle of equality there cannot be a special *status* of the private subject, nor a differentiated system in identical situations.

Naturally, positive law reflects the history of the principle and the political and constitutional history of Europe, therefore it carries the events and the versions of its application more generally than the Western state systems: in this system's cultural heritage the roots of modern and contemporary thought keep the central core of the principle of equality more or less intact, as has been said in a brief formula of its definition.

The double edge of the principle of equality comes into contact with the increasing awareness of a datum, which more or less philologically, can be pinpointed on the central position occupied by the human person within the constitutional political system of a society which is organized as a State. The relationship in question, which is vital to understand both its terms, generates a number of elements which are fundamental to contemporary theory of constitutional law in Western democracies: as to the topic examined here, two of them are particularly significant, that is the principle of the people's sovereignty and the category of the person's fundamental rights.

One does not stand without the other: neither will the people's sovereignty make sense, from the point of view of the general concept and of positive law, without the assertion of the person's fundamental rights, nor will the contrary.

Given the above, one can better understand how the principle of equality implies, not that the identity of individuals be a presumption or the general aim, a pseudo concept that should be dismissed as a mystification, but that each person deserves to be given certain rights, described as fundamental, which include freedom, opportunities, claims, and, as one's first and unassailable of all the other fundamental rights, the ability of self-determination.

When this ability is lacking or limited, no other fundamental right can be said to be fully expressed or recognized: neither liberties, nor opportunities, nor claims. Moreover, on reflection, not even the

principle of the people's sovereignty can be held to be actually proclaimed and upheld in the positive system. This principle is very dear to the theory of the contemporary State in democratic systems (this term is rather ambiguous, but it is here adopted in its strictly etymological sense), so much so that it is considered the pivot of every political democracy; it presupposes that the individuals who make up the sovereign people fully enjoy the power of self-determination, without which nobody can truly exercise, directly or indirectly, political rights which constitute the living body of the people's sovereignty.

3. The individual's self-determination and the heritage of identity

The individual's self-determination implies the choice of one's own identity, and therefore its components: thought, faith, morality, culture, language, customs, professionalism, the physical form, intersubjective relations. When self-determination is full, as I have said, it is so only so that one can enjoy the freedom of choosing the elements of the desired identity.

Some elements pertain to a necessarily collective structure, and often (but not always) derive from a heritage that is common to other subjects, is historically defined and organized and can be provisionally called an identity-giving social group. These are collective bodies, cultural-linguistic (ethnic), and religious (confessional), ideological and political (parties, movements), and others as well.

The choice of one of these factors is the necessary way to satisfy the free determination of one's own identity, in the sense that it is the only way to achieve the cultivation of a creed, an idiom and a culture, a way of life, an ideological and political system.

The link between exercising one's freedom for self-determination and the individual's possession of his/her own identity is absolutely evident, and does not need to be checked: should it be lacking, primary factors of identity will not be present in subjective faculties, and even less so in the domains of one's rights, from religion to language, from practicing one's customs to culture. And this is true of liberties as well as of opportunities, and especially of claims, which obviously imply the (necessary) duties of public authorities as well as bonds with the organization of important public functions.

All in all, considering that the freedom of self-determination is indispensable for the theoretical recognition and positive safeguard of the person's fundamental rights, and certainly comprises the right to one's identity in its wider sense, and includes the right to choose, maintain and interpret the data of identity, whatever is achieved regarding the person's fundamental rights must be applicable to the right of identity.

4. The right to identity in the form of the State and in the form of government

As is well known, the theory of the individual's fundamental rights leads to outcomes that influence the form of the State and the form of government. In particular it provides elements for the qualification of sovereignty, both from the point of view of international order and of internal organization.

Under the first count, the recognition and the safeguard of the person's fundamental rights can be traced back, with increasing certainty, to the pre-eminent value of imperative regulations of international law: recently there has been increasing awareness that such rights can be upheld for any damages suffered through the action of individual governments, and even of individual States (i.e. the right of interference).

It is true that many margins of uncertainty persist regarding the effectiveness and the univocal nature of this trend: according to some it might be just a cluster of abstract daydreams which cannot be transformed into real provisions based on principles, or of make-believe principles which hide the continuation of the eternal rule of pure force in relations between States and other subjects of international order.

These objections are not baseless, and yet they do not forbid the assertion of a given fact, which is that, in international law, the absoluteness of the sovereignty of States is limited by the principle of the superior power of regulations that recognize and protect the fundamental rights of the human person. Every denial or compression of such rights on the part of the State are internationally illegal, even if they are adopted in due form in the exercise of their rights.

Because of the link that has been shown between the person's fundamental rights and the private individual's right to his/her own

identity, the statement that has just been expressed must be extended to the latter.

From the point of view of the internal law of States, and independently of what follows from examining international law, one sees that in many constitutions of States that are governed by political democracy (the principle of the people's sovereignty), it is accepted that the recognition and protection of the person's fundamental rights are as many limitations to that sovereignty itself.

Unlike what concerns the international legal system, in internal law and its influence on the system of the States, it is not a question of the sources' hierarchy, but of the absolute lack of legitimacy which weakens the position of every regulation that is in contrast to the recognition and protection of the individual's fundamental rights. A survey of the premises of these limitations of sovereignty in the internal law of the States would lead us out of the scope of this paper, because it would have to take into account the well-known differences between theories of natural law and positivist theories, as well as the idealistic concepts and even more.

In this paper it should suffice to limit the debate to the observation of the trend that concerns the concept of the form of the State on the basis of the relationship between the person and public power. In this respect the Italian case of the 1948 Charter can be mentioned which, in the first part devoted to fundamental principles, expressly ratifies the principle of the sovereignty of the people, admits in the same provision that sovereignty has its limitations, and significantly prescribes that the fundamental rights (and duties) of the individual are inviolable, in the following article 2.

This is a typical example of the trend, even regarding the form of government. In fact, it establishes the principle that sovereignty pertains exclusively to the people and dismisses all other sources of the legitimization of political power (the function of political direction that includes the power of regulatory predisposition) which are different to direct popular investiture (parliament), and indirectly through a relation of trust (government).

It is quite evident that the limits imposed on sovereign powers, on the principle of the people's sovereignty itself, of not compressing nor reducing the fullness of the recognition and protection of the fundamental rights of the individual cannot fail to pass on to the function of political direction, because of the system of government, when they are conferred on the organs entitled to them, parliament

and the government, to each of which the people cannot delegate powers which are greater than those that are enjoyed by itself as the body invested with these powers.

I have recalled that the relationship between sovereignty and the individual's fundamental rights is defined differently on the two levels of sovereignty in international law and sovereignty in the internal law of the State. I can now add that the two planes strengthen and support one another. That the principle of international law is founded on the special place of the individual's fundamental rights, and its increasingly imperative character, are structurally intertwined with the restraint placed on the constitutional system of the States which implement political democracy, that limits the sovereignty of internal law and imposes the recognition and protection of the individual's fundamental rights.

What derives from the system of internal law corroborates the legality of international regulations, and vice-versa, the principle of international law in its turn strengthens the pre-eminence of the principle of internal law in the legal system of the State.

5. From the national State to a multi-ethnic society

What has been considered up to now, in the framework of the progressive establishment of the contemporary theory of the form of the State, leads to a markedly innovative datum, which is currently summed up in the formula of the passage from the National State to a multi-ethnic society.

One must keep in mind that such a formula, like any other, sacrifices much of the precision of the definition and the single meaning of conventional communicative language: and yet it is a useful formula because it denotes the meaning and the significance of the change that has been brought about, and grasps its essence.

One speaks of a national State, and not a society, and rightly so, because in the so-called national States the community of members (subjects and then citizens) rarely reproduces the fixed profiles that are conventionally attributed to such a form of a State, in specific historical events. In the so-called national State the community is almost never mono-ethnic, or at least it is not always so, nor does it dispose of exclusive identity markers, particularly the most common ones (language, religion, culture). It follows that the community of members maintains the elements of pluralism in identity.

In the national State, dominant ethnic groups and identity factors establish themselves, and are officially recognized, while all others are placed on an inferior plane, in various grades (legality but with less esteem, tolerance, lack of recognition and prejudice, down to their exclusion or prohibition). To this form of the State corresponds a constitutional system that denies the principle of equality to subjects belonging to collective identities, sometimes going as far as their repression.

Historically, the so-called National State collides with the surging movement of a multiethnic society, and therefore enters into a crisis: according to what has been shown in the preceding paragraphs, this happens, on the level of the form of the State, when the principle of the people's sovereignty is linked to the principle of equality, widening its meaning and defining its legal content as it evolves.

One can therefore say that, on the strictly theoretical plane, a multi-ethnic society corresponds to the form of the fully democratic State, in which both the principle of the people's sovereignty (political democracy in the proper sense) and the principle of equality find their place and are actually provided for in the positive system.

The phenomenon is still undefined on the level of positive law, and the correspondence of a multi-ethnic society, or equal identity, and the democratic State is still incomplete and tendentious.

If, in actual fact, the pre-eminence of one or more ethnic groups over the others is nowadays not accepted, and therefore the idea that the so-called national State is a thing of the past is based on this common conviction, the same cannot be said of the disparity between the identity markers of the constitutional system of the individual States, in which the multi-ethnic structure of society has made and is making important progress in real community life (in the economy, customs, communications, coexistence, reciprocal recognition).

The official character of important markers of identity continues to be granted to some and denied to others, sometimes with explicit positive measures, sometimes unexpressed but in equally effective forms.

This is reflected both on the recognition and on the protection of self-determination and the right to an individual's own identity, as well as on the whole constitutional system of the individual's fundamental rights, which are consequently compressed and limited as a result of self-determination. Once more an Italian example can

be recalled and used as a symptom: one only has to remember what happens to the identity marker of one's religion, as was shown during the conference organized by the University of Malta, under the auspices of the Commission of the European Union (at Ischia, 1-2 December 2001; see the Proceedings in *Rassegna Parlamentare*, 2002, pp. 157 sgg, Papers).

6. Multi-ethnic society, equality of identity: contradictions and limitations

Contradictions and limitations, which still hamper the process of correlation between a society with many identities or multi-ethnic, and the democratic State, can take various forms, and are especially evident on two levels: the offer of services by public authorities, the place in the legal system of collective subjects, to whom the full enjoyment of specific identity markers is functionally connected. These are the major points of resistance of the culture and of the legal principles of the form of the so-called national State.

Self-determination, as regards the individual subject's free choice of his own identity markers, certainly includes his obtaining and maintaining them (if not all, at least most of them): consequently there is no real self-determination unless the public authorities offer the right services for their obtaining and maintaining the factors that depend on that (for example, language and culture, religious rites and doctrine: and the specific organization of certain administrative activities is equally necessary).

As to collective subjects with certain identity markers, their place in the system essentially conditions the self-determination of the private individual. This is evident in the case of religion, whose practice presupposes the freedom of each confession in relation to every other one. An analysis of the positive regulations of democratic constitutional systems shows how, without any doubt, the legal discipline of religious organizations is, in many cases, still far from these characteristics (absolute freedom, equal organization, exemption from the authorities' control).

7. The question of citizenship. Political rights

In every democratic system the principle is generally expressed by which each subject who is submitted to the sovereignty of the

State is guaranteed the enjoyment of the so-called civil rights which include the majority of the individual's fundamental rights, while the same does not apply to political rights, for which citizenship is considered a requisite (even though very recently the conviction that this requisite is not absolute nor unmodifiable).

In spite of this, the right to one's identity does not fit easily into the individual's fundamental rights for non citizens. This is probably the clearest case which distances itself from the principles that concern self-determination among democratic regulations, in relation to which there seems to be substantial continuity with the form of the so-called national State. One is especially struck by a fact, that is, when rules are made specifically to attribute claims for self-determination in the identity of the non-citizen, they are not formulated as the application of principles of the constitutional system, and therefore are shorn of their regulatory power.

It follows that in this case the area of the non-citizen's right to an identity appears as immune to the influence of the principles of international law, whose validity and effectiveness meet with difficulties when facing the sovereign power of the States towards its subjects who are not citizens.

The legal position of the question of citizenship is even more complex and incomplete. It's not only that the States maintain full powers regarding the concession of citizenship to the non citizen who aspires to it, bringing up elements that belong to the community of its citizens (work, family relationships, and other intersubjective relationships), but it generally excludes any independent value to the claim of citizenship which has been thus motivated (a claim that takes the form of a premise for sovereign concession, not as a right of the individual established in a different manner). In this way arises the figure of the subject who has duties but does not enjoy full rights, the figure of the person who has no papers: the concession of citizenship maintains its nature of a sovereign act, in the traditional meaning of the word that is essentially a "pardon".

Neither is changes being made to the legal system of rights and to active legal situations in general, which stem directly from the process of citizenship. This is evident regarding the political rights of active and passive voters, as well as for employment in public office, with some exceptions, which originated from the preceding regulations, before the new shape of the multi-ethnic society.

Rights and faculties that derive directly from the status of

citizenship, and are considered as its immediate expression, are denied to non citizens, who therefore lack an essential guarantee about their right to self-determination, the right to their own identity.

Finally I must remark on an item which does not necessarily pertain to the topic of this paper, but which has to be taken note of in the wider context of the theoretical and institutional aspects of the multi-ethnic society. It is the question of minorities that have been present for a long time in the territory of some States, and are deprived of the right to their own identity, independently of whether they possess citizenship or not. Some remarks are therefore necessary.

First of all one must deny that this form of the State is of the democratic type. The principles of this typological system exclude it from a system which is thus set up: it is certainly not enough to mention the principles of political representation in the establishment of the organs of the direction, whose competence it is to govern, to draw up laws and any other activity which leads to it, in order to affirm that it has the form of a democratic State, when anyway the principles of a system which comprises the individual's fundamental rights are absent.

It is important to emphasize that this assertion does not arise from ideological convictions, or from an idealistic culture or one based on natural law, but it coherently arises from the first principle of the form of the democratic State which, as I said before, is the principle of the people's sovereignty. There cannot exist a people in the proper sense, therefore there cannot be a sovereign people, if the individual's fundamental rights are not recognized in full, and if such recognition does not constitute the unmodifiable limit of sovereignty.

Secondly, if the situation remains that specific state systems deny the right of identity to minority groups within the respective community, the effectiveness of the international legal system is thrown into doubt, since in such cases the validity and effectiveness of the regulatory principles is not guaranteed, although they have been proclaimed as such in the legal system, and not as simple ethnic aspirations, having only an educational or exhortative value.

On the contrary, the case whereby a minority group refuses to belong to the community of a State, and invokes the right of self-determination, is outside the topic of this paper. It is actually a case which has been amply discussed in debates about the serious problems of international law, and not only on its own.

8. The right to an identity between persons and the collective identity group. A premise

It is necessary to dwell upon an aspect of this topic which concerns the place of the individual in the collective identity group, which he/she has joined freely, and by belonging to it he/she can fully satisfy his own self-determination, as to the effective possession of the chosen identity marker.

The definition of the individual's place in the identity group implies serious questions which may influence both the autonomy of the identity group and the fundamental rights of the individual himself.

It is proper to underline that the individual's belonging to the group can only come about from a voluntary act on the part of the individual himself. No external influence can be admitted on the subject's belonging to and his staying in the identity group, otherwise the self-determination which is the necessary premise for his enjoyment not only of this right but also of the individual's fundamental rights will be denied at its root.

Besides, the identity group, according to its rules, can expel the individual who is a member or refuse to admit him, since it has these powers due to its autonomy, which is indispensable for its existence and for its actions to guarantee its members' rights of identity, being their guardian.

On one side, therefore, the individual's freedom to be a member of and stay in an identity group is full and free of any constraint or authority exercised by whoever, including the public authorities and the group itself; on the other side one cannot deny the group's right to refuse the will of the individual becoming or staying a member, according to its rules (since the group exists through its self-government according to its statute, which it had freely adopted). The individual's will cannot prevail on the identity group, otherwise its autonomy will be denied, nor can the group force the individual to become a member against his will, because that would violate his self-determination: for the same reason the group cannot force the individual to remain a member against his will.

9. The legal system of the group

The identity group is necessarily formally established because this is the primary sign of its autonomy. Its ability to set itself up formally does

not only correspond to the basic needs of functionality and self-protection, it also guarantees the refusal of any interference from the public authorities.

This fact is essential to define the position of the identity group within the legal system. Historically, the first sign of the will to deny the existence of identity groups is the State's claim to dictate rules on the formation of the group and on the way it carries out is activities, apart from the extreme case when the group is declared illegal and the consequent measures of repression.

Occasionally the claim of the public authorities consisted of laying down constraints and requirements which, in substance, meant that they dictated rules governing activities and behaviour that were valid in general: on other occasions a system of authorizations and checks was established which in actual fact, having been extended to degrees of merit, was tantamount to the authoritarian prescription of internal regulations.

Particularly the legal history of the concept of public order, raised to the level of a parameter of the legality of identity groups and of their legal systems and activities, is the history of the submission of the groups to the political will of the government and public administration, which reassumes the dominant position of the official identity group above all the others.

The question must be analyzed in a concrete way, in the positive discipline as established and carried out, since the so-called recognition of the identity group: when the act of recognition is simply one of taking cognizance, and is only aimed at giving public notice of the group and its organization and structure, one may conclude that the identity group has an autonomous position and disposes of the necessary requisites for self-determination.

However, when the recognition is one of constitution, and a result of the discretional appreciation of the authorities regarding its possessing certain requisites that are prescribed in a willfully generic manner by the legislator, one arrives at the opposite conclusion. The most recent cases regarding the discipline of religious groups in Italy does not leave any doubt as to the institutional tradition of the so-called national State (see. *Proceedings*, above, cit., loc. cit.).

10. The rights and duties of the member of an identity group. The individual's fundamental rights

Given that the identity group necessarily enjoys the power of organizing itself, which comprises the power of establishing its

regulations, it follows that the individual who is a member is automatically endowed with rights and duties. In particular the identity group, once it is established and organized, begins to represent the interests of its members within the legal system of the State.

Representation does not however substitute the safeguard of the individual's fundamental rights but concerns essentially the faculties of the collective exercise of identity law. For example, concerning the teaching of the group's language and culture, where such language groups possess their own culture and social customs, or to perform their religious rites and learn the doctrine of their own religion.

The organization of the identity group contains the prescription of their members' rights and duties – depending on the nature of their identity marker, these have different forms and contents. The nature of such situations deserves a few reflections at the end of this paper.

In the first place one has to keep in mind what has been affirmed before, that is the absolutely voluntary character of the individual's membership of the identity group. Contrary to what characterizes one's belonging to a State, which usually cannot come to an end by means of a unilateral expression of the said member's will, nor does the cessation of membership automatically extinguish the rights and above all the duties of the individual, the individual's will to stop being a member of an identity group is vice-versa a sufficient reason, since one cannot be forced to remain a member contrary to one's will.

Secondly, an identity group's regulations that constitute rights and duties, guarantees and relative sanctions, do not have any external relevance if they actually derive from the group's statute. It is a different matter in the case when rights and obligations (not duties) arise from acts of autonomous discussions, which is independent of the status of membership of a group: in this possibility the rules of the State's legal system will be applied, not those of the statute of the identity group.

The third point is that all those situations which derive from the statute of the group, which influence the individual's fundamental rights, deserve special consideration. In this hypothesis one must make a distinction and give an explanation.

The question of the availability of the individual's fundamental

rights to those who are entitled to them must be clarified. If one is inclined towards their non availability, one has to admit that all cases that necessitate the compression or limitations of those rights are invalid: faculties and obligations which derive from such cases concerning the statutes of identity groups cannot receive any protection; on the contrary their relative prescription may lead to their being labeled as unlawful.

In the case where fundamental rights are considered available, certain issues remain open and require deeper investigation.

First of all, even if one is willing to admit the availability of the individual's fundamental rights, it appears rather doubtful whether such availability is unlimited, and one should be inclined towards a negative conclusion. One must keep in mind that the entitlement to fundamental rights necessarily implies their possession and their exercise, both so that it will not be reduced to a simple statement and because it is the outcome which is still imperfect, let alone irreversible, of a long process that has been going on for a thousand years, and is woven into the denial of the principle of the universal and equal attribution of such rights.

One of the limits of this availability is apparently unfailing, and it is the one by which the voluntary renunciation is not allowed when it excludes indefinitely the member's right to be reinstated, even when this is determined by events that concern the content of rights (the right to life, the right to physical or psychic integrity).

Lastly, there is the problem of the subject's will to enjoy the right: apparently it is not possible to admit any possibility of legal substitution of the will (the case of the minor, or of the handicapped in general).

These last considerations, about the prescriptions contained in the statutes of identity groups, are perfectly applicable to the place of the private individual in the State's legal system.

ETHNIC INTEGRATION AND POSTINDUSTRIAL SOCIETY

PIO MARCONI*

1. Contemporary liberal democratic culture is based on multicultural imperatives underpinned both by values and interests. Multiculturalism is perceived as a kind of corollary to the freedom and the faculty of doing and believing, with the sole limit of not causing material harm to others.

In some cases multiculturalism comes across as a pure and simple consolatory ideology, or a rhetorical expedient. In this case the multicultural message tends to conceal certain specific aspects of the meeting / clash of cultures; or else tries to pass for a just-round-the-corner perspective, or even to disguise interests (which at times proclaim to be radically, and by definition, antagonistic to any possible perspective of the exclusion of diversity) which radically obstruct the process of integration between cultures.

Multicultural rhetoric utilises certain analysis carried out in specific phases of the economic cycle to demonstrate that a perspective of integration:

a) is of easy realisation;
b) is assuredly effective;
c) can be put into practice even in the absence of radical modifications to the internal rules of the community and, above all, to those which discipline the rapport between different communities.

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The model most favoured by multicultural rhetoric is the one sketched by Tocqueville in his analysis of democracy in America: a nation made up of various ethnic groups and of diverse religious creeds and yet one which achieves solidarity and develops a specific common identity. In truth, multiculturalism alone does not always prove to be an effective instrument of cohesion and growth of a community. In the 19th century multicultural powers rose, but in the 20th three great multicultural empires fell: the Ottoman Empire, the Austrian Empire and the Soviet Union. What the sermons promoting multiculturalism often do not mention are:

a) the linkages, now clear to all, between the economic cycle and the acceptance of foreigners,
b) the phases of the economy which accompany the triumph of the multiethnic models of society,
c) the types of cultures which have come to coexist in inclusive societies.

2. Migratory movements during the phase of industrial growth have traditionally been characterised by their being functional. The host society was in a more favoured situation than that of the societies releasing the emigrants; it had a high level of industrialisation, or else had available land good for intensive agriculture or for pasture; and in all cases needed a work force[1]. The ability of factories to take on work, indeed to devour it, increased considerably as Fordism gained recognition.

The Fordian model had the (secondary) effect of making it easier for those coming from areas lacking an industrial culture to find a job. The subordination of man to the machine and to the fragmented organisation of labour asked only minimal technological know-how of the worker, and favoured a fast and extremely economical training for the job. The ex-farmer, the day-labourer on farms, the small businessman, the artisan, the servant, figures which people the migrations in Europe and from Europe to America, though formed far away from industry could integrate in the new work organisation

[1] V. M. Paci, *Migrazioni interne e mobilità sociale negli anni di espansione economica*, "Quaderni di sociologia", XVI, 1, 1967; Alberoni F., *Caratteristiche e tendenze delle migrazioni interne in Italia*, "Studi di sociologia", I,I, 1963.

of the country receiving them. Besides, these immigrants found before them vast possibilities of work in those areas which entail great expenditure of energy (building, agriculture, deforestation, pasture, harvesting) and in the network of the distribution of services.

3. Immigration assumes different characteristics in the post-industrial society and in the era of globalisation. Functional migration still exists, but there are also strong forms of conflict-ridden immigration. Functional immigration is in certain aspects different from the immigration typical of the industrial society. The difference lies in the quality of some of the persons who move from one country to another. The migratory flux does not carry only a work force, seen only as a supply of physical force; it carries also a vast range of knowledge and know-how. These could be the fruit of sophisticated formative systems (say, as regards mathematics and informatics in India) based on traditional national vocations (one cannot fail to note the fact that in India the attitude for the study of virtual dimensions develops in a spiritual environment dominated by the imperative of freedom from the shackles of material things). Or else they could be the fruit of an informal acquisition of competencies in certain communities; these competencies can now substitute attitudes that overdeveloped societies have lost as a consequence of the impact of technology. Care of the person, especially of the person in critical moments, infancy and old age, needs vocations and competencies which are much more readily found in societies that have hardly been touched by technology and by the various benefits that this brings.

The galaxy of competencies and knowledge which moves around with migrations is very diversified and can be grouped in the following series of sub-groups:

- Entrepreneurs and bearers of innovations who move from one end of the world to the other.
- Ultra-specialised workers who move from less developed countries to more developed ones.
- Specialised workers ready to carry out jobs, which in developed countries are not considered attractive to those qualified for them because they are considered exacting (or risky), poorly paid, or not enjoying enough social prestige.

- Poorly specialised workers ready to carry out jobs which in developed societies are exacting, dangerous and poorly (or inadequately) paid.
- Non specialised workers available for auxiliary work which citizens of developed societies consider unpleasant or even stigmatised.
- Workers with a sophisticated traditional culture of personal relations and who satisfy urgent needs of developed societies.

4. One must evaluate not only the generic perception the host society has of the migratory phenomenon but also the gratification it receives from it. In one phase of the industrial society the host nation saw in the influx of emigrants not only a source of certain material benefits but also a confirmation of the goodness of its institutions, and this in spite of the conflicts and xenophobic pressures[2] this influx caused. And also in spite of the fear that a multitude of foreigners, constituting a reserve work force seeking employment, could lower working conditions, especially of salaried workers. At times it was the symbolic satisfaction that made bearable the strains created by difficult forms of cohabitation and by increased competition. The countries first to receive immigrants, the USA, Canada, and Australia, consider immigration "part of the national epos", "one of the founding myths" and "celebrate it in the national ideology"[3].

Migrations in the epoch of industrial maturity moved hundreds of thousands, even millions, of people to nations which enjoyed democratic institutions and where freedom, in the sense of providing the possibility for human potentialities to develop, was strongly rooted. The host nation saw the migratory phenomenon as a

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[2] This is essentially a European phenomenon closely allied to antisemitism and which spread wildly after the great crisis of 1929. One has but to think of France in the '30s and the national campaigns against the metics. The exclusion of foreigners reaches its peak with the law of the 17th July 1940 which barred any person born of a foreign father the possibility of employment in the public service. On the 16th August 1940 this norm was extended to the legal profession. Some exceptions regarded military persons and combatants. With the law of the 3rd October 1940 Jews were excluded from public service and important posts with the press and in business.

[3] M. Martiniello, *Le società multietniche*, Il Mulino, Bologna, 1997, p.25

testimonial of the goodness of its institutions. It knew that it was reaping benefits from the work and the knowledge of the emigrants, but it was also fully aware of the fact that it was offering a socio-political context which favoured the development of human dignity.

The host nations offered merciless competition, hard work and subordination, but they also offered equal rights. Phenomena of hostility to foreigners were absorbed by an awareness common to all the members of the host society which acknowledged that immigration was to it a factor of gratification, a confirmation of its good qualities.

Migration is perceived very differently when it underscores, as is happening today in the post-industrial society and where the economy is subject to the dictates of globalisation, the great differences in the stage of development and the privileges of the host nation. The presence of the immigrant produces an ever increasing hostility / sense of guilt in the host society. This begins to perceive the immigrant as a permanent warning on the effects of opulence, on the consequences of an unequal distribution of resources, on the responsibilities of individual, group or class narcissism. The host society no longer sees immigration as a testimonial of the quality of its political and economic institutions; it looks on it as proof and indelible evidence of a faulty, and perhaps unjust, economic / normative equilibrium.

5. The presence of immigrants in post-industrial societies arouses two kinds of fears: social fears and institutional ones. Here I intend to analyse the latter. By institutional fears I mean those involving the powers of the state (as commonly defined), and the party forces which maintain the political life of democratic countries.

Institutional fears have a wider spectrum than social fears. The former manifest themselves as fears concerning the behaviour both of the foreigner and the native. I will try to draw up a brief catalogue of them:

- Fear of public disorder.
- Fear of a lowering of consensus.
- Fear of dropping out of the free trade system.
- Fear of the politically incorrect.
- Fear of delegitimizing the process of globalisation.

The convergence of fears concerning divergent situations produce in the countries involved in the migratory wave a series of policies

and a system of communication which are substantially homogeneous.

First of all legislative policies of control are adopted which, rather than try to mitigate issues, emphasise regulatory aspects. There is no doubt that in matters concerning immigration communication has a role to play: a negative message, one that prohibits strongly, could inhibit attempts at clandestine immigration. Often enough, however, the prohibitive message is annulled by other messages, those relating to the well being and to the opportunities to be enjoyed in that nation, and which the network of the media supplies to whoever is in some way in contact with it.

Institutional fear manifests itself in the form of strong campaigns against xenophobic cultures and against those ideologies that despise and preach hatred towards 'others'. The range of interventions in this field is quite varied. It is often the case that the prohibition and censure of propaganda based on racial hatred are formulated in severe penal laws. Punitive legislation on incitement of racial hatred and on propaganda of ethnic intolerance has received a new thrust in the last twenty years of the 20th century. And this coincided in the European political scene with the birth of localised parties and with a series of phenomena (ranging from the fiscal crisis of the State to the fall of the Soviet empire) that helped a new philosophy of ethnic identity to gain ground.

The experience of the application of such laws in Europe has shown that:

a) they are applied to repress very small extremist groups who resort to explicit symbologies which recall National Socialism or European Fascist movements;
b) when political organisations of xenophobic tendencies acquire some electoral weight and manage to get over the threshold of representation, or even get near it, they generally become immune to censure;
c) in no case has it been proved possible to suppress social racism through laws; nor those forms of intolerance which reveal themselves in the behaviour typical of the social group;
d) at times legal proceedings have been taken against intellectuals or scholars who expressed strongly critical opinions regarding religions or ethnic groups;

e) at times the legislation in question has been made use of to put under accusation scholars whose interpretation of socio-historical phenomena was not in line with the prevalent cultural/academic tendency. (This is the problem of historical and sociological 'revisionism').

6. In matters concerning migrations and multiculturalism one must also reflect on a variable which has a bearing on the preparedness of a society to accept the 'other'. I refer to the social policy and the state of public finance in the host nation.

A society whose foundations lie on the principle of the free market, or as some prefer to call it 'the unbridled market', has a greater potential to accept foreigners. Countries with a multicultural genesis (the USA, Canada, Argentine and Australia come immediately to mind), or those in which the multicultural model did not end with their dissolution (as in the case of the Austrian Empire, the Ottoman Empire, the Soviet Union, and in the Yugoslav Socialist Federation) rooted their pluralism in economic phases which go from that of *primitive accumulation* to more or less pure liberalism. Where a State which does not concern itself with the social conditions of the citizen and the guest, where everyone is expected to claim his own frontier, the problem of migration has no fiscal or redistributive impact. Quite different is the case when a country has institutions with a strong public commitment to sustain the quality of life of the citizen, the resident and the guest[4].

Strong Welfare institutions in a country provoke a double conflict regarding solidarity. In the first place they give rise to strong competition for the destination of the benefits of solidarity. A sector of the natives holds that these benefits should not be shared with the alien population and with immigrants. The second conflict is related to the difficulty of integrating the immigrants as a result of the excess of Welfare and of the normative/administrative control system which permeates daily life.

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[4] On the various meanings of citizenship and the politics of integration v. V. Mura, *Sulla nozione di cittadinanza*, in V. Mura (a cura di), *Il cittadino e lo Stato*, Angeli, Milano, 2002.

At times an overburdening of the Welfare State multiplies the difficulties of putting multiculturalism into practice. In some European countries a pervasive social legislation, one which is too detailed, makes the conflicts with the guest communities more serious. A nation wishing to protect the individual from the cradle to the grave finds it difficult to include persons who are 'different', persons who have deep existential identities which have to do with birth, socialisation, the rapport between sexes, roles, formation, social destiny, or destiny *tout court*, without any adjectives.

Difficulties in integration arise also out of public expectation that certain profound aspects of existence, as well as the values one wants to internalise, should be guaranteed. We owe to Alessandra Facchi the distinction between the English and French models of multiculturalism[5]. The former is pragmatic, the latter prescriptive[6]. In the establishment of norms by the French, often copied in continental Europe, there is at times a claim to the right to invade and leave a deep mark in the personality of the individual. The chador can certainly limit the freedom of Islamic girls because it is not a free choice but an imposition of the group and/or the family[7]. One must never forget, as Passerin d'Entrèves reminds us, that the most disquieting aspect of Rousseau's philosophy manifests itself just when he proclaims the necessity of constraining man to be free[8].

7. From time to time the idea of introducing a system of personal rights related to one's ethnic group and religion is floated in the European debate. Such a system aims at facilitating coexistence between ethnic groups which embrace conflicting systems of relationships. As Alessandra Facchi[9] reminds us, both Bruno Etienne[10] and Erik Jayme[11] have advanced the hypothesis of

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[5] A. Facchi, *Immigrati, diritti e conflitti*, Clueb, Bologna, 1999, p.71 et seq.

[6] v. M. Martiniello, op.cit., p.47 et seq.

[7] v. on this matter the reconstruction of French jurisprudence carried out by A. Facchi, op.cit.

[8] Passerin d'Entrèves A., *La dottrina dello Stato*, Giappichelli, Torino, 1967, p.309

[9] A. Facchi, op.cit., p.35

[10] Etienne B., *La France et l'Islam*, Hachette, Paris, 1989

[11] Jayme E., *Diritto di famiglia, società multiculturale e nuovi sviluppi del diritto internazionale privato, in "Rivista di diritto internazionale privato e processuale"*, 2.1993

introducing institutions of Islamic law within European contexts or of legal systems recognising personal cultural identity. They are possible itineraries and not radically incompatible with the legal system of the modern state. One must not forget that in Italy, up to the introduction of divorce, annulment of marriages was entrusted to the ecclesiastical tribunal whose pronouncements were based on ecclesiastical law and jurisprudence. Nor should one forget that that in countries of the European Union the prevalent religion is still given privileged treatment. The Greek constitution lays down that religious proselytism is prohibited, which is very much like many Islamic legal systems. In the English legal system the Crown appoints the head of the religion of the state and religious dignitaries carry out functions of a civic/legal nature. And these facts are constantly quoted by Islamic jurists to those European jurists who take the moral high ground because cases of human rights are left to the *sharia* (Islamic jurisprudence) or because in some Islamic countries lay legislation and religious principles are too closely interwoven.

Pluralism is basically a challenge and, considering that all modern institutions constitute a challenge and bring along with them risks, it has to be accepted as such. On this point Vincenzo Ferrari has recently underlined the complexity, both technical and where values are concerned, of a juridical discipline of multiculturalism. The right to differentiated treatment, this author says, is at the same time a conquest and a paradox of our times. It is a conquest because it defines a fourth generation system of rights. It is a paradox in as much as it has to contend with identities and customs that are often illiberal and antidemocratic[12].

A ductile legal framework could make it possible for host countries to reduce conflicts with sectors of the immigrant population[13].

A return to a system of personal rights is not, however, a solution easy to adopt in the juridical systems of the west based as they are on the principle of universalism.

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[12] Ferrari V., *Citizenship and Immigration, Introductory Remarks*, in Ferrari V., Heller T., De Tullio E., *Citizenship and Immigration*, Giuffrè, Milano 1998, p.7

[13] On the techniques of the regulation of coexistence and on multiethnic experiences v. Facchi A., *I diritti nell'Europa multiculturale*, Laterza, Bari-Roma, 2001; Mancini L., *Immigrazione musulmana e cultura giuridica. Osservazioni empiriche su due comunità di egiziani*. Giuffrè, Milano, 1998.

In order to adopt a juridical pluralism which is adequate to the multiplicity of identities present in the developed countries one would have to grant to diverse communities diverse rights. One still has to find a way of how to define in a general way the areas in which communities could be free to institute their own jurisdiction and to regulate themselves according to an autonomous discipline.

Perhaps alongside the above it is possible to hypothesise a different type of solution to the problem, one with a stronger dose of universalism and which could be applicable to all the communities without creating forms of discrimination and without underlining differences and / or privileges.

Many of the problems of integration derive from the fact that in time, but particularly in the second half of the 20th century, developed countries have produced a normative system which percolates too deeply into the universe of vital areas. To use the language of Schutz, the juridico-burocratic organisation of developed countries progressively denies the existence of a multiplicity of "finite provinces of meaning" and imposes a single system of meanings. It is a phenomenon which Max Weber had clearly anticipated in his reflections on the risks of bureaucratising social life. "It is terrible to think, Weber writes, that the world could one day be full of nothing but of small cogs of a mechanism (...) This bureaucratic urgency leads to despair (...) It is in an evolution of this kind that we are already caught up, and the big problem is not to find a way how to promote and speed it up but in finding means to oppose this mechanism, in order to save a part of humanity from this dismemberment of the spirit, from this absolute dominion of a bureaucratic concept of life[14].

For the coexistence of ethnic groups and of identities, together with pluralism one must also prescribe a study of how to reduce public interventions which are too pervasive of the sphere of personal life and also of work. In some sectors a repristination of minimal law would certainly improve integration.

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[14] Speech to the assembly Verein für Sozialpolitik in 1909. v. Ferrarotti F, *Max Weber e il destino della ragione*, Bari, Laterza, 1968, p.209. On the pre-eminence of the sphere of daily life in Schutz, v. Izzo A., *Introduzione a A. Schutz*, *Saggi sociologici*, cit.

THE CASE OF SOUTH TYROL / SÜDTIROL AS A MODEL FOR THE SETTLEMENT OF ETHNIC CONFLICTS

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1. Introduction

Nowadays, the abstract ideal of ethnic homogeneousness as expressed in the slogan "one nation – one State" has long ceased to correspond to reality all over the world. Autonomy is being increasingly invoked as a solution for ethnic conflicts; and ever more often ethnic problems are at the basis of political claims for self-determination[1]. On the whole there is increasing interest in questions of autonomy as "an instrument for power-sharing aimed at maintaining the unity of the state and at the same time showing respect for diversity within the population"[2].

Obviously claims for self-determination and the suggestions put forward vary from case to case, since they are influenced by a particular blend of different elements that comprise history, tradition, geography and the economy, the degree of democratization, the strategic target, the character of the group that is claiming autonomy, the events and the specific facts that lead to its award or regulation. For this reason there are no precedents that could be

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[1] See the proposal submitted by the Dalai Lama at Strasbourg in 1989 or the proposals concerning the status of Corsica within France. Cfr. Tomuschat (ed.), *Modern Law of Selfdetermination*, Dodrecht 1993.

[2] R. Lapidoth, Autonomy. *Flexible solution to Ethnic Conflicts*, Washington D.C. 1997, page 171.

automatically valid and applicable. As we have said, each situation is different. Therefore adopting models that have been successful elsewhere must be ruled out. The concept of autonomy offers a very wide spectrum of possible solutions, ranging from cultural autonomy to the simple decentralization of administrative functions, and to semi-independence. Consequently, although there are no models that could be directly applied to different situations, one could anyway proceed in a comparative manner, seeking lessons from "history" and from the experiences gained in "similar" conflicts. In this way, a case which is often quoted as an example for solving ethnic conflicts[3], the case of Alto-Adige - Südtirol, shows that a conflict between minorities can be solved to the satisfaction of all the parties involved through self-government instead of secession[4].

One must examine the factors which brought about the "success" of the system of the Autonomous province of Bolzano[5]. As a consequence one must ask whether one (possible) function of this model shall be attributed to the system as a whole, as it has been institutionalized in the 1972 statute of autonomy, or rather (and eventually) to only some of its elements. These observations reveal the evident sociological premise which is the starting point of this study that is the question whether a certain model can be adopted elsewhere. An analysis based on the view that the procedure for decreasing the power of a conflict and for the normalization of relations between the groups is the dependent variable, which requires constant explanations, clarifications and deeper investigation that also take into account non rational elements, while the judicial mechanisms for controlling the conflict and its subsequent

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[3] J. Woelk, "Südtirol ein Lehrbeispiel für Konfliktlösung?" In *Die Friedenswarte* 2001, pag. 101 ss.; S. Böckler, "Das Autonomiestatut für Trentino-Südtirol – Ein Modell für die friedliche Regelung des Kosovokonfliktes?" In J. Marko, (ed), *Gordischer Knoten Kososo / a:Durchschalgen oder entwirren?* Baden-Baden 1999, p. 87-104.

[4] This opinion is shared by the President of the Italian Republic Carlo Azeglio Ciampi, who mentioned the settlement of the South Tyrol problem as an example for solving a serious problem like the one in Kosovo; see *La Stampa* 16.06.1999; Alcock, Antony Evelyn: "South Tyrol", in: Miall, Hugh (ed.) *Minority Rights in Europe*, London 1994, p. 46-55.

[5] Cfr. M. Magliana, "The Autonomous Province of Bolzano-Südtirol: A Model of Selfgovernance", *European Academy*, nr. 20, Bozen/Bolzano 2000.

phases, and the various elements that constitute it, are the independent variable for the evaluation of the "exportability of a model". Only through such an analysis of the causes and effects will it be possible to "explain" how and why a certain mechanism for solving conflicts (together with other variables which are always present and relevant, that depend on the political, social, economic and cultural context) could have contributed to the "success" of an experience, such as the transformation of a conflict into peaceful forms of coexistence and even to "normal" situations between the groups. Anyway, when considering each hypothesis for solving conflicts, one must seek answers to two fundamental questions: firstly, how can a conflict be stopped from spreading by violent means? Secondly, after a conflict, especially a violent one, how can "coexistence" be made possible? From my own experience when comparing this case with others, I have concluded that it is not the individual elements of the institutional system of the Province of Bolzano that can be applied elsewhere, but above all it is the fundamental idea that inspired the statute for the complex process of its implementation, due to its general character. It is this idea which can become a "model" for other situations. It is precisely the complementary functionality between segregation and integration, their continuous balancing out and their suitability to offset one another, the one prevailing over the other and vice-versa in the two phases of the conflict's solution and reconciliation, that has guaranteed the coexistence of "effective and institutional equality" in the South Tyrol region. In my opinion its complementary functionality deserves to be examined in more detail.

2. The context: history and the changing global environment

After six centuries in which it belonged to the Austrian part of the Habsburgs' monarchy, the treaty of Saint Germain detached the South Tyrol from the newly-formed Austrian Republic and its Ladin and Germanic population became part of Italy[6]. This was

[6] See F. Scarano, "Di chi è l'South Tyrol? Una disputa fra storici italiani, austriaci e tedeschi" in *Limes* 1/ 2003, pp. 199 ss.

followed by sad events, especially the deportations under the Fascists and Nazis, with their dramatic consequences for many individuals, before and after 1945[7]. By means of the agreement between De Gasperi and Gruber, signed in Paris on the 5th September 1946 and attached to the Italian peace treaty as attachment IV, the Italian government undertook to guarantee the maximum autonomy possible to the German-language minority, besides safeguarding its culture and language. Thus the question of the South Tyrol did not remain an Italian issue; it became an international issue on account of the implementation of the fundamental rights of minority groups. The Austrians were able to take up the role of Protective Power (*Schutzmacht*) and to support the South Tyrol cause on an international level. In 1960 and 1961 the issue regarding the implementation of the De Gasperi-Gruber agreement was brought to the UNO. Resolutions nr 1497 and nr 1661 were approved unanimously, that is by Italy as well, and confirmed Italy's obligation to seek a peaceful solution to the South Tyrol controversy. The first positive result that followed the UNO appeal was the setting up of the so-called "commission of the 19" by the Italian Government on the 1st September 1961. The first proposals drawn up by this commission up to April 1964 were adopted as the first measures during the bilateral negotiations at the experts' and the Foreign Ministries' levels. In 1969 some measures for more autonomy were approved in the so-called "Package". In its turn the Italian Government approved the measures and later the Austrian Nationalrat favourably considered them. This Package of measures – later called simply "the Package" – contained 137 implementation measures: 97 of which could be implemented by means of an amendment to the 1948 statute of autonomy, 15 by a ordinary State law, nine by a administrative decree, the others through administrative regulations[8] or by the approval of a new one, which was effected by the constitutional law n. 1 of the 10th November 1971 (which came into effect on the 20th January 1972), followed by the publication of a consolidation act in 1972 (DPR n. 670 of the 31st

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[7] See R. Steininger, *Südtirol im 20. Jahrhundert. Vom Leben und Überleben einer minderheit*. Innsbruck 1997.

[8] Cfr. G. Pallaver, "South Tyrol, the 'Package' and its ratification", in *Politics and Society in Germany, Austria and Switzerland*, Vol. 2, 1990, pp. 70 ss.

August 1972), which contains the measures still in force of the former statute as well as those of the new statute. The remaining measures contained in the "Package" were practically all applied in due course. Twenty more years had to pass till all the measures contained in the Package were implemented and, in actual fact, the conflict was formally resolved as late as 1992. Three years later Austria joined the European Union and in 1997 the Schengen treaty was adopted, an event that transformed the frontier between Austria and Italy, which had been a rigid demarcation line that separated cultures, languages and peoples, into a simple administrative border.

3. The model and its different levels

3.1 The point of departure: recognizing (cultural) differences

In the past, once the road of safeguards and guarantees was chosen, the juridical treatment of minority groups by a State always resulted from a compromise between maintaining sovereignty and territorial integrity and the creation of sufficient and necessary conditions for the existence and development of the minority groups within the State. History has shown that the quest for such a compromise is difficult, and often presents insoluble problems due to the intrinsic contradiction between, on the one hand, the demands of the State which legitimates its sovereign power over its territory on the population, precisely in virtue of the intimate link between that territory and that population, and on the other hand the claims of a minority group for an exceptional position within that State, both as regards territory and population. Obviously this contradiction in principle did not make it impossible to find solutions, albeit sometimes minimal, for balancing these two vital interests[9]. This is up to a certain extent evident in the basic compromise that was found in the negotiations between the majority South Tyrolese People's Party (SVP) and the Italian State which led to the "Package". The compromise solution consisted of the explicit recognition of the (cultural) diversity and in the division of the areas of competence on the legislative and executive levels. As a fundamental requisite both

[9] Y. Dinstein, *Models of Autonomy*, Tel Aviv 1991,pp. 291 ss.

parties had to give up incompatible positions: the South Tyrolese had to give up the issue of secession from Italy and annexation to Austria with the purpose of "mending" the "historical injustice" of the violation of their right to external self-determination, and the Italian party had to concede guaranteed territorial autonomy and to abandon all the policies, even democratic ones, of centralization and assimilation based on numerical proportions.

For the people of the South Tyrol the most important objective was obtaining better guarantees, in consideration of their being a minority; better relations with the Italian linguistic group was a natural development of this, but it was not the aim of negotiations. On the other hand Italy's aim was to find a solution to the conflict. Neither party, therefore, had a fundamental idea or project for the constitution of a multicultural and multilingual society. For these reasons the agreement has been compared to a Pact between Church and State[10], i.e. a pact for mutual recognition, respect and non-interference[11]. This is reflected exactly in the basic structure of the "Package", a compromise between the principles of the protection of individuals who belong to the German/Ladin group and of the said group/s on the one hand, and the principle of territoriality on the other.

3.2 The method of negotiation

A notable characteristic of the South Tyrol process which is particularly relevant – and useful – to other situations[12], results from foreseeing a series of institutional and procedural contexts in which special autonomy itself is structurally fitted in and is able to manifest its consent according to its own consolidation and its own development: this consists of requests for participation in the functions for which other bodies are qualified by the method of negotiation, which turns out to be formally and historically suitable to contribute in a definite manner to the best use possible of

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[10] A. Langer, "Miteinander, Nebeneinander", in Bauer/Dello Sbarba (eds.) *Scritti sul Sudtirolo 1978 – 1995*, Merano 1996.

[11] S. Baur/I. v. Guggenberg/D. Larcher, *Zwischen Herkunft und Zukunft. Südtirol im Spannungsfed zwischen ethnischer und postnationaler Gesellschaftsstruktur*, Meran 1998, pp. 27 ss.

[12] S. Böckler.; *Das Autonomiestatut für Trentino-Südtirol*, cit.

autonomy. This conventional method, already embedded in the text of the Treaty of Paris (article 2) where it says that "the frame within which the said provisions of autonomy will apply will be drafted in consultation also with local representative German-speaking elements", and later perfected during the negotiations, led to the approval of the Package which can be considered as the corner-stone of the special autonomy that is now in force. The first factor that, without any doubt, allows the best use possible of the management of the pact of special autonomy lies in the setting up of a joint and binding institutional headquarters and of an atypical legislative source for implementing the Statute. This consists of a special joint commission made up of twelve members (of whom six represent the State, two the Regional Council and two represent each Provincial Council while three members must belong to the German language group) and a special joint commission composed of six members set up purposely "for the regulations for implementation concerning subjects assigned to the competence of the Province of Bolzano" (three members of which represent the State and three represent the Province, specifying that "one of the representatives of the State must belong to the German language group; one of the representatives of the Province must belong to the Italian language group")[13]. Naturally the formal setting up of the commissions just mentioned is not, in itself, one of the strong points of this kind of special autonomy, what matters is the political use that has been made of it: actually the successful outcome of the negotiations' process in that institution precisely results from the virtual availability of the instrument, defined by the particular legal effectiveness of the source (which is above the ordinary law and therefore cannot be changed unilaterally by the State) and also by the outline which lacks publicity (that is transparency as well as political responsibility), both of which are ideal conditions for the correct application of the method of negotiation.

The second factor, which is relevant due to its influence on the constitutional source, concerns the possibility of amending certain articles of the Statute, peremptorily specified by means of ordinary

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[13] A. Lampis, "Autonomia e convivenza", *Quaderno* n. 17, Accademia Europea di Bolzano, 1999; P. Hilpold, "Die rechtliche Stellung der Deutsch-Südtiroler in Italien", in *Europa Etnica* 1996/3, pp. 117 ss.

State laws – instead of by a law for constitutional revision – following a joint request by the State and the autonomous Province: although this is an institution which is also present in other systems with special autonomy, and although the matter is governed by the derogatory procedures through which it may be modified not only technically (and it therefore corresponds to a process of simplification with reference to the heavy procedure of the revision of the statute according to the provisions of article 118 of the Constitution)[14], the desire for autonomy is a requisite that confirms its vocation for giving guarantees through those modifications that could have a more consistent political validity: in fact the consent of the Province works as one of the integrative assumptions of the joint request, which in its turn acts as a condition for the legitimacy of a derogatory normative procedure which should be applied in parliament.

Even the exclusion of the subordination of the statutory modifications (approved by Parliament by a majority which is less than two-thirds) by means of a national referendum, which on application could also, as a last resort, legitimize parliamentary options which are not in agreement with special autonomy and have eluded an improbable "appeal to the people", actually protects the agreement reached. Another joint commission needs to be remembered here, the so-called "Commission n. 137", already set up with the closure of the Package and so named because provided for by article 137 of the Package, with the duty to discuss issues concerning the protection of the minority group and of the cultural, social and economic development of the ethnic groups that live in South Tyrol, to suggest solutions and indicative future perspectives. This Commission, which is set up within the Cabinet's Chairman's Office, should be a "workshop of ideas for autonomy".

This procedure of agreement and collaboration among the various participants – representing the minority group, the majority and Austria, a foreign State – on which autonomy is based, as well as the possibility of further checks, ensured that the process of safeguarding the minority, with its long-term orientation, did not evaporate at the last ring of the chain, that is in its concrete

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[14] F. Palermo, "Ruolo e natura delle commissioni parititetiche e delle norme di attuazione", in *L'ordinamento speciale della provincia di Bolzano*, Cedam 2001 pp. 826 ss.

implementation. Besides, the process also allowed the possibility of flexible adaptation and did not hinder the further evolution or development of autonomy[15].

3.3 The Content: a "blend" of different principles

In answering the question about which provisions of the South Tyrolean Autonomy Statute could be usefully applied to other situations, one must distinguish different levels. These will be briefly described in order to give an idea of the attention and the principal intentions which were followed in settling the conflict in South Tyrol.

a. The Relations between the Minority group and its kin-State.

The Autonomy Statute does not contain any decree that concerns contacts between the German-language group and its kin-State, Austria. However there are some bilateral treaties that promote economic relations and the recognition of educational and vocational diplomas. Economic activities across the frontier with the Austrian *Land* of North Tyrol were already possible and actively pursued even before Austria joined the European Union, and they have now become more intense in the framework of the "Europa Region" which includes the Trentino[16].

b. The influence of the Minority Group / Autonomous Entity on the decisions of the Central State.

Due to its relatively small size, concerning both territory and population, there are very few articles that provide for regulating participation and representation in South Tyrol at the central level. Here one may point out the participation (but without the right to vote) of the President of the Provincial Council at the meetings of the Italian Cabinet "when treating issues concerning" the Province's autonomy – although in this context the real importance of this provision does not go beyond an essentially symbolic nature – the participation of the autonomous Province at the Conference on the

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[15] M. Feiler, "South Tyrol – Model for resolution of minority conflicts?" In *Review of international affairs*, vol. 28, 1997, pp. 10 ss.

[16] P. Pasi, "L'euroregione. Basi storiche, normativa e prospettive di sviluppo", in *L'ordinamento speciale della Provincia di Bolzano*, Cedam 2001, pp. 922 ss.

State and its Regions, besides the committee of the Regions in the European Community.

Because of Italy's political instability during these last years, the Members of Parliament elected in the Province of Bolzano have often enjoyed strong political influence, because their support was potentially decisive for the survival of the Italian Government. Besides, there's no doubt that the autonomous Province of Bolzano actually invented and built regionalism in Italy, and has contributed in a decisive manner to the development of the "constitution of the minority groups" in the Italian system; without it constitutional law in Italy and in Europe would have been the poorer.

c. The powers of Autonomy

Since the protection of linguistic minority groups can be ordered according to different degrees of intensity, from the least one, which is only of a cultural nature, to the one which provides for legal and institutional measures, one can affirm that in the legal set-up of autonomy in South Tyrol the full range was considered to build an advanced and complete system.

3.4 The areas where Legislative and Administrative autonomy intervenes.

The different legislative and administrative competences of the autonomous Province are primarily concentrated on economic, social and cultural topics, for example place-names, local customs and habits, urban studies and planning, the environment, mining, agriculture, tourism, communications and transport (an area in which the Province has a primary competence), elementary and secondary education, commerce and public health (the Province has a secondary competence here). The Provincial Council is the law-making body and elects the Provincial Government which carries out the executive functions[17].

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[17] The constitution takes place by means of an election, which follows its own procedure, but through the election of a Regional Council of the Trentino-South Tyrol region. The members of the council elected in the constituency of the Province of Trento automatically make up the Provincial Council of the autonomous Province of Trento, and the same goes for those elected in the constituency of the Province of Bolzano.

a. Language

In South Tyrol the German language enjoys the same status as the Italian language, which is the official language of the State. All the Regional and Provincial laws are therefore published both in Italian and in German. In order to reach the objective of a bilingual public administration, all public officials in the Province must have to pass a compulsory exam in bilingualism to prove their knowledge of both Italian and German, and the citizens enjoy the right to use any one of the two languages (or, in a limited way, Ladin) in their dealings with courts and authorities[18].

b. Proportional representation of linguistic groups

The Statute of autonomy contains numerous provisions that, in certain sectors, give the German, Italian and Ladin language groups the right to be considered according to the strength of their numbers. This mechanism is usually called the "ethnic proportionality", and it is a mechanism for protecting the two ethnic minorities, German and Ladin, who live in South Tyrol region. Its purpose is to avoid that these minority groups be side-lined – in their original territory – by the nationally-dominant population in certain areas of public life; areas which, as the past has shown quite evidently, may easily suffer injustices, and on the contrary it will help them to gain a position which is their due, on the basis of their numerical strength.

However, considering that the proportionality does not only give the two ethnic minorities, German and Ladin, the right that due consideration be given to them according to their numerical strength, but it also extends its protection to the Italian language group which lives in the Province, the proportional principle also safeguards the latter, particularly in those areas where the ethnic minority groups, German and Ladin, are the majority. In virtue of the Statute, the proportional system must be applied to all state and semi-state bodies operating in the Province, in the composition of the organs of local public boards and in the distribution of funds from the Provincial budget that are allocated for welfare and social and cultural aims.

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[18] D.P.R. 15th July 1988, n. 574. Regulations on the implementation of the Statute have widened the scope of the application of this measure to include private bodies that provide services of a public nature (cfr. decree-law of the 24th July 1996, n. 446).

Consequently, every ten years the citizens residing in the Province of Bolzano must declare their belonging to one of the three linguistic groups (or their membership in order to enjoy the relative rights). The declaration can only be changed on the occasion of the following census[19].

c. Education

The Treaty of Paris in 1946 established the fact that primary and secondary education be imparted in the child's mother-tongue as one of the fundamental principles of autonomy. Consequently the education system in the Province of Bolzano adopted the separatist principle, by which two different school set-ups are established, which differ also in their organization, in one of which only German is the medium of instruction while in the other only Italian is used, obviously except for the fact that the study of the other language as the children's "second language" is compulsory. The principle of the parents' free choice is upheld: a child may be refused entry only if his command of the medium is considered below standard and this in order to guarantee the proper functioning of the school. However in the Ladin schools they adopt the method of immersion which offers instruction in all three languages[20].

d. Finance

The essential issue of autonomy is its financial self-sufficiency. The noblest guarantees of autonomy are worthless if the means to consolidate and empower autonomy are lacking. The degree and the quality of autonomy can be calculated through a number of autonomous tasks and assignments only with reference to the financial means available. Sufficient financial allowances are the indispensable condition to effect and empower autonomy; they are the necessary basis for creating a stable autonomous structure. Insufficient financial means would not only compromise the general

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[19] G. Poggeschi, "Il censimento e la dichiarazione di appartenenza linguistica", in *L'ordinamento speciale della Provincia di Bolzano*, Cedam 2001, pp. 922 ss.

[20] For further details see G. Rautz, *Die Sprachenrechte der Minderheiten. Ein Rechtsvergleich zwischen Österreich und Italien, Baden-Baden 1999*, A. Lampis, "Recenti sviluppi dello speciale ordinamento scolastico in Provincia di Bolzano", in *Rivista giuridica della scuola*, 1997, pp. 23 ss.

characteristics of autonomy, which can be defined also in South Tyrol, like the autonomous legislative and administrative competences, the organs' independence and so on, but also the existence and development of the German and Ladin ethnic minorities.

Nowadays, since the international quarrel with Austria has been solved thanks to the implementation of "the Package" (1992), and since the commencement of the so-called "dynamic autonomy" phase (the progressive putting into effect of the Provincial competences through the particular mechanism set up for the issuing of regulations for implementing the special statute for autonomy), the State only has competence for matters of defence, the police, the administration of justice and the collection of revenues. With the exception of the army and, partly, the police, this competence is exercised by means of local personnel (proportional in the civil service) or anyway possessing the certificate in bilingualism. Considering the high cost of such an institutional structure and of the competences, as well as of the whole legal system (suffice it to mention the translation costs in a bilingual or trilingual administration), the State guarantees the devolution of nine tenths of the direct or indirect revenues collected in the territory of the Province to the territory itself, besides the revenues of the Local Council and the Provincial Council itself[21].

3.5 Relations between the different groups residing in the autonomous entity

As to the relations between the various linguistic groups, one must distinguish between two different types of conflict: the first one concerns the German/Ladin language minority in South Tyrol and the State, the second one concern relations within the Province itself. In the second

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[21] The system is actually rather more complicated. The pattern is that of fixed quota devolution (9/10), to which an annually-fixed variable quota is added of a general tax on income and various other taxes on business transactions. Then quotas are established for annual funds allocated in the State budget for increasing industrial activities, the allocation of funds for exercising the functions delegated by the State and special contributions. Cfr. F. Debiasi, "Finanza della Regione e delle Province in Regione autonoma Trentino-South Tyrol", Università degli studi di Trento (a cura di), *Commentario alle norme di attuazione dello statuto speciale di autonomia*, Trento 1995, pp. 295 ss.

is still justified by recalling historical experiences, especially the prohibition of the use of German in public and the consequent underground founding of secret schools during the period when the fascist regime attempted forced assimilation.

One must recognize the importance of language, which becomes a criterion for establishing ethnic identity and the demarcation line that determines the socio-cultural identity of individuals who speak it to assert their belonging to a culture and as a factor which allows the recognition of this belonging to a specific social group. Although the Autonomy Statute (article 2) refers to the ethnic and cultural characteristics of the various South Tyrol populations, it also refers to the "linguistic groups" to denote the groups speaking Italian, German and Ladin which live in South Tyrol.

In the same way one must take into account the **geographic and demographic situation** to establish which form of autonomy should be applied. In the case of South Tyrol the suitable form was that of territorial autonomy: that is the members of a territorially compact minority were given the power to govern their own territory, thus actually switching over the relation between the majority and the minority: in fact the more decentralization is conceded to that territory, the less are the aspirations for secession of the minority from the national State that hosts it[24].

In **the case of South Tyrol** the following factors have proved to be of fundamental importance for the settlement of the conflict:

a. The political conditions

Italy was a democratic country, based on the rule of law that was striving to reach internal political stability. The process of the development of South Tyrol's autonomy was initially meant to evolve step by step with the implementation of the whole Title V of Part II of the Republic's Constitution, therefore side by side with

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[24] This was not an obvious choice. The international bond established by the De Gasperi-Gruber agreement in 1946 essentially refers to the safeguard of the rights of the "German-language inhabitants of the Province of Bolzano". Although the agreement provides for the concession of "autonomous legislative powers", one must remember that this recognition is given to the "populations" not to the territory. The option of a solution which favoured the personal autonomy of the group instead of the territory's autonomy would have been equally possible.

development of the entire regional system. Besides, the Südtiroler Volkspartei represented – and still represents – an impressive majority of the German-language group, making it a natural and legitimate participant in the negotiations with the Italian government. Again, both Austria and Italy were interested in keeping good relations between them, and European integration was making its first steps.

b. The economic situation

Besides the almost total absence of unemployment, in South Tyrol there's a flourishing productive activity, based on agriculture, tourism and handcrafts, there is (international) trans-frontier cooperation, but there are also residues of large industries and a heavy public administration: all of which are benefits deriving from its geographical and geo-political position. Economic stability and an ever-increasing prosperity are essential characteristics of the region's development, most of all to create the right environment that would lead to even more cooperation between the various linguistic groups.

c. The international links

The international links of the South Tyrol issue, arising from the 1946 agreement between De Gasperi and Gruber confirm its international importance. Considering the involvement of Austria, particularly as one of the signatories of this treaty, the Austrians were able to take up the role of Protective Power (*Schutzmacht*) and to support the South Tyrol cause at the international level.

d. The time gap

Thirty years had to pass before the tension subsided and for the institution and gradual implementation of the legal system provided for in the second Statute of Autonomy. In spite of the delay, this gradual approach had already been agreed on beforehand, during the negotiations that led to the Package and that were listed in detail in the so-called "Operative Calendar".

4.2 Lessons to be learned

As I have already said the applicability of any model for autonomy that was developed in particular economic, social and demographic

situations may appear over-ambitious[25], however a few lessons can be learnt from the case of the South Tyrol.

The compromise reached through the negotiations that led to the "Package" is of fundamental importance: the explicit recognition of cultural diversity and the abandonment of incompatible positions by both sides. The reciprocal renunciation of the "maximum" requests and the "extreme" positions by the linguistic groups, transformed the "negative" part of the agreement into a positive one, thanks to the reciprocal recognition of minority positions. This is easily deduced when one compares the first and the second statute of autonomy. In fact, since with the 1948 Statute the German language minority had been given a minority position within the region, territorial autonomy could not have any effect to defuse the conflict., because the minority continued to perceive the continuation of the assimilationistic policy of the Italian State (although this was effected democratically) and it therefore felt that its existence as a collective entity was threatened. It was only after the baricentre of the provinces was shifted and after the transfer of relevant cultural and economic competences to them, that the German-speaking minority became aware of its demographic majority in the territory where it exercised self-government and was now feeling safe. In this way the foundations were laid to guarantee the effectiveness of the protective functions of territorial autonomy, because the minority group was now in a position to "believe" in its survival as a group, and this conviction was not only kept but it also increased during the implementation of the Package, thanks to the procedural mechanisms for the implementation of the Statute, so much so that it became a certainty. By means of proportional linguistic representation in the legislative, administrative and legal spheres, faith was instilled in (and by means of) equal treatment, and with the transfer of further competences to the Province, by guaranteeing autonomy in education and finance, the minority group acquired the feeling that it was once more "at home".

One of the particular aspects of this method of settling the South Tyrol conflict which could be important – as well as especially useful

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[25] U. Schneckener, "Making Power-sharing work. Lessons from success and failures in ethnic conflict resolution", *Quaderno InIIS*, n. 19/2000.

for other ethnic conflicts – is the creation of a platform of institutions and procedures aimed at negotiations which, in the case of South Tyrol, has allowed both parties to find common solutions on controversial issues. Therefore the process of de-escalation by means of which the parties have succeeded – together – in transforming a conflict which up till then had only been through negative stages into a positive road which could guarantee peace and stability both in the short and long term. The individual procedures might also offer interesting examples for other conflicts: the operative calendar, with its detailed pre-planned time-frame, the negotiations which were institutionalized in special joint commissions of the State and the Province, the special procedure of enactment decrees, which cannot be unilaterally modified by the State and, last of all, the guarantees and particularly the possibility of bringing disputes to the Italian Constitutional Court.

Besides this procedural machinery another successful element of the South Tyrol experience is found in the so-called "institutional equality",[26] which went beyond the opposition between formal and substantial equality.

The principle of formal equality, aimed at equality among citizens "without distinction" of sex, race, skin colour, language, religion, political or ethical convictions, national or social origins, membership of a national minority, and so on (as the French text says in article 14 of the European Convention for the protection of human rights and liberties – unlike the English version), as well as the principle of substantial equality cannot provide full solutions to the "dilemma of differences".[27] Only institutional equality can allow the members of a minority group joint participation with the others in determining their own destiny from the beginning that is from the moment of the "identification of their difference", independently of the "magic formula of numbers". The point of departure for an effective and lasting (juridical) solution of conflicts must not and can not be tolerance as a moral imperative, but "tolerance through law". It is therefore not a question of preaching "peace to all men of goodwill",

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[26] Cfr. J. Marco, *Gordischer Knoten*, cit.

[27] Cfr. M. Minow, *Making all the difference. Inclusion, exclusion and American law*, Ithaca/London 1991, pp. 51 ss.

which indirectly implies that peace is possible only among these people, but creating goodwill on a legal basis, that will from the very beginning give everybody the "feeling" of being treated equally and of enjoying the same rights. The South Tyrol experience shows that from the beginning the concept of institutional equality was taken into consideration in the relativization of relations between the majority and the minority. In fact the German group, the majority in the Province, is the minority with regard to the competences exercised by the State, while the said minority status belongs to the Italian group with regard to the competences of the autonomous Province. In this way individuals belong to the majority or to the minority according to context. A member of the German group residing in Bolzano belongs to the majority in the territory of the Province, but he/she belongs to the minority in the Italian State and in the city of Bolzano, while an Italian-speaking South Tyrolese belongs to the majority in the national and local council context and to the minority in the Province. Besides, thanks to the fact that both Italy and Austria are members of the European Union, one has to take into account, not only another level of government but also a new dimension in belonging to majority or minority groups, because on the European level both German and Italian are official languages, but their speakers are anyway a minority with regard to the other citizens of the Union[28].

It is precisely through procedural elements that the recognition of the existence of the minority group becomes the recognition and legitimization of a situation of contrariety endowed with equal dignity, not only for drawing up the "basic compromise" but also for the implementation and management of autonomy. And yet, even thirty years after the approval of the Package and of the second Statute of autonomy, this reciprocal recognition of the legitimacy and equivalence of rights between the groups is still precarious, as shown by the importance that is still attached to names and symbols (the South Tyrolese, for example, have recently obtained that Piazza della Vittoria in Bolzano, where the

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[28] Cfr. S. Ortino, "Dalla tutela delle minoranze all'autonomia funzionale", in *Die Südtiroler Autonomie in europäischer Perspektive*, a cura dell' Accademia Europea di Bolzano, quaderno n.1, Bolzano 1998.

monument built by the Fascists to mark the Italian victory in the First World War stands, be changed to Piazza della Pace [that is from Victory Square to Peace Square], but this has provoked a reaction by Alleanza Nazionale who have proposed a referendum to bring back the old name of the square, which is considered the symbol of Italianity; the referendum did bring back the old name, although only by a low percentage of voters).

All in all in South Tyrol an environment for the "promotion of peace" between the two ethnic-linguistic groups has been created: in Switzerland such a context is the foundation for the peaceful system of compensation of reciprocal interests among the different language groups, so much so that it is the essence of the Swiss nation and of the Swiss "people". The opposite seems to be the case in Northern Ireland. where economic, religious and ethnic-national rifts meet and overlap, and this contributes to the permanence of the so-called "sectarian violence" in that land. Only by relativizing the positions of the minority and the majority will it be possible to create the willingness of the individuals to become aware of the need for a compromise. Only this would allow peaceful coexistence, seen as the permanent and convincing alternative to violence. Segregation and "ethnic" proportionality are institutional instruments which create security, which is the essential condition for peaceful coexistence, but this does not necessarily bring about trust among the groups, which is the essential condition for integration through cooperation. On the contrary, segregation and proportionality are actually expressions of "institutionalized lack of trust". In other words, the legal recognition of the ethnic factor cannot by its own nature be confined to the State or to the public sector, but it tends to embrace the private sphere again, in a kind of spill-over effect. One may therefore ask how can it be sufficiently open and flexible in order to make the creation of positive consensus possible to interethnic cooperation, and even to allow it to pass on to the following phase in reconciliation? Nowadays, in actual fact, the situation in South Tyrol is marked by "parallel societies", that is there is peaceful coexistence (*Nebeneinanderleben*) but one cannot speak of the communities living together (*Zusammenleben*). Both the German/Ladin group and the Italian group have built their own organizational structures and society subsystems; nurseries, schools, political parties, public libraries, trade unions, youth clubs, sports clubs,

mass media and churches are mono-ethnic[29]. Contacts between the groups are not many, because of structural reasons (the urban-rural contrast and separate economic structures) and of linguistic difficulties (fluency in both languages has not yet been reached, especially in the older generations).

If some time ago they used to say "the more we keep separate, the better we understand one another", the time has come to turn the motto upside down and say: "the more we understand one another, the less should we be divided".

Besides, the fundamental question remains to be answered: how can we move on from a multi-national institutional system to a multi-ethnic society, or else from the prevalence of ethnic segregation which is institutionally recognized and imposed to de-ethnicization where the elements for integration prevail? The responsibility of the whole local ethnic group, identified historically and territorially, will in future be expressed in the guarantee that local values and traditions will be preserved, also through the inclusion of the group's territory in the new global scenario[30]. And this should happen in such a way that the identity of the whole local group will be preserved and at the same time its participation in the global circuit will be guaranteed.

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[29] In South Tyrol, as in Switzerland, it is apparently necessary to ask up to what point, for example the school system effectively safeguards against the possible risks of assimilation. Today assimilation is seemingly no longer based on the ethnic conflict of the Italian and German groups, but rather, in this era of globalization, on the lure of English. Cfr. B. Czernilofsky, "Momentaufnahme: Sprachenpolitik in Südtirol – Muss die Trennungspolitik überdacht werden?" in *Europa Ethnica*, 4 1998, pp. 140 ss.

[30] Cfr. S. Ortino, *Dalla tutela delle minoranze all'autonomia funzionale,* cit.

THE EU POLICY OF INTERNATIONAL CO-OPERATION FOR DEVELOPMENT, THE PROMOTION OF HUMAN RIGHTS AND THE RESPECT OF CULTURAL IDENTITIES

LUCA PIERANTONI*

The issue of the relationship between the promotion of Human Rights and the safeguarding of cultural identities involves considerations of not only juridical but also social, ethical and political nature. It might initially appear that there is an obvious conflict between them. In fact when we speak of Human Rights, we speak about something that should be given to all the men, independent of their race, social class, religion and nationality. The very idea that such a *Unicum* exists and may be applied independently from the national diversities, appears in contrast with the existence of considerable cultural differences between and among the populations. Not strangely, therefore, a comparative analysis of some of the formal acts with which Human Rights have been "declared" shows that even the so-called universal declarations have always substantially depended on the cultural, political and social contexts in which they have been promulgated.

After all, why should Human Rights be so different from all the other juridical principles? The laws and the juridical principles have always changed and will always continue to do so as they will never be perfect. We often speak of four "generations" of Human Rights, but there will also be a fifth, a sixth and most certainly a seventh

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generation, because Human Rights will always reflect the product of a certain mentality existing in a certain context and will follow the running of time.

We can start by taking into account the Declaration of the Rights of the Man and the Citizen of 26 August 1789. The idea of the "Nation" plays a central role in this declaration. This is the French Nation which rebels against Tyranny and refuses to be enslaved any longer. Article 3 of the Declaration of the Rights of the Citizens states:

> *"The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation."*

How could one say that this Declaration did not directly express the values of the French revolution? It would be difficult to find elements of the same sort in other declarations of Human Rights which were born within a different context.

The Declaration of the Rights of the Citizen is genetically linked to the first modern declaration of Human Rights in history: the Declaration of Independence of the American Colonies of 4 July 1776. Not surprisingly, this Declaration begins by recalling what will become *in fieri* the Principle of self determination:

> *"When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."*

Just incidentally I notice that the Declaration uses quite a "friendly" tone towards the English upon whom the Americans are in fact declaring war. The Declaration prefers to indicate the English King George as the real enemy, responsible for betraying the Americans, rather than the English as a population themselves. In this light, I may hazard to say that in a certain sense the Declaration leaves the door open to what will become the modern "Special Relationship". On the other hand the Declaration introduces a new element given by the idea of the freedom from the Tyranny. This idea is recalled, as we have

already seen, by the French in 1789, but it will go on to be abandoned in the later declarations.

Moreover, the American Independence declaration points out the need *to "assume among the powers of the earth, the separate and equal station"*. It would be very difficult to find such an element in modern declarations, since today the idea of "parity among the powers" is relegated, maybe due to an excess of idealism, to other contexts. Finally this Declaration continues by stating that:

> *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."*

In this sentence there are several interesting aspects. I will only make a couple of comments. The first is that the Declaration refers in a very direct manner to God. That human beings are equal as far as God so wills. The same idea is present in some modern declarations such as the Islamic Declaration of Human Rights, which says textually:

> *"Human Rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all Human Rights. Due to their Divine origin, no ruler, government, assembly or authority can curtail or violate in any way the Human Rights conferred by God, nor can they be surrendered."*

The second element is the "Right to happiness" which was to be recalled by President Franklin D. Roosevelt in January 1941, when he pronounced his famous speech on the "Four Freedoms". The same principle is present in some of the more recent UN Covenants on civil and political rights; and economic, social and cultural rights.

The Right to Happiness can play a fundamental role in extending Human Rights to other social and economic issues. It is very difficult, indeed, to maintain that it is possible to speak about respect of Human Rights in a world where the majority of human beings is condemned to unhappiness; 800 million people suffer from malnutrition of whom 200 million are children, one third of the whole world population does not have access to water and to basic energetic services, while every year HIV infects more than 2 million people in the African subcontinent alone.

Nevertheless, the theme of the Right to Happiness is not central at all within the UN General Assembly Universal Declaration of Human Rights of 1948. However, this fundamental act recalls in turn another concept: the concept of universal fraternity. In 1948 the word was still tragically overwhelmed by the shock of a war which cost 40 million victims. Therefore, it is not surprising that in its preamble the Declaration highlights that:

> *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".*

Immediately following this the Declaration directly recalls the tragedy that:

> *"Whereas disregard and contempt for Human Rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people"*

and above all in article 1 the Charter continues:

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

Another fundamental element in this Declaration is the individual who plays a central role in the modern Western Conception of Human Rights. The centrality of the individual is perhaps the point on which Western and Eastern mentalities most differ. This element, the attention to the individual, presents in the Declaration of 1948 is even further stressed in the European Chart.

As Westerners we should admit that the centrality of the individual is both the reason of the achievement of great goals by our society in terms of respecting fundamental freedoms, and a point of weakness at the same time. Individualism may give us freedom but it has its shortcomings too in terms of loneliness and the generation of selfishness.

Now, it is not possible to deny that all these declarations were influenced by the political, social and cultural context in which they were developed, and that some of the acts that we believe to be the

fundamental principles to promote around the world reflect the modern Western mentality.

Nevertheless, to continue with the comparative analysis of the texts on Human Rights, we can highlight several points in which all those declarations coincide, and this is because aside from different mentalities and sensibilities, there have always been certain elements that have been considered as fundamental whenever human beings have had the possibility to express themselves freely and to point out what they believe to be the fundamental principles for living in freedom, peace and happiness.

We can take for instance the example of the principle *nullum crimen sine lege*. Already present in the Habeas Corpus of 1679, the principle is recalled in all the Charts of Fundamental Rights including the Declaration of Independence of the American Colonies, the Declaration of the Rights of the Citizens, the universal Declaration of Human Rights, the article 38 of the Statute of the International Court of Justice as well as the African Declaration of Human Rights:

> *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

and in the Islamic Declaration of Human Rights (in Section II: Right to Freedom) it is declared that:

> *"Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law".*

Now, can the violation of this principle be justified by the existence of the so-called Right to Cultural Diversity? It is clear that the violation of such a fundamental principle cannot find any sort of justification. Whenever violations have been justified in this way, it was to hide criminal and despicable cruelty and violence behind a Right (the Right of all the population to keep their own cultural identities) which has – of course- a completely different sphere of application.

The conclusion of this *excursus* through the main acts of Human Rights is that Human Rights and Cultural Differences are not in

fact in contrast as it seemed initially. However, these two fundamental concepts are not one against the other if the reading of the texts on Human Rights is developed by understanding that what counts is the fundamental meaning of these acts because their form and their general structure is not universal more than all the other juridical principles. This also means that if we really want to promote Human Rights we have to abandon certain accents which link them to a peculiar Western sensibility such as the centrality of the individual. We should try to re-interpret those principles merging on the one hand the right of the individual and on the other hand the rights of communities to their customs. Finally it is necessary to develop a policy of promotion of the latter's rights as well. Also the right of communities to keep their fundamental customs and values should be promoted and should be an integral part of a more general policy aimed at promoting Human Rights. Moreover, not only should the promotion of cultural rights be carried out by persecuting the violations of the rights of the communities and of the minorities, but those rights should also be promoted actively by establishing those procedures and structures which are necessary for communities for keeping their customs and their traditions.

All these elements assume an even greater importance if we consider that the policy aimed at the promotion of Human Rights and Democracy has become a fundamental condition for the whole policy of co-operation for development. This is one of the main achievements of the recent reform of the international policy for the development and particularly for the EU policy of co-operation with the third countries. Preliminarily, it is necessary to highlight that it is no longer possible to speak of Development Policy without taking the Promotion of Human Rights into account. Indeed if in the past underdevelopment was considered above all for its economic aspects, in all the most recent strategy papers of the European Commission underdevelopment is considered as a multidimensional phenomenon where the different fields (political, social, cultural and economic underdevelopment) are taken into account in their entirety.

Having considered underdevelopment from a purely economic viewpoint is arguably the reason for some of the failures of the past. International Organisations and their Members often funded and supported governments which did not respect the fundamental principles and which nonetheless used the money coming from the

international policy of co-operation for development for buying arms and strengthening their own system of power.

The EU has today adopted a method which is completely different. Human Rights and the "Governance" are central to all efforts of co-operation with Third Countries. This also means that when a beneficiary country does not prove that it guarantees democracy and Human Rights, European co-operation programmes can be suspended. This principle is present in the Cotonou Agreement as well as in all the bilateral Partnership agreements. Moreover this principle plays a central role in the main internal strategic documents of the European Commission such as the Communication of the European Commission to the Parliament of 26 April 2000 n. 212 on the European Development Policy and the Communication of 8 May 2001 on the "Activity of the EU for the promotion of Human Right and Democratisation in the Third Countries".

These latest considerations lead to the last element that I would like to highlight today. In fact together with the reform of the co-operation policy and the integration of the respect of cultural diversities in the framework of the promotion of Human Rights, there is a third challenge that particularly affects the Euro-Mediterranean region. Indeed, the last fundamental challenge facing the European Development Policy is that of the need to redefine the relationship with beneficiary countries in a multilateral framework. The development of a Policy of Co-operation at a multilateral level generates several advantages. First of all this assures the uniformity of treatment and reduces diffidence between and among the beneficiaries. Furthermore this acts as a deterrent, causing beneficiaries to respect their obligations since not only would they run the risk of being excluded from the co-operation programmes, but they would also find themselves isolated diplomatically. What is more, the multilateralism can lead to a substantial strengthening of relations between the beneficiaries up to the point that it can turn out to represent a considerable incentive to the reinforcement of relationships among the beneficiaries themselves. This might also generate (as happened in the past) the creation of a custom union among the beneficiaries with a very positive feed back also on the commercial interests of the donors. An example of a success of this kind is undoubtedly the Marshall plan as well as -more recently- the Cotonou Agreement which is a fundamental

framework for co-operation with the ACO countries in a difficult context such as the de-colonisation process.

Unfortunately co-operation with the countries of the Southern Mediterranean has not always been structured on a multilateral basis, and even now the majority of the countries in North Africa maintain that the main framework for their co-operation with the EU should continue to be the bilateral agreement of partnership.

The launch of the Process of Barcelona is an important chance for the strengthening of the Euromediterranean Dialogue at a multilateral level. The future of co-operation in the Mediterranean will depend largely on the Process of Barcelona. The adoption of the Common Strategy for the Mediterranean and the reinforcement of the MEDA programme highlight that the EU believes that the Mediterranean is a strategic area and a key challenge for peace and stability and for European well-being. The challenges described above regarding the relationship between North Africa and Europe take on a particular importance.

The Barcelona process and the strengthening of stability in the Mediterranean, in fact largely depend on the development of a policy of co-operation which on the one hand ensures a central role for the promotion of Human Rights, and on the other hand imposes the necessary conditions for carrying out a policy which is respectful of the cultures and the customs of the North African population. Indeed, as we have seen, the promotion of Human Rights is not in contrast with the safeguard of cultural diversities as far as the rights of communities are integrated in the general framework of the promotion of Human Rights. After all an individual is not free if he or she is not given the possibility of sharing customs, ideas and passions with the community of which he or she is a part. It is only with this aim that political support will be able to achieve the results which, it is hoped, will build a strong foundation for the growth of a policy of cooperation in the Euro-Mediterranean. As we have seen this is a policy which finds itself facing important challenges, the most important one being the necessity to redefine the relationship between mediterranean countries at a multilateral level. Any success will depend entirely upon the way in which these challenges are tackled. This is certainly not an easy task and it is one that has already met with great difficulty, these difficulties must be overcome as too much is at stake in terms of stability, justice and peace.

THE STATE AS AN "OPTION" IN A MULTI-ETHNICAL SOCIETY:

Ways to Address the Problem of Western Legal Ethnocentrism without Adopting Cultural Relativism

CIRO SBAILÒ*

1. European legal systems and the multi-ethnical society

The "love of difference" as an *arché* of Europe is as old as Europe itself. Among its recent and well-known definitions one finds that of Chabod (1961a) but the first ones were written by the Greek tragic playwrights and Aristotle.

However, nowadays the same critical expectations and the same craving for power that have brought Western culture to dominate the planet, to make the world "round" as the language of Hegel and Marx would put it, have produced an epoch-making crisis. On the one hand a complex political and constitutional transition phase is going on in the advanced democracies, within the general crisis of the national State, and particularly in the "Euro-continental" type of state (Held 1999), on the other hand a deep change is coming over, on a global scale, in the identity mechanisms and in community membership as a result of de-territorialization processes and economic integration (Papastergiadis 2000).

Ever since the first sea voyages and the first clashes between civilizations, Western culture has experienced "cultural relativism", but nowadays the issue is on a "squared" scale. We have become

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fully aware that the cultural horizon itself where relativism emerged is now less clearly defined: "Everything vacillates" (Troeltsch 1924).

The problem concerns all of the West, but especially Europe and particularly the Euro-Mediterranean area, where the world's main religious, political and legal traditions clash (Common Law, Civil Law, and Islamic Law).

We shall here try to show that the problems of today's multi-ethnical society are severely testing the European legal systems by pointing out their "ethnocentric" character. On the other hand, this ethnocentrism does not only reflect a simple psychological attitude, but a structural element of the scientific and legal culture of the West. In this line we shall see that the conflict between the policies on human rights and the respect for different cultural identities, which at the moment seems inevitable, needs an epistemological kind of investigation on our legal culture, in order to distinguish – allow me to borrow an expression from civil engineering – "the coefficient of oscillation" of our conceptual pillars. By doing so we shall also take into account the "artificial" nature of ethnic groups and of nations and we'll see how the cultural elements predominate over biological ones. On this basis, we shall examine the possibility of "incorporating" our ethnocentrism into a political project for integration, by means of the interpretation of the state as a "state of culture". In this perspective, Italy may have to take up a special role on account of its position at the centre of the Mediterranean.

In order to do this, we shall briefly review the present situation in Europe and examine, in particular, the problem of the integration of the Islamic community.

The Muslim community is the most numerous no Christian community in the West, including Europe. For instance, Islam is the second more widely-spread religion in Italy. Besides, Islamic culture – and this is deeply rooted in European historical memory since the high Middle Ages – has brought claims for social and political recognition which derives from a long history of contacts between the civilizations of Europe and Islam, consisting of "rivalry" (Lewis 1990) but also of "a fruitful friendship" (Cardini 1999), as if the one is reflected in the other, thereby defining one another sometimes as an enemy, sometimes as a favourite interlocutor.

In the West substantially two models of Islamic settlement are known; these may be respectively defined the "Muslim town" and the "diffusion" pattern (Allievi 2002). In the first case there is a

high concentration of Muslims in one area. The "Muslim town" is kind of settlement which is typical of the industrial city, where carrying out a function is intimately linked to the assignment and occupation of a specific area. In an industrial city the functional space tends to coincide with the physical space and the definition of identity matches the outline of this space, whereas in post-industrial society the outline of the space is seen as an "option" and settlement becomes "spreading". The determination of identity takes place on the basis of the many communicative occasions that the urban web allows: one is not a Muslim because one lives in a Muslim town, but in so far as one asserts one's own identity through countless communicative exchanges.

The "diffusion" pattern is rapidly spreading in Europe, to the extent that it is surpassing the "Muslim town" pattern. The Islamic vocation of occupying space is therefore amplified and, in a certain sense, modified. This means that the Islamic community is living the experience of de-territorialization as an occasion for multi-dimensional expansion.

Membership of the community itself, from this viewpoint, even when family-based, is experienced as a *choice*, adherence through conviction, not taken for granted, albeit definitive according to the teaching of the Koran.

National identity is consequently cut down. A young immigrant whose family came from Morocco, for example, tends to consider himself not so much as a Moroccan but above all as a Muslim. On looking carefully, this can also be a kind of reacquired historical identity: in the Islamic world, national states, with rare exceptions like Turkey and partially Egypt, do not have a solid autochthonous tradition, but are mostly the product of Western initiatives. Originally, in fact, Islamic community experience is characterized by multi-ethnicity and "non nationality" (Viatikitos 1993). Besides, even the relationship with the religious authority changes, because it is direct and not mediated by the family or the clan. It openly calls on "adherence" to Islam. Again, religious authority cannot count on a foregone legitimization, but must accept the risk of being challenged on an "ideological" basis, with reference to the values and the ideals of Islam, but also to the ability of safeguarding the community's interests. Naturally this is also valid on the legal plane, since in Islam there is no clear distinction between law and religion. Considering that in the West, the community does not have the legal

instruments to punish wrongdoers, the exercise of authority lies from time to time on the head's charisma, on his ability to interact with the host country's authorities in the community's interest.

In this sense the community's relationship with the legal system of the host country tends to be ambivalent. On the one hand, that system is a guarantee of freedom and an opportunity for expansion, and anyway an assertion of their presence. On the other hand, the same system may be perceived as a threat to the community's integrity, since it is based on the freedom of conscience. This ambivalence has another one inside it. The Western secular state is considered as a stimulus to a stronger awareness of one's being Muslim: precisely because a system of positive laws that protects Islamic identity does not exist, there's a need for a stronger awareness and more participation. On the other hand the "permissiveness" of the secular state may also be interpreted as a "challenge" to Islamic identity and as proof of the fact that the clash with the West is irreversible.

If it is generally true that cultural identity is ever more a social product, and not a vested and unchangeable fact, this is even truer of the Islamic community of the West. In this sense the Islam of the West challenges Western society on two counts: on the one side its cultural ethnocentrism, and on the other an interpretation of tolerance as giving up one's own identity and values.

At this point one may ask how the European legal systems react to these new processes of integration.

More than systems, here one should perhaps speak of "legal philosophies", in so far as not only specific systems are being tested, but rather conceptual structures and behavioural practices that underlie those same systems. In this sense it is particularly important to consider the way the two models *par excellence* (Bellucci 2001), the common law model, as exemplified by the English system, and that of civil law, whose best expression is exemplified by the French system, have reacted.

The French legal system operates on the paradigm of equality: all relevant juridical situations must be typified on the basis of a single procedure. The differences must be annulled: each individual is equal to the other one, since he is rational. One starts by assuming that the Legislator had issued the laws on the basis of a clear representation of reality in its universal and humanistic terms, and then one continues by assuming, according to Weber's well-known

characterization of modern rational law, that "every concrete legal decision is the application of an abstract legal principle to a tangible case in point" (Weber 1922b).

Consequently no laws are issued expressly for the community, because the community as such is not recognized.

The paradigmatic rationality of the French system succeeds in giving answers that are apparently coherent with the system, but which, precisely because of this coherence, place the system itself in a crisis. Paradoxically, the egalitarian principle, on coming into contact with the fluid situation of the new identity and community processes, provokes evident unevenness in their treatment. Recent experience has shown that the individualistic and rationalistic structure of the system does not manage to dominate the complexity of the identity differences that characterizes French society. The often-quoted case of exsection is emblematic here. The system has been forced to shift from a position of substantial legislative tolerance to a sudden rigidity at the moment when it had to face the eventuality of formalizing that tolerance, that is when a Breton woman who was not Muslim, presumably in shock, submitted her daughter to exsection. Legislative inflexibility is then in turn followed by more tolerance in the application of the law, with the result that the decision on the attitude of the state towards the problem is referred substantially to the judge only, which is something that means a lot in the land that created civil law.

In the United Kingdom the situation is completely different. Here there is specific legislation, the Prohibition of Female Circumcision Act of 1985. Before 1985, legal action against female circumcision could be instituted only when there is proof of serious intentional harm to the body. Faced with the multiplication of cases and the impossibility of proving the harmful intentions in every case, and the many ethnic and religious excuses, it was deemed necessary to proceed with a specific law. This law allows criminal charges to be brought against anyone who practices forms of mutilation of the female genitals.

The paradigm of the British system is actually that of "difference". In the absence of the possibility of a full universal representation of the problems, an empirical procedure is followed, on the basis of rough estimates, without closing the door on different experiences. In this sense the presence of the community is therefore recognized. There are many Acts that guarantee respect for cultural diversity,

ranging from the right to wear a turban with the college uniform to special laws that protect the cultural identity of ethnic gypsies.

And yet the English system has been criticized at home because it may promote the formation of new "ghettoes", that are less evident than in the past but certainly more harmful to the interests of the community and to the rights of the individual. The member of a community, according to these critics, would suffer a reduction of his ability to define his own identity even with regard to the community he belongs to.

The point is that the new processes about identity and membership of a community throw both the rationalistic approach of the French and the empirical one of the English into a crisis.

Both approaches represent two ways of looking at the distinction between private and public, which is still fundamental in our legal culture, beyond the various interpretations that are given. The fact that the distinction between what is public and what is private has a *political* character does not undermine the fact that for the Western legal civilization this distinction is a fundamental principle. In Weber's description, this principle almost seems like an anthropological feature of Western Man, that is rather than a result of the evolution of European culture, it is one of its prerequisites.

However nowadays this distinction has been having a hard time, precisely because of developments in Western civilization.

Membership of the community is not only one of the answers to the bewilderment that follows globalization processes, it is also an instrument for rationalizing social behaviour in the de-territorialization processes. If we consider some of the fundamental characteristics of global society – the multiplication of opportunities together with the multiplication of information, de-territorialization together with wider insecurity (the threats come with the opportunities, as internet shows), the crisis of the distinction between "internal and external" in economic relations and in communication and information processes – we will realize why nowadays we feel the need for "filters" to decide, rationalize, live and programme our own existence. Taking decisions in a paradigmatic way, that is by starting from a clear representation of all the options and their relations, has become more and more difficult. For this reason the community becomes important because it is the first element for orientation and selection. On the other hand there's the risk that the community itself, instead of acting as a "filter" will act as a

"stopper", placing itself externally as the only interface between the individual and society.

The present Constitutional State is finding it difficult to react to this situation. This is where the "ethnic" origins, in their wider sense, come in, not only regarding our system of public powers but also with reference to its rationalistic and universalistic inspiration. In the meantime it will be seen that creating problems out of legal ethnocentrism is a peculiar characteristic of Western, especially European, civilization. We believe that it's worth reflecting on this point, in order to understand if, and to what extent, our political systems are compatible with a multi-ethnic society. The "universalism" of the Constitutional State of the Euro-continental kind turns out to be not so very universal, in the sense that it is not neutral but represents definite values and as such it is potentially in conflict with other cultures. It is now in a situation where it must defend its own legitimacy, which is universalistic, with regard to cultures that are antagonistic to the secular and neutral values of institutions.

Evidently, it does not make much sense to ask: how shall we get rid of ethnocentrism? Ethnocentrism, and especially legal ethnocentrism, is an essential element of our civilization, and in certain ways it is the basis of democracy and of the national states. The values of personal freedom and of the supremacy of conscience are *constituent* elements of European civilization. It's a different question that we should be asking: how can we give up a rigid and rationalistic approach to the problem of a multi-ethnic society, or rather, how can we avoid that our ethnocentrism produces the de-legitimization of our society for us and for the Islamic world?

The problem concerns Italy mainly because of its position as the pivot of the Mediterranean, at the cross-roads of the main migration flows and of the highest geo-political tensions of the world. The end of the bi-polar order has brought into view "another wall", invisible but not less solid than the former one in Berlin, which instead of dividing Europe into East and West, divides the Mediterranean into North and South: on one side the territorial national states which began taking shape towards the end of the 15th century; on the other side the "states without nation" which were built in the Islamic world, mostly on the initiative of Western nations. The construction of this wall began when the Europeans took the road leading to the territorial national state and it was consolidated by the industrial revolution.

This wall divides the Mediterranean on the religious, legal, political, linguistic and economic levels. The difficulty of communication between the two sides showed up, and continues to be seen, most of all in the difficulty to reconcile the community paradigm which is typical of Mediterranean cultures, with the public-private paradigm that is at the basis of European legal systems, and which is developed on the different lines of the common law and civil law systems. The answers provided by the European legal culture to the problems raised by the multi-ethnic society, in this sense, is decisive for the destiny of Europe, in a phase when attempts are being made to create a European constitution and, with reference to this, to define a European "identity".

2. The "ethnic" character of the doctrine of human rights. More on the theoretical foundations of Western legal ethnocentrism

Ethnocentrism is not a characteristic of Western civilization but of all civilizations. However, ethnocentrism is "accomplished" as it is, in the West, in the sense that it shows its maximum powers, has entered a crisis. It has been the West's task to give birth to this fundamental tendency of man, bring it out of the peoples' unconscious and make it an "object" of reflection. This belongs to the destiny of the West as the technical civilization: *techné*, as a fundamental tendency to create the right conditions for the efficient pursuit of aims, has made ethnocentrism its natural horizon where representations of "the other" are placed. In the case of ethnocentrism, as in capitalism and modern science, the West has "eaten of the tree of knowledge" (Weber 1922a). The awareness of the existence of other cultures and civilizations goes side by side with the theoretical foundation of ethnocentrism. The "ideal type" of such a foundation can be seen in Carthesian philosophy, because in Carthesian philosophy *as such* there is not only the theoretical foundation of ethnocentrism (Leach 1978) but also, from the West's point of view, the proof of the "legitimacy" of this ethnocentrism. On the other hand, as we have said, the theoretical foundation of ethnocentrism has been seen as a problem by Descartes himself. It is precisely this foundation that, in the end, allowed the development of "cultural relativism" in modern Europe and opened the way to Vico's condemnation of the "haughtiness of nations" (Vico 1744).

However, it is to Carl Schmitt that we owe the denunciation of the epistemological, rationalistic and individualistic foundations of modern law. He made a huge attempt to re-think those foundations, and interprets them no longer as an absolute fact, but as the fruit of a cultural formulation and, in the end, of a historical decision, which as such authorizes and brings to mind "another" decision, that of the "*nomos of the earth*" (Schmitt 1950). By seeking the criticism of modern liberalism in Hobbes, Schmitt finds that the foundations of modern individualism and liberalism are indissolubly entwined, as well as those of the modern constitutional doctrine of the limitation of sovereignty (Sbailò 2001). Writing on the question of the "miracle", Hobbes recalls the tradition that originated with Saint Thomas and St. Augustine and that goes back to the theology of Saint Paul and the teachings of Christ himself, and distinguishes between the "exterior" acceptance of the miracle, which is a public matter, and its "interior" acceptance, which is a private matter. Schmitt thus finds the seed of liberal constitutionalism in Hobbes, and he finds it particularly in Hobbes' discussion of miracles.

The supremacy of conscience, in fact, presumes equality among all men. This equality in turn implies that all men are entitled to inalienable rights.

In this sense, the "negative" concept of freedom and modern liberal individualism do not appear as fruits of historical evolution, or as reversible conditions, but rather as structural elements of Western civilization, since they arise directly out of the principle of the freedom of conscience.

The difficulty Western legal systems find in accepting the community paradigm derives precisely from this conceptual premise.

3. Public and private in constitutionalism and individualism

The modern distinction between public law and private law must be seen within the context of the development of the link between constitutionalism and individualism. That is, the modern definition of the human rights postulates, on the plane of legal theory, the distinction between private law and public law. This is not because human rights fit into both areas, but because the distinction between a collection of laws that govern the relations between the citizens and the sovereign, on one side (public law), and the collection of

laws that govern the relations between citizens on the other (private law), presumes the reciprocal demarcation line between the individual and the state, and therefore the legal definition of individuality.

However, now it is precisely by analyzing the distinction between public law and private law that one sees the series of problems that arise from the individualistic foundation of modern law, particularly as regards human rights – these problems are more and more topical in a multi-ethnic society.

The distinction between public law and private law is not strictly formal (Weber 1922b). After all it is just a political distinction, since it is based on a judgement of merit on which actions are referable to the State and what, after all, is the State. Mind you, the political character does not only belong to the specific distinctions between public law and private law, but to the principle of this distinction itself. On the basis of this principle it is possible to construct a rational law on the following structure:

a) Every concrete legal decision is the application of an abstract legal principle to a tangible case in point.
b) For every tangible case in point it should be possible to obtain, by the means of legal logic, a decision from the abstract legal principles.
c) The objective legal system must be complete and without any lacunae, even in the latent state, or it must be treated as such.
d) Whatever cannot be constructed in a technical-legal way is irrelevant at law.
e) Any behaviour on the part of individuals and communities must be considered as an application or transgression of a legal provision.

Such a legal system, as we was saying, can only be conceived in the context of an individualistic culture.

The term "individualism" was introduced by Tocqueville to define the American diffident attitude towards public power and the non solidaristic character of American democracy. However, modern individualism would be unthinkable without the culture of "individuality" that marks Europe since very ancient times. In the 6th century Clistene substituted the tribes based on blood relations, and therefore on a "natural" principle, by other "tribes", based on the rational division of the "territory", and therefore on an artificial

principle. The abstract *Registry Office* replaced identification through blood relations, thus recognition was now based on the regulations of *registration*. At the same time, the groups that were formed by this subdivision create cultural instruments for self-identification and self-legitimization that are not different to those founded on the "family", and this makes us suspect that in their turn blood relations were just a cultural creation which followed the process of social aggregation: "the individual" and "the family" have a social basis.

The Western *ethnos*, from this point of view, distinguishes itself by the continuous succession of various models of aggregation on an individualistic basis.

In the light of this characteristic one can also see, we believe, the self-contradictoriness that Tocqueville perceived in modern individualism.

The individual has a destructive energy that can be directed at any set-up. He is a product of the technical civilization. Or else he is the expression of the tendency to create the conditions for an efficient pursuit of aims, independently of these aims. *Homo democraticus* does not bear the "nearness" of the others. He wants distance and diversity.

The internal aporia of individualism comes out in the opposition between the "state" and "civil society". The spontaneous reality of civil society can only be guaranteed by an artificial reality – by definition – like the state. It is possible to free the economy from the corporate rules of the *ancien régime* only thanks to the rationalizing and centralizing activity of the state (De Sousa Santos 1990). The "natural" principle of *laissez faire* gets established thanks to the active role of the state in dismantling the class-based society. It was originally the state that marked the space where the free market could develop.

But this means that in Western society it is difficult to think of an intermediate dimension between "public" and "private", in the sense that the one and the other are two forms of the projection of the individual. Electoral machinery has an individualistic basis: the result consists of the sum of so many decisions taken individually. The whole institutional mechanism and the whole administrative structure stand on this principle. We could say that the matter is anthropological: Tocqueville's *homo democraticus* (Cacciari 1996), which represents the contemporary form of Western man, tends to

know the community dimension imperfectly, or to place it, as the case may be, within the "public" or the "private" category.

Evidently the problem concerns multi-ethnic societies forcefully. Western cities are no longer inhabited by "individuals" but also by "communities" that ask for recognition as such and to participate as such in decision-taking. The claims of the "community" cause a crisis in both the "public" and the "private" factors, because it criticises their common individualistic roots.

4. Is ethnos an invention of the West?

The awareness of the "constructed" nature of ethnic identities is perhaps one of the most significant products of the social sciences in the Twentieth century. However, this awareness tends to be forgotten as a consequence of the spread of indecision regarding one's own "identity". The issue characteristically concerns contemporary society wherever the flows of migration become more intense and varied, and therefore less controllable. The fear of being sucked into this flow, of losing one's historical memory or, to speak in a more down-to-earth manner, of losing the advantages that a historically superior ethnic group offers its members, arouses a vague sense of nostalgia for the "roots" or the "origins", and often also intolerance and violence.

It is therefore worth remembering that in the awareness of the "constructed" nature of ethnic groups there lurks the self-awareness of Western culture, that is, the awareness of its own ability to make "culture" prevail over "nature" and of the non-absolute – that is "ethnic" – character of its own values. There's actually something paradoxical about Twentieth century culture. The awareness of the "ethnic" character of Western culture apparently produces two opposite but, in a certain sense also complementary, attitudes. On the one side there is "cultural relativism", which means the sceptical renunciation to confront the "other [group]" based on the awareness of one's own identity and values. On the other hand there is the other [group]'s refusal in the name of its own roots, precisely because these are not universal.

Is it possible to avoid this either-or situation? Or rather, is it possible to accept the "other [group]" on the basis of the awareness of one's own identity?

Weber places ethnic membership among the sources of a

community's behaviour. But this source is subordinate to the political one, particularly to "class". The effectiveness of the ethnic call is largely conditioned by political factors and class elements. In certain aspects Weber even presents "ethnic roots" as a means to achieve political ends, and almost as a product of political will.

The origin itself of belief in an ethnic community therefore has an "artificial" nature: it is a classic example of the shift from a rationally-based, but weak, community that becomes stronger by changing into a community with a personal nature. During this shift an apparently decisive element like language may play a secondary role, since ethnic groups with different languages do exist. Elements of class differentiation, like dress, hairstyles and eating habits are more important for determining ethnic family relationships.

As a result one finds that the "class" lies at the base of the ethnic group, that is a social group marked by a *status*.

And "nationality" seems to be precisely one of the results of this political will. There are no substantial differences between nationalities and ethnic groups. Weber sees nationality as a rationalized ethnic group. But the ethnic group itself is simply the result of a cultural process.

5. The nation as a tool of the state

The word "nation" is the term by which the West rechristened *ethnos* with the aim of rationalizing it. Like the ethnic group the nation is the assertion of the principle of individuality (Chabod 1981b).

In this sense "nationalism" is a tool in the hands of the states, both in the nineteenth century, when the national states were formed, and in the de-colonialization phase when it was adopted by the colonial populations and helped rationalize the territory according to the paradigm of the state. The nation is the "natural" community, and politics and law must be legitimized in its regard.

Thanks to its "natural" character, the nation brings universal values. In this way a mechanism similar to the one of the "nations" of the Medieval Universities is reproduced on a geopolitical scale. The "nation" is identified with the whole precisely because it is a part of it. And this is not a contradiction, because it *mediates*, as the Italian patriot Giuseppe Mazzini would have said, the relationship between the individual and humanity. In this sense, the word "nation" encapsulates a philosophy

of history. While *ethnos* draws upon myth, and the fatherland draws on landscape and memory, the "nation" feeds on history, not only by turning to the past but also by looking towards the future. That is, it represents a historical direction, a horizon of meaning, a *project* (Gil 1978). We might therefore define the nation as an ethnic group that has been "treated" so that it could be incorporated into the State, so that the state could count on "virgin" territory.

Due to this, the rediscovery of national identities to oppose the process of cultural integration has an aporia within it. National identities are not original; they are the result of a historical construction carried out by the State.

6. Political incorporation and the State as educator

In the West, the construction of great legal and political systems, therefore, is done on cultural not ethnic foundations. From this point of view the West is constantly grappling with the problems of cultural integration, that are the problems of multi-ethnic societies.

The construction of the great political situations does not happen by radiating from a centre, it is not the widening of an initial nucleus, but a process of *incorporation*, inspired by a political and cultural project.

This incorporation is achieved by forming a superior unit which does not cancel the differences but preserves them. In this sense, the difference is recognized as an essential stage of the process of incorporation. Ortega y Gasset shows that the Roman Empire was formed through such a process of incorporation, within which the various ethnic and national groups were not only not recognized but, on the contrary, they were better exploited (Ortega y Gasset 1921). National unity, therefore, is not static but continuously evolving and reasserts its own identity by incorporating new realities. From this point of view the military way is a secondary one. The process of incorporation is part of a political project, in which ethnic and social differences are represented in perspective and in a dynamic manner. National unity, therefore, is not nourished so much by the past and by traditions, but by the future, by the project and its aspirations.

Every state is born when ethnic divisions are superseded by the "nation". That's why the ethnic state is a contradiction in terms: the state is a movement that goes beyond the ethnic and national differences, it's "integration" as a "political project" (Ortega y Gasset

1929). The linguistic and cultural unity of certain populations is not an original fact. It is often the result of the movement that is the state. It's the State that gives the impulse for overcoming the ethnic and linguistic barriers and for creating a common cultural heritage. In short it is not the nation that is defined by its frontiers – geographical, linguistic, cultural – but rather the frontiers are determined by the state through the nation: a *project* is so much the stronger the more it succeeds in being felt by the *others* as their own, that is by those with whom it shares the frontiers of civilization.

7. The crisis of the national state and the crisis of democracy. The State as an "available option"

The *demos* of democracy is an ethnically determined entity, obviously in the sense that the ethnic group is the result of a political and cultural process of integration. This refers to the individual democratic systems, built within the context of the national states, as well as to the *homo democraticus*, that "human species" that Tocqueville described as being in a pure state in Nineteenth century America. In fact, in my opinion, one of the problems that need to be solved in the debate on "global democracy" is the possibility of forming a global "people", which in its turn would rediscover a world agora by exercising, on a global scale, the role that public opinion has played in the development of national democracies. Writers like David Held see this possibility in the spreading and the improvement of the mass media and in the multiplication of individual and mass movements on the planet. On the other hand Held himself must admit that it is difficult to surpass the national state as an element of rationalization in cases of conflict between interests and rights. After all who decides on coercive powers and on the allotment of resources? The national state is a process of integration and rationalization which, at present, it is very difficult to imagine as dead or interrupted. On the other hand, global *governance* requires that we rethink the position of the State in the global political system, considering that the exercise of territorial sovereignty seems to be threatened by the processes of globalization, since it is not equal to the task of guaranteeing congruence and symmetry between decisions and the areas where these decisions are effective. We do not believe that the creation of a global *demos* can lead to the annihilation of the State, but rather that it can be incorporated into a wider process

of political integration, as part of a new "invitation sent by a group of men to another group of men" (Ortega y Gasset 1940).

As we said, by means of democratic procedures guaranteed by the state, conflicts in civil society have undergone a strong process of rationalization (Carrozza 1994; Gioia 1994; Ornaghi 1994; Poggi 1991). Nowadays, however, civil society tends to produce its claims beyond the mechanisms of representative state rationalization, and in various ways, that cannot be pinned down to one political profile, so that the state often finds itself in a condition where it has to negotiate its own sovereignty with a "society of interests" which is more and more many-sided and aggressive. In this sense the multiplication of claims for the recognition of collective identities by ethnic communities can be seen as the evident result of a process that concerns the whole society. Now, such a set of phenomena can also be read on the whole as a process of de-politicization of society, and a move towards the so-called "strong powers" of the economy. And there's no doubt that the representative and elective system, as well as the executive and legislative mechanism that it upholds, cannot keep the pace of economic transactions and technological innovations. But the theory of de-politicization presupposes the identification of the territorial national state with the political sphere. And, for what concerns us, it is precisely this problem that must be solved now. The so-called "crisis of politics" may be considered as a crisis of the *necessary* link – or as the change of the *nature* of this link – between the national state, the territory and politics. Perhaps we are only facing a new kind of political question.

Nowadays that link must be reconsidered in the light of the aforementioned role played by the democratization process in the context of the unification of civil society. That process addresses a series of problems that are typical of modern society – problems that can be summed up by the term "procrastination". The fundamental question of secularized society – that is one lacking theological references or magical reassurances – is that of controlling the gap in *space* and *time* that runs between a decision-making process and its effects, that is between *command* and *execution*, and therefore between an action and its result. In other words this is the problem that in economic circles is known as "the foreseeability of transaction". The process of formal legal rationalization, which finds its most significant expression in the modern state, has led to a sort of

"spatialization" of time, by means of the quantification of "risk", of "responsibility", of "fear" and of "trust".

Now the problem of procrastination seems to be on the way out. The hiatus between space and time that separates decision-making processes and their effective results seems to be *getting shorter*. Transactions tend to be concluded "in real time" (Ferrarese 2000). Their result is often not only foreseeable, it is simply "visible", immediately manageable. It's not that there is no longer the need for "guarantors" for the result of a transaction. But such guarantors are being sought outside the context of the state, among subjects whose credibility is based on factors such as their biography, history or sympathy. Figures like the legal "father confessor", mentioned by Weber when treating Anglo-Saxon law, are spreading all over the world.

This change in the space-time horizon of transactions has considerable consequences on the political and judicial levels, because the original form of every delimitation is spatial and temporal. The territory is the spatial context claimed by sovereignty, but it is also the spatial context where responsibility is assigned. Every acquisition of territory – every change of sovereignty – usually takes the shape of a succession of states in a specific territory. But with spatial and temporal contraction –with the progressive reduction of the problem of procrastination – the problem of controlling a territory becomes less important. The national territorial state loses competence on many issues. Besides, the concept of "territory" is changing in society and in civil consciousness, and is increasingly considered as an option, a variable like any other, and no longer as a *premise*, the natural horizon within which transactions are programmed and developed. An important symptom of this is the relationship that companies nowadays keep with the legal system. The latter is no longer a fixed frame of reference but a variable among other variables; and the sanction of what is illicit is one of the possible costs that must be taken into account when organizing an economic transaction: the speed of technological innovations makes legal systems look old and they progressively lose their legitimacy.

The issue must be seen in the light of the evolution of the modern concept of "nation"; the concept of the State is seen as the rationalization of the idea of the nation.

Through the absorption of the nation by the State (the case of France is emblematic) the idea of citizenship progressively detached

itself from the idea of the nation, up to the birth of the UNO and the Declaration of 1948, when citizenship became a universal value. But during the cold war the universality of citizenship was guaranteed by its division into blocks. The world has become structured like one large state, divided into opposing factions, the USA and the USSR. This structure guaranteed unity, rationality, foreseeability, and the assignment of responsibility in the context of international relations. The modern national state developed around legal ethnocentrism and cultural, linguistic and territorial unity. Nationalism and ethnocentrism have thus played a fundamental role in the rationalization and unification of law and administration, but also of the market and the economy. The productive processes of the industrial age require rationality, unity, control and centralization according to a hierarchically organized pattern: nationalism and ethnocentrism in a certain way have given *form* to the state of the industrial age.

But these days the "national" element, being tied to territory and the state, tends to dissolve. Up to about ten years ago, for instance, the problem of multi-culturalism was limited to "minority groups". Everything is changing because of the migration processes from the south to the north and from the east to the west. The trend is the formation of communities of a political, economic and cultural nature that go beyond territorial borders. Affinities meet and develop along the web model, inside which the "land" dimension is only an option, not necessarily a point of departure. This means that the centre/suburb paradigm is being substituted by the "web", by virtue of which the input (impulse, decision, the event) spreads in real time over the whole system, or else it is reworked, and up to a certain extent re-created, at every point of the web, so much so that the "primitive impulse" is no longer treated as the result of an objective observation, but as the result of a deliberate interpretation and choice.

The changes that came over in these last years moved at the same pace as those that happened before the first industrial revolution, and globalization shows up contradictions similar to those that marked the establishment of the liberal State (Marconi 2002). It is not only a question of technology and the structuring of the productive process, but of its *nature*. The linear and progressive pattern of growth, of expansion – and therefore of the anticipation and expectation – is giving way to a web pattern which on one hand makes communication and movement more fluent and faster –

therefore the distinction between "material" and "immaterial" goods, between the product and information – and on the other hand it increases the percentage of risk inherent in every transaction. On the political and institutional plane such a process appears as a progressive cutting down of the state-central model that has up to now governed political and economic relations. According to this pattern, the internal and external relations of the state-nation are governed by the creation of hierarchical and centralized structures which reflect the structure of the nation-state, reproduce its form and its actions. It is a centralized model based on the "subject" as a category which distinguishes the individual. At every level of the system it is possible to classify subjects on the basis of the we/them paradigm: the same concepts of "the free market", "multiculturalism", "cooperation", etc. are possible on the basis of this paradigm. While on the level of political relations the State is being substituted by the "region", as the point of reference of social relations, the individual is losing its traditional central position and is taking on the increasingly important role of the *community*, which is different to the traditional "community" as a stable assembly of individuals. The *community* is a meeting-place, a "project", a kind of agora where *personae* meet in the Latin meaning of the term, that is "masks", "roles", and therefore "projects". Relations on the community level develop beyond territorial limits, on the basis of cultural affinity, cultural interests or common adversaries. In this way the paradigm of the "subject" becomes less and less important regarding social rationalization, or the binary we/them concept. "We are the others": this statement, which has become too banal in its use by the media, in my opinion illustrates rather well the process we are speaking of.

8. The State of culture and multi-ethnic society

The territorial national state cannot get rid of its ethnocentric roots. The ethnocentrism of the state safeguards the fundamental values of Western society – the same values on which the modern theory of human rights has been built. In my opinion, therefore, it is not possible to think of building the processes of integration by following a pattern centred on the state.

In this regard the Italian situation seems to me emblematic. Italy has exercised a considerable influence on the politics and on the culture of the countries bordering the Mediterranean. Suffice it to

mention the fact that Italian has been the language of the Mediterranean jurists, and to a certain extent it continues to be so. Maltese, Balkan, Turkish and Egyptian jurists often share the knowledge of Italian and of Italian law. The constitutions and legal systems of these countries are strongly influenced by Italian juridical culture. But the colonial experiences of Italy have been few, they lacked coordination and finally failed. Up to the Eighties Italy was a country of emigrants and not of immigrants. On the contrary today it is one of the principal destinations of migration from countries outside Europe, particularly from Islamic countries. It is particularly important that Islamic immigrants do not settle in "Muslim towns", since Italy lacks this kind of tradition, but settle according to the "diffusion" pattern. With the establishment of the multi-ethnic society, Italy is now in a situation where it has to deal with various knotty problems of its history (Rebuffa 1999). For some years now Italy is in a "transition" phase without knowing neither where it is going nor where it started from. In certain aspects indecision even creeps into the "subject" of this transition. It is as if in the "destiny" of transition there lies the "character" of the nation itself.

The establishment of the multi-ethnic society has brought the problem of the re-examination of the constitutional pact, concerning the changes that came over the population's composition from the viewpoint of values, customs and language. The "people" to whom the pact refers is no longer the same one of fifty years ago.

The formalization of the pact is not equivalent to its transcription but to the transcription of what follows from it.

A Constitution presupposes a pact between the social and political actors. Such a pact is obviously not tied to the physical presence of who represents those actors at the moment when they are stipulating the pact itself. The pact is also valid after the subjects have disappeared, to the extent that, in that precise historical context, they are the "emergency" of the fundamental cultural components of a nation – those components which give legitimacy not only to the social and political subjects that sign the agreement, but to all other actors on the social and political scene. Besides, on signing the pact, the powers, that by various titles and with a different intensity represented the social and political components of the nation, could not legitimize themselves but had to show, in some way, that they are the heirs of the political powers of the past, especially of those of the Risorgimento, which had represented those same social and

cultural components of the Nation. Now, can that agreement be still considered valid in today's society?

Häberle writes – "Constituent power is not a non constituted power that decides on the basis of nothing". Constituent power is based on extra juridical legitimacy deriving from culture and from the spirit of the times. So much so that no Constitution possesses an effective mechanism for its self-defence. No Constitution exists which cannot be subverted by "constitutional" means, with reference to its "written laws". The defence of a Constitution does not come from juridical mechanisms, but from the "values" to which it refers.

Constitutional culture is fixed into certain many-sided cultural crystallizations that mediate, direct, and "sort" the processes of interpretation. According to Häberle some of these crystallizations comprise the judgements of tribunals and of the legislator, the ideologies, programmes and the parties' internal organization. Without considering these elements it is not possible to interpret the Constitution: "Law and juridical science, the legislator and the judge are not self-sufficient, dependent as they are from "materials", "impulses" and "resources" This is even more true with regard to the "new knowledge" and "experiences", to the "new hopes and new ideals that place the inherited legal system in a new light or force it to defend traditional contents".

In effect, culture "treats", elaborates sentiments and conventions on the basis of which, then, the Constitution is formed and stands. The constitutional State "needs" art and literature since they are emanations of freedom.

The concept of the Constitution is at once juridical and political: juridical in its political nature and political in its juridical nature. It is in the political context that decisions are taken to see which laws are fundamental and untouchable and which laws are modifiable without changing the structure of the Constitution. And it is also in the political context that decisions are taken regarding to what extent the Constitution can be tampered with without putting the "fundamental pact" into doubt.

Nowadays the processes of integration and globalization imply widening the concept of "constitution". Today, more than yesterday, if the Constitution is conceived simply as a written text it will be reduced to a piece of paper that will be burnt by events. More than ever the Constitution appears as a collection of laws and values that govern civil life, and are in turn interpreted and modified by it.

In the renewal of the Italian constitutional pact it will not be possible to ignore the reality of the multi-ethnic society.

When we speak of renewing the pact we do not mean rewriting the text of the Constitution. Otherwise it would be a contradiction of what we said before regarding the cultural character of the constitution.

The interpretation of the constitutional pact may also effect some changes in the written text, but what counts is the concrete application of the Constitution, that is its "life".

In the end it may turn out to be desirable to keep the written text as it is, as historical memory and juridical limit. It is historical memory because it witnesses the founding phase of national history – a phase in which fundamental elements of the Italian identity came into play. It is a juridical limit because a written text may lend itself to various interpretations but it will still be an unbeatable vestige in certain terms and principles that refer to inviolable human rights and to the fundamental characteristics of our culture.

The concept of the "family", for instance, has certainly undergone an interpretation that was unforeseen by the Italian founding fathers of the constitution. If the Italians had kept to the letter of the Constitution, today de facto, unmarried couples would have been discriminated against, but thankfully this did not happen, although a lot remains to be done in this direction. Without changes to the written text of the Constitution, nowadays jurisprudence recognizes to unmarried couples many of the rights that are recognized to the so-called "regular" couples. So much so, that the Legislator has taken this into consideration and, anticipating the legal judgment, already includes in the law the equivalence of regular and unmarried couples for the enjoyment of certain rights (for example, regarding the home).

Something on these lines could happen regarding the new identity rights.

We do not believe that it is necessary to revise the text of the Constitution in order to guarantee the new identity rights. To be recognized, the "community" dimension does not need to be formalized constitutionally. The Constitution can only guarantee the rights of the individual and govern the functioning of the State.

The "community" dimension is recognized by the live Constitution, that is in the tangible activity of public and private subjects. From this point of view, with reference to the text of the constitution, it is possible to act, as is actually happening, on the organization of

competences, giving more space to private citizens and local bodies. But this is only possible on the basis of a process that culturally clarifies the identity and nature of the constituent pact.

A centralized type of management of the multi-ethnic society is unthinkable.

The claims of the multi-ethnic society cannot be included in the public/private dichotomy that is the foundation of our state apparatus.

In cases where the community recognition claim is reduced to the "private" context this can lead to, on one side, a clash between the community and the public powers system and, on the other, the latter's delegitimization.

We have seen the first example in France, in the notorious case of the *chador*. The "private" interpretation of the right to cultural identity, that is individualistic and negative, is not accepted by the Islamic community. Particularly the majority of the Muslims in France is not ready to consider the women's use of the veil as an issue that concerns "one's private life" and that should not involve the school, which is a public institution. The Muslim community does not accept the choice between a public dimension, which is by definition ethically neutral and non-religious. The claim of their community clashes with the system of the behavioural expectations that marks the French system of rights. Naturally, where on the contrary one wishes to maintain an anti-community position of principle, one cannot refuse to be tolerant in practice, considering that it is inconceivable to institute legal proceedings against tens of thousands of Muslims. The same goes for the already quoted case of female circumcision, that also happened in France. Evidently, practical tolerance, especially if accompanied by rigidity in principle, makes the immigrant see the whole legal system as a collection of questionable conventions.

On the other hand, public recognition of the ethnic community contradicts both the individualism of our legal system and the principle of the state's secularism. It limits the individual's right to take up an antagonistic position against his own community. And at the same time it threatens the neutrality of the state with reference to ethical and religious values. We believe that in this regard the case of the concordatory system (I.e. a system based on an agreement between the state and the Church), of government is emblematic, because, in spite of the important changes effected by the

Constitutional Court and by legislative interventions, it shows its limits in the establishment of the European juridical space (Labriola 2002). If we wish to apply the concordat paradigm coherently, at present we should draw up a concordat between the Italian state and the Islamic community, considering that the Muslim faith is the second religion in Italy as regards the numbers of the faithful. But such a concordat would harm the state's secularism, because it threatens it even more than the pact with the Catholic Church, considering that Islam, even in its milder form, interprets the secularism of the state as a potential threat to the integrity of the religious community.

It is not easy for the European legal systems to satisfy the claims to community recognition. On the other hand this difficulty is one of the central aspects of the division of the Mediterranean into north and south. It is Europe's responsibility to overcome this division, especially Mediterranean Europe with its culture, and particularly its legal culture.

European legal culture is apparently facing a very hard task: without the southern shores of the Mediterranean, without its contacts with Islam, Asia and Africa, Europe (we might say the Europe of Charlemagne) would be on the wane, defeated, resigned.

Is a *Mediterranean koiné* of rights possible? Is it possible that in Europe "diversity" would become a "resource" rather than a threat to "identity" (Resta 2002)? This depends mostly on the manner in which European culture will bring to light its own juridical ethnocentrism and, at the same time, build a political project for integration which would contain that ethnocentrism without being dominated by it.

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CIVILIZATION AND RELIGIOUS FREEDOM IN THE WEST AND IN ISLAM

AHMAD 'ABD AL WALIYY VINCENZO*[1]

1. On account of the lack of knowledge about other civilizations and religions, in the West there is widespread use of certain words which do not convey the exact meanings of the original concepts that belong to different civilizations. To complicate matters, Western languages do not express concepts that have transcendent and immanent values at the same time, that is words that have a truly "universal" character. However, in other "civilizations" words are often used that express metaphysical meanings which can be understood on different levels of meaning, arranged hierarchically.

This problem has been around since the Middle Ages, especially as regards the sciences which were passed on through the Islamic world. The majority of the problems that lacerated Christian scholasticism originated from the difficulty to understand and translate certain concepts of an essentially symbolic and metaphysical nature like those of "time" and "eternity", which reflect a particular vision of the world, of history and of law.

In the Arabic language the concept of "time" is endowed with a whole series of shades of meaning that can express different perspectives: *al-dahr* is time in an absolute sense and is equivalent

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to one of the aspects of eternity, so much so that God Himself in a *Hadīth qudsī* declares "I am time", *Anā al-dahr*.

> *The descendants of Adam wrong me: they are offending time (al-dahr). Now I am Time, and the night and the day are in my hands.*[2]

The word *al-zamān*, denotes the "time of the world", which in certain cases can be translated by "the times". In fact one says "these days", "the decadence of the times", and so on. Finally the term *al-ayyām*, literally "the days", expresses "time" in relation to a people or a specific situation, a meaning which in Western languages expresses more or less an "epoch" or, better still, a "season", for instance when one speaks of "the seasons of life".

The symbolic dimension of the concept of "time" naturally also affects the historical perspective in a general sense. In a vertical hierarchy, starting from below, history distinguishes above all the events that have a contingent value, related to specific events, to particular "seasons": for example, the great battles of the Arab people before the Muslim age were called "the days of the Arabs", ayyām al-'arab. One could say that the activity of the great interpreters of the law corresponds to the great "seasons" of legal history which are reflected in the different schools.

Subsequently, in a more general perspective, the episodes that manifest the nature of "the times" of humanity can be distinguished: this is the vast context of annal-writing, *ta'rīkh*. From the legal point of view this corresponds to the laws that the religious communities have received in different ages as part of revelation.

Finally, men can be seen in their more universal perspective as descendants of Adam who have made a "pact" with God, placing their contingent reality in relation with the eternity of the spiritual dimension. Here the temporal dimension is detached from the simple

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[2] *Al-Bukhāri, Kitāb adab (the Book of Education)*, n. 200. Eternity, as non manifestation, is called *qidam*, while *azal* denotes the negation of a beginning, eternity *a parte ante*, just as *abad* denies any end, eternity *a parte post*. These terms are no longer proper when one refers to manifestation as an origin in time, udūth al-'ālam "the beginning of the world". In fact, within this structure Time appears as a mobile image of eternity that proceeds according to number (Plato, *Timeo*, 37d).

succession of events and assumes a symbolical and metaphysical value: it is the history of civilization, in Arabic *al-umrān*, which as we shall see corresponds to the universal principles contained in the primordial "pact" of the whole of humanity.

2. Although it may seem strange, in Western languages the use of the word "civilization" became current only since the beginning of the 19th century. Its etymological relationship with the Latin terms *civitas* and *civilitas* is only apparent, a result of a speculative reconstruction rather than of continuity in usage. The word *civitas* meant "citizenship", in the sense of the condition of living in a city. Some Latin authors used also the term *civilitas* in the specific sense of "the art of governing a city", thereby meaning "politics" (particularly Quintilian), an activity that should be considered above all in an ethical perspective, so much so that other authors mentioned it as an expression of "trustworthiness" and of "mildness" (especially Suetonius). Actually, nowadays we use "civilization" to translate the French word *civilisation*, which originally was only considered as a synonym of "progress", "an indefinite positive development", with a strong positivistic ideological connotation. The word *civilisation* itself was first entered into the dictionary of the Académie Franċaise in 1835, coincidentally in the years when France began the occupation of Algeria, during the renewal of the European powers' enthusiasm for colonization, who thus projected themselves as the defenders of modern civilization in the world. The new concept of "civilization" thus provided an ideal justification for colonialism in Western countries, who felt that they were invested with the universal power which in some way legitimized the political and economic exploitation of the colonized countries, since this was happening in exchange for the "civilization" process. During the 19th century the reality of colonialism was justified by the idea that "the white man had the responsibility" of necessarily extending his political and economic dominion over the other civilizations.[3] The substantial identity of civilization and progress shifted attention primarily to the material horizon of the peoples' life, while this context was traditionally considered extraneous to the deep meaning of "civilization", or at

[3] S. P. Huntington, *Lo scontro delle civiltà e il nuovo ordine mondiale*, Garzanti, Milano 2000, p. 84.

least extremely marginal, no less than the geographical aspects of a specific country. This perspective did not change throughout the 20th century, not even when de-colonization led to the "West's cultural domination over other societies and the latter's need to imitate Western institutions and ways of life".[4]

Although considering a civilization as superior to another, past or present, may seem unbecoming, it is even worse that the "superiority" of that civilization is based only on the criterion of its technical and material development or, at best, on its political development; this carries the risk of simply declaring the "superiority" of the rich "materialists" over the poor "fatalists". In actual fact this paradox has only been observed occasionally.

> *" It is paradoxical that in an age when Western thought is declaring the impossibility of access to a kind of "Truth" that is capable of founding ethical principles suitable to decide the great dilemmas which contemporary science is presenting every day; in an age which has pronounced the death of God, the death of the Subject, the end of History, the failure of ideologies, or in crude terms, has proclaimed disenchantment, the irrationality and insignificance of life, the body of Intellectuals who structure the Western Establishment and provide it with its "discoursive" legitimization in the Universities, in Publishing Houses and in the Media, goes on proclaiming the "superiority" of Western "civilization" and the universal character of its patterns of behaviour and its forms of social organization".*[5]

Only recently political developments linked to the process of Europe's Unification seem to have launched a process of re-thinking the term "civilization". In this sense a reflection on the "roots" of Europe has begun, which includes the search for a more traditional character that is less tied to "progress" in the positivistic sense. It is not a coincidence that this is happening in relation to the concrete legal need to draw up a European Constitution, a document which should not only have a technical and political character, but also that of a "pact" between peoples, a prospect that calls to mind the

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[4] *Ibidem*, p. 85.

[5] Pietro Barcellona, *Le passioni negate*, Città aperta, Troina 2001, p. 15.

synthesis of the "art of government" and ethical strictness that the Latins expressed by the word *civilitas*. This latter term, moreover, with its meaning of "mildness" and "trustworthiness", allows a reference to faith and introduces the dimension of "civilization" which is typical of Judaism, Christianity and Islam, as of all the traditional religions in general.

3. In the Muslim world, the Arabic word *'umrān*, which is usually translated by "civilization", actually denotes the sacred quality of a people, or of many peoples, therefore the "fertility" and the "spiritual frequentation" of a part of humanity, concepts that have a primordial value. In fact the Arabic root *'-m-r*, from which derives the word *'umrān*, means "to frequent", as of a place which is frequented by God and in which man is not alone or abandoned: the greeting "may you live" in Arabic is *'amara Llāhu manzilaka*, literally "may God inhabit your home (your body)!". Besides they also say that a man "frequents his Lord", *'amara Rabbahu*, meaning that he adores God with the ritual acts that are due to Him and that He has revealed.[6] The *'umrān* is therefore the spiritual dimension of a people, or rather of a religious community: it expresses the manifestation of the presence of God in it. Such a manifestation results both from religious practice and from the spiritual "taste" for religious practice itself, that is the extent up to which men "frequent" God and are "frequented" by Him: the concept of civilization, in the Islamic sense of the word, goes beyond the material and geographic consideration, but it essentially takes into account the spiritual qualifications of the individual persons, their "naturalness in adoration", *fiY ra*, that is "Adam's nature" of the man who was created "in His image": in reality this is the unchangeable tradition, *sophia perennis*, in Arabic *dīn al-qayyima*, which leads to "pacification in God", which is the etymological meaning of Islam.

The study of the history of civilization in the Islamic tradition, which is said to have begun only in the 14th century with the *Muqaddima* of Ibn Khaldūn, in reality is only the adaptation to historical science of primordial intellectual principles that are

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[6] A. De B. Kazimirski, *Dictionnaire Arabe Française*, Librairie du Liban, Beyrouth 1944.

therefore present in all traditions, and which can be summarized emblematically in the various spiritual characters of nomadic and sedentary peoples. In fact in the *Muqaddima* one reads:

> *[The Beduins] are nearer to the primordial nature, fiYra, and more distant from wicked habits. They are easier to "heal" (in a religious sense) than the sedentary communities. This is evident. One will later see that sedentary life, al-Hayāra, corresponds to the end of civilization, nihyāt al-'umrān, and to the beginning of decadence. It constitutes the last stage of wickedness and the opposite of goodness. It is therefore clear that the beduins are nearer to being good (believers) than the sedentary communities: "God loves those who fear Him".*[7]

This "sacred" science of civilization refers directly to the ancestral symbolism that can be traced back to Cain and Abel, who are considered by the Bible as the forerunners of the nomads and the sedentary peoples respectively. In fact Cain is the farmer and offers God the fruits of the land, while Abel, who like most nomadic people is a shepherd, sacrifices the first-born of his flock. The sacred story of the murder of Abel, Adam's more devoted son, by Cain corresponds to the predominance of the sedentary tribes, who are more secularized, over the nomads. The relationship between peoples is therefore subordinate first of all to the relationship between the different degrees of adherence to sacred intellectuality and of nearness to the primitive nature of man, since the sacrifice offered by Abel "pleases" God, contrary to Cain's. Emblematically, when Cain "took his distance from the Lord" he became a "builder of cities".[8] The version of the sacred story as told by al-kabarī contains four couplets that Adam is said to have pronounced on that occasion:

> *All cities are equal, man was finally corrupted. The earth is a salty desert, a horrible sight. Everything has lost its enjoyment and its colour; what was beautiful has retained its splendour only in parts. Oh dear, my son Abel has been*

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[7] Ibn Khaldūn, *Discours sur l'Histoire Universelle*, p. 247. The quotation at the end refers to the Koran, III, 76.

[8] Genesis, IV.

unjustly murdered. All his charm has become nothing beneath the earth. We had a neighbour who did not find death, and on this earth that was inhabited by him there's no good luck.[9]

A similar kind of symbolism is also found in the tradition of Asian peoples, where the opposition between Iran and Tūrān, more than to the simple geographical distinction between Persia and Turkestān, referred primarily to that between sedentary peoples (the name "Aryan", from Sanskrit *aryas*, denotes the "plough", hence agriculture) and the nomadic peoples, who from the 11th century onwards were identified with the Turkish populations by the Muslim historians.[10]

Even the sacred history of the Hebrew people unfolds as that of a nomadic people, and it remained like that at least up to the time of Solomon, so much so that foreign craftsmen had to be engaged to build the Temple in Jerusalem. The latter's destruction constitutes the return to a nomadic dimension that coincides with the "diaspora". The detachment from material life and the predisposition to follow God's appeal is also present in Christ's sermons, for example when he says "the foxes have holes and the birds of the air nests, but the Son of man hath not where to lay his head".[11] In the Islamic tradition the calendar itself is calculated from the moment of "emigration", the *Hijra*, which means the departure of the Prophet Muhammad and his Companions from the city of Mecca, their being forced to "migrate" to Medina. Not even when the city of Mecca was freed of the idol worshippers would the Prophet retrace his steps; he remained at Medina, where he is buried. The Koran often mentions the spiritual reality of emigration.

Those who have believed and who emigrated and have fought on the road to God and have given hospitality and help. These are the true believers.[12]

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[9] al-Jabarī, *Storia di Profeti e Re*, Guanda, Parma, 1993, p. 16.

[10] Cfr. René Guénon, *Il Regno della Quantità e i Segni dei Tempi*, Adelphi, Milano 1995[3], pp. 142-143, note 4.

[11] Luke, IX, 58.

[12] The Koran, VIII, 74.

Christ himself had stated that "No man putting his hand to the plough and looking back is fit for the kingdom of God".[13] The opposition between nomadic and sedentary peoples is therefore not related to their degree of material development and organization, neither does it strictly refer to the external customs of the peoples, but it is a symbolic representation of the strength of their attachment to a spiritual perspective which can be defined as "the ocentric". In this sense the Islamic tradition often mentions the image of the nomad in the desert, who has no attachment to worldly goods except for those that are indispensable to his survival: it is precisely this essential nature that allows the full enjoyment of the constant miracle of divine omnipotence and mercy, just as only he who has really experienced thirst can thoroughly appreciate the miracle of water.

In cyclical sequences "civilizations", as defined in the Islamic sense, or more widely in the "traditional" or "Abraham's" sense, must reckon with phases of decadence due to the progressive prevalence of material and individual aspects. In the context of a general secularization there is however the possibility of renewing from time to time, as far as possible, the spiritual dimension, by instilling new life into the trunk of civilization. Thus the sequence of the different revelations is the answer to the spiritual need for a cyclic religious renewal.

This renewal of the sacred history of humanity can be linked, at least symbolically, to the great migrations that periodically engaged nomadic populations in conflicts with sedentary ones. Substantially this is the eternal dualism between the Letter and the Spirit, within which a religious dimension which lacks the necessary metaphysical tension would risk stifling the spiritual perspective, just as Cain "killed" Abel. From the traditional point of view the distinction between sedentary and nomadic peoples is not considered as an absolute opposition as much as the coexistence of two elements that must be balanced in each traditional civilization. In Arabia there was an ancient custom by which sedentary tribes donated grain and dates every year to the Beduin nomads as a kind of "fraternity tax", *khāwa* (or *ikhāwa*) by virtue of a primordial "agreement". It wasn't just a guarantee against their raids, as orientalists would interpret

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[13] Luke, IX, 62.

it, but the sedentary people's homage to their desert brethren who kept on living their ancestors' noble life, preserving their ancestors' spiritual perspective. On the present legal plane the symbolism of the relationship between the nomads and the sedentary tribes could correspond to that between Religion and the State.

From the traditional point of view the coexistence of the two perspectives allows the prosperity of a "civilization", or at least it keeps God's punishment away from it. What must be avoided is the prevalence of the secular dimension over the religious one. On this plane the Bible provides us with examples of cities "inhabited" by only a few "just" persons. In fact Abraham asked God to postpone the destruction of Sodoma so long as ten just inhabitants could be found in the city:

> *"Wilt thou destroy the just with the wicked? If there be fifty just men in the city, shall they perish withal? And wilt thou not spare that place for the sake of the fifty just, if they be therein?" (...) "I beseech thee", saith he, "be not angry, Lord, if I speak yet once more: What if ten should be found there?" And He (God) said: "I will not destroy it for the sake of ten".*[14]

Civilizations can therefore decline to the point that they are wiped out by God or are abandoned by Him. Anyway these aspects correspond to the end of civilization in a religious sense, *nihāyat al 'umrān*. Every civilization, in the traditional sense, has a fixed term, as the Koran also reminds us.[15] In fact, from an external point of view the balance between the Letter and the Spirit is destined to tip increasingly in favour of the former, just as the sedentary peoples are destined to prevail over the nomads, even though the latter will never totally disappear. The traditional historiographic vision thus ends up by corresponding to the eschatological one, which is common to all religious traditions, because the world is apparently destined to take on a less spiritual aspect, declining progressively until the Letter will appear to prevail on the Spirit and then the sacred heritage of civilization will only be preserved by those who, as the Gospel says, will adore God in "Spirit and Truth".

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[14] Genesis XVIII 23-32.

[15] The Koran, VII, 34.

In a parallel manner, in sacred history the spiritual "renewal" of the just will allow the preparation of the return, the *parusìa*, of Jesus Christ, son of the Virgin Mary, no longer as a Prophet but to announce the Hour of the Last Judgement, from which a new world and a new "civilization" will emerge. This would be the second "coming" which both Christians and Muslims await, and that will be the coming of the Messiah awaited by the Jews. It is quite singular that all the traditions agree in presenting the end as the moment when the attractions of a material and secularized perspective will spread as never before, to the point of raising the course dimension of this world to virtual spiritualism: many will be "seduced" by a kind of "religion of man".[16] Again the Christian and Muslim traditions agree in representing the negation of the spiritual "civilization" in the emblematic figure of the anti-Christ, *al-Masikh*, the one who will bring the abomination of desolation to the world. However when he will be challenged by Christ at the Door of Ludd in Jerusalem, the Impostor, *al-Dajjāl*, will dissolve "like salt in water", together with the illusions he brought.[17] It will be precisely the peoples of the West who will play the role of preparing Christ's coming: the Islamic tradition says that "the peoples of the West will continue to follow the Truth till the very end".[18] The end when "the sun will rise in the West".[19]

It is significant that in contemporary Arabic the Western word "civilization" is translated as: *aÿ...ra*, which in classical Arabic indicated the character of "sedentary" peoples, or rather of a "sedentary civilization": *'umr...n aÿ...ra*. This reduction of the concept of civilization to its purely material dimension is one of the marks of the "crisis" in which much of the Islamic world, particularly its Arab part, finds itself as a result of the combined activity of fundamentalist and nationalist movements. This activity started to assume a dominant role from the mid-twentieth century onwards and will be discussed further on. In reality, in that same period the whole world has had to confront a similar crisis insofar as it was thought possible, and in certain cases obligatory, to chop off the religious and civil roots of peoples to be able to adapt to so-called

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[16] Apocalypse, XIV, 18.

[17] The collections of *a Hādīth* contain numerous references to al Dajjāl.

[18] Qāī 'Iyā, *I miracoli del Profeta*, Einaudi, Torino 1995, p. 89.

[19] Al-Bukhārī, *Tafsīr*, 6/73.

"modernity". Only after having initiated a sort of "cultural revolution", which in countries like China led in a few years to the destruction of the traditional civilizations of entire peoples, has the spiritual and intellectual patrimony found in traditional civilizations been re-appreciated. Today, after many delays and still in very restricted environments, we are beginning perhaps to see the beginning of a "restoration" of those aspects of the traditional religious world which retain their vitality.

4. The "pact" of fraternity that bonded the nomads and the sedentary peoples was a reflection of the primordial "pact" that bonded the two groups in one community. By virtue of this unity all the Arabs, nomads and sedentary tribes, had preserved the rite of the pilgrimage to Mecca throughout the centuries, in spite of the fact that this had lost its "purity" before the Islamic age. This rite had been established by Abraham and Ismael, who had thus rebuilt the Ka'ba, "God's house", at Mecca. In its turn the pact of Abraham was only the re-actualization of a "pact", *'ahd*, stipulated between God and man at the beginning of time.

> *Abraham and Ismael raised the foundations of the House. "Lord, make both of us believers who are your subjects; make of our descendants a community which will be submissive to you; show us the rites that we shall observe! Pardon us! You are the One who always looks upon those who turn to you in repentance!"*[20]

The Islamic tradition isn't the only one that has kept the memory of this primordial pact. Naturally, even the Hebrews consider themselves the "people of the Alliance" and even Christian Arabs called the Old and the New Testaments respectively *al-'ahd al-atīq*, "the old pact", and *al-'ahd al jadīd*, "the new pact". Similar references are not lacking in all the civilizations. One of the oldest rites of the Romans, for example, was that of the "sacred Spring", *ver sacrum*, during which the youths born in a certain year were taken to the edge of the city with hoods over their heads, as *sacrati*, "consecrated to a god". In this rite some have seen "a return to a semi-nomadic

[20] The Koran, II, 128.

condition, that characterizes peoples who remained close to their origins".[21] In Rome itself, the principle of the law was the preservation of the *pax deorum*, the "peace of the gods", which had been established directly by Jove ("peace" and "pact" have the same etymology). In the oldest legislation of the city, *leges sacratae*, the gods were the guarantors if there was violation of the law.[22] Up to the 3rd century B.C., at the time of the curule aedile Gneo Flavio, the procedural aspects of the law preserved a directly sacred character, because in this way the law became ritualized, and placed in correspondence with the divine order by means of a sacred knowledge which was only possessed by the members of the priesthood: even today Italian law speaks of the lawsuit as a "rite".[23]

In Islamic law the "pact", *'ahd*, is different from a simple "contract", *'aqd*, in so far as it binds the whole collectivity, while a contract may be stipulated between private citizens and binds only them. The prototype of the "pact" is therefore the original pact established by God with the entire progeny of Adam directly during the time that preceded the world's time.

> *And when your Lord drew out of the sons of Adam all their descendants and made them bear witness against themselves: " Am I not your Lord?" They said: "We testify it! (shahidnā)". And this so that you won't have to say, on the day of Resurrection: "In truth we did not know".*[24]

The reciprocal bond that God creates with mankind is that which promises future life after death to those who observe the pact, "salvation", in which transgressors cannot participate.

> *Those who sell cheaply the pact with God and their oaths: see, these people will never share the future life, God will not speak to them; he will not look at them on the Day of Resurrection; he will not purify them, and a sorrowful punishment awaits them.*[25]

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[21] R. Del Ponte, *La religione dei romani*, Rusconi, Milano 1992, p. 23.
[22] Ibid. p. 24.
[23] M. Brutti, "La giurisprudenza pontificale", in M. Salamanca (ed.), *Lineamenti di storia del diritto romano*, Giuffré, Milano 1979, pp. 323-330.
[24] The Koran VII, 172.
[25] The Koran III, 77.

The original pact is the only one and it has been stipulated with the whole of humanity because originally all men belonged to one sole community of believers that offered God a pure cult: the community of Adam.

> *And the men formed one community: then disputes arose among them and were it not for an ancient Decree of your Lord, their disputes would have already been decided.*[26]

Later on this sole community was divided, as the Biblical myth of the tower of Babel also narrates. Since then different communities of believers exist, to each of whom God has sent a Messiah and a law.

> *To each community We have given a law.*[27]

The primordial pact synthetically contains the rights and duties of humanity towards God, therefore these are "universal" in the etymological sense of the term ("universal" derives from *Unum versus*, "turned towards One"). The "pact" is therefore a premise of the sacred law and its foundation, since it is by virtue of this that it assumes a ritual and sacred value. It is in its being a practical application of the "spirit" of the primordial pact that the law acquires vitality and an operative importance within human society: if it weren't for this vitality the law would have been just a "letter", a simple collection of regulations whose binding character would lie exclusively in the coercive action of the constituted authority, notwithstanding any "universality" and "intelligence" of the law.

Each community has its own law that is observed by virtue of a "pact" which is unique and is renewed within every community. Every religious community therefore deserves respect and recognition, but this has no bearing on the diversity of cult and law, since finally every community observes the pact with God to the extent that it abides by its own religion: this is the foundation of religious freedom.

It is no coincidence therefore that in the Islamic world the relationship that binds the State to non-Muslim communities is considered a "pact", *'ahd*, and is called *dhimma*, "protection",

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[26] The Koran X, 19.
[27] The Koran V, 48.

"obligation". Similarly, even foreigners cho resided in the State enjoyed the same protection by virtue of the same pact. In their regard, however, one used the word *amān*, "security", or *jiwār*, "hospitality". The full legitimacy of the cult for the Hebrews – in those times this was the only community which was different to the Muslim one – is witnessed by the "Medina Charter" itself, which is one of the very first examples of Islamic "constitution" (622 A.D.).

> *Article 25. The Hebrews of the Banū 'Awf comprise one community with the believers. The Hebrews preserve their religion and the Muslims their own. This is valid for them and for their clients, except for those who have committed misdeeds or treachery: these are dangerous to themselves and to their own people.*[28]

In this sense, in the Islamic world the universal premises of freedom of worship of the religious communities were affirmed.

5. In the Western world the concept of religious freedom was established only very recently, and assumed a prevalently ideal and philosophical nature, which has been positively applied in our time, and sometimes not even now. Perhaps it is this long laboured process that leads many Western persons to consider religious freedom as an exclusive product of "progress", and therefore also of Western "civilization".

The concept of freedom has in effect a more juridical nature than that of "civilization". In Roman law the *status libertatis* corresponded to the full rights and duties of the citizen, and distinguished him from the *servus*. As everybody knows, even the slave could regain the *status libertatis* through manumission and was then called *libertinus*. At first religious adherance did not comprise limitations on the level of juridical ability, but the concept of "freedom" apparently did not immediately recall that of "religious freedom"; even though the Roman world can be generally defined as "tolerant",

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[28] Ibn Hishām, *Kitāb al-Sīrah Rasūl Allāh*, ed. F. Wüstenfeld, Göttingen 1858, pp. 341-344; Italian transl. in V. Fiorani Piacentini, *Il pensiero militare nel mondo musulmano*, pp. 261-264.

in so far as the practice of different pagan rites was largely tolerated in the Empire.

However there's a tendency to over-estimate the religious freedom of the age. In reality the pagan cults of antiquity were much more similar to one another, and homogeneous between themselves, than is generally thought, so much so that in many cases one could speak of different aspects of the same *religio*. Besides, the different cults were tolerated in so far as they were all obliged to offer sacrifices to the figure of the Emperor. Since it was not strictly tied to a legal principle, religious freedom could meet obstacles in the Empire's lack of unity and political stability. Besides, even in the times of Cicero, ancient laws prohibited the practice of cults that were outlawed by the public authority and this tradition was restored during the Imperial age within the framework of the persecution of Christians.[29] Having reached its peak in the reign of Diocletian, the persecutions stopped only in 311 A.D., when Galenus finally issued the edict of tolerance.

In those days tolerance was seen as a gracious concession by the authorities, who had the power to concede religious practice to certain cults. On the juridical plane tolerance was therefore an aspect of the State's internal policy, to which it remained strongly linked in the following centuries. This ethical dimension of politics seems to have grown thanks to the recognition of different "civilizations", which is the essence of the primordial "pact".

The Norman dynasty, for example, which had conquered large parts of Europe between the 12th and the 13th centuries, had multiple relations with the Islamic world; suffice it to mention Frederick II and the role of the Templars, and it was a model for the organization of the state and moderation in religious matters: one can mention the autonomous status of the Islamic colony of Lucera in Puglia.[30]

In the Middle Ages, episodes of intolerance were limited but, from the 15th century onwards the Inquisition, and the Reformation in the following century, brought moments into Western history when intolerance was rife and almost uncontrolled. From the 16th century up to the French Revolution Europe was continuously ravaged by

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[29] V. Arangio-Ruiz, *Istituzioni di diritto romano*, Jovene, Napoli 1984, p. 62.

[30] Amad 'Abd al-Waliyy Vincenzo, *Islām, l'altra civiltà*, cit., pp. 316-319.

the so-called "religious wars". "Religious" intolerance was for a long time the unit of measurement of European politics, to the extent that the same Protestants and Catholics who used the concept of tolerance to defend themselves from persecution, once they came to power did not hesitate to use the same pitiless intolerance which they had previously suffered on their adversaries. The concept of "tolerance" is therefore historically inconstant and juridically short-lived, because similar cases in point could be determined in various ways according to circumstances. A paradigmatic image of all this is the difficult "tolerance" that was accorded to Jews in Europe up to the 20th century.

The long period when religion was used as an instrument for political purposes brought about a diffident frame of mind towards religion itself, which showed up clearly since the Enlightenment. The thinkers of that age had an ambiguous attitude towards the religious factor, and they managed to reflect on the need for more liberal relations between the State and the religions (Locke),[31] the expression of secular tolerance (Voltaire)[32], as well as displays of anti-religious secularism (Rousseau). Even those voices who could have contributed to overcome confessional exclusivism in the light of an increasing "recognition of otherness", remained isolated and unheard for a long time (Castellion).[33] Ruffini, one of the fathers of Italian ecclesiastical law, had already pointed out the limits of the Enlightenment's reflections on religious freedom.

> *But Rousseau's disbelief, which rather than leading him to respect conscience, as we shall see, made him the promoter of the most tyrannical compulsion of all religions; and the tolerance of Voltaire, marked by too much sarcasm, were not suitable to find the right way for those souls which were still full of a strong faith. And the strong contrast could not come out of better words than those that the sharpest*

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[31] M. Tedeschi, "La libertà religiosa nel pensiero di John Locke", in *Vecchi e nuovi saggi di Diritto ecclesiastico*, Giuffré, Milano 1990, pp. 443-468.

[32] See G. Carobene, *Tolleranza e libertà religiosa nel pensiero di Voltaire*, Giappichelli, Torino 2000, with an anthology of readings.

[33] M. D'Arienzo, "Libertà di coscienza e tolleranza in Sébastien Castellion", in *Studi di Diritto ecclesiastico e canonico*, "Quaderni della Scuola di specializzazione in Diritto ecclesiastico e canonico", N. 7, Jovene, Napoli 2002, pp. 115-130.

mind in Switzerland ever had, who according to Grimm was the wisest man of the age, that is Alberto Haller, who wrote to a friend: "I don't love tolerance, when it is brought to me by Voltaire".[34]

The ambiguity of the philosophers of the Enlightenment, especially on the legal plane, was reflected negatively during the French Revolution, when phases marked by the freedom of worship alternated with attempts to impose a secular and radical "civil religion". Only the Constitution of the 22nd August 1795 put a stop to the anti-religious persecutions which had marked Robespierre's attempt to apply Rousseau's ideals to the State. After the excesses of the Revolution, almost as a reaction to them, the idea spread that religious intolerance could be overcome only when the public context would have assumed a "non-religious" character, progressively defined as "secular" in the wider sense, in which the different religions would no longer have any reasons for conflict. In this sense, avoiding the harsh "sarcasm" of Voltaire, secularism may be seen as having overcome the long period of conflicts and as being an important destination in the history of Western political thought.

In 19th century liberalism it was programmatically formulated in Cavour's motto "a free Church in a free State".

Although the modern science of law has contributed considerably to the consolidation of the secular and liberal dimension of Western thought, the concept of religious freedom has been affected for a long time by the largely individualistic and materialistic philosophical perspective which produced it. Many of the first theoreticians of religious freedom were principally concerned with pronouncing the principle that everyone is free to be religious or not, ignoring the aspects where such "freedom" is substantiated. The concept of secularism itself, a point of arrival in the long and tormented road of Western history, appeared from the beginning as a philosophical and ideological perspective, rather than a model of a juridical system.

Secularism thus remains an ideology on the tendential level like all ideologies, and also relative in time and space,

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[34] F. Ruffini, *La Libertà religiosa*, Feltrinelli Milano 1992, (1st edition, Torino 1901), p. 183-184.

> *certainly not a panacea but a concept that needs further examination, and any attempt at its legal definition is not only difficult but it also contrasts with legislation and the actual reality which do not allow that it be fully considered as a constitutional parameter of the issues concerning the religious factor.*[35]

On the legal plane certain issues were still undefined, and some still are: the specific relations between the State and the different religious communities, the regulations that should be observed by the different communities in relationships between them within the context of the State, and, finally, the character of some fundamental rights of the "religious" individual, like those concerning life after death.[36]

It has therefore been necessary for generations of jurists to work on the preparation of concrete legal solutions for the problem of respect for religious freedom, each of which naturally has positive and negative aspects, but on the whole they constitute one of the most important aspects of Western legal heritage. During the 20th century Western states have experimented with a wide range of "ecclesiastical" models, starting with the confessional State that should be more or less "liberal" towards the other "tolerated" or "admitted" cults (like the majority of the European states during the 19th century and also today Greece, England, Ireland, Denmark, Finland or Sweden up to the year 2000), then the separatist model according to which the religious context should have no contacts with the State (as in the USA and in France since 1905) and, lastly and above all, the systems based on "pacts" and "negotiations" between the State and religious faiths, which recover a concordatory right of an old legal tradition, which are applied in Italy and Spain.

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[35] M. Tedeschi, "Quale laicità? Fattore religioso e principi costituzionali", in *Scritti di diritto ecclesiastico*, Giuffré, Milano 2000, pp. 69-70.

[36] Apparently after death certain fundamental rights cease, e.g. the right to perpetuity in burial. On the contrary, for example, article 4 of the Cairo Declaration on human rights in Islam (1990) reads: "Every human being has the right to the inviolability and protection of his good reputation and of his honour during his life and after his death. The State and society shall protect his remains and his burial place". Similarly, it is noteworthy that the Hebrews call their cemeteries the "place of the living".

The "translation" of religious freedom from its philosophical dimension to the solidly juridical one apparently requires a last effort, especially towards more convergence of the ecclesiastical policies of Western States, with a view to establishing a common European policy. In fact more attention must be given to the effective presence of Islam on the continent, a recent phenomenon which has already made it the second faith as regards numbers of practising members. A fresh effort to adapt to this situation is necessary to avoid that Islam enters into a condition of inferiority with respect to other cults.

The problem now emerges about which model of relations between the State and the religious faiths could guarantee in principle more religious freedom. For some years now absolute separatism, which according to some is the most perfect "secular" model as embodied in the French law of 1905, is under fire in France itself, where a process of rethinking "secularism" should change it from "passive" to "active", that is without excluding the intervention of the State in religious matters. The law against "sects" (May 2001) is a step in this direction, as is the direct drawing up of rules for forming a Representative Assembly of Muslims in France, which should happen before spring 2002. Even in the United States, where separatism has been consolidated since the 19th century, the Supreme Court, with its restrictive interpretation of the first amendment to the American Constitution, has taken a series of rather disputable decisions, which apparently deny the possibility of implementing absolute separatism, by giving, for example, preference to the State over the Christian confessions.[37]

Without touching the principle of secularism, which in Western legal systems is the indisputable foundation of religious freedom, the concrete experience of the European States has brought to the fore the pact model inferred from the Italian Constitution, that was later also applied in Spain. Such a system fits into the concept of relations between State and Church that follows the Romanistic tradition of "concordats", revising it however in a "pluralistic" key. Both these perspectives, as we will see, are significant points of

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[37] M. Tedeschi, "Alle radici del separatismo americano", in *Saggi di Diritto ecclesiastico*, Giappichelli, Torino 1987, pp. 213-254.

contact with Islamic legal tradition.[38] The "pacts" or "agreements" that the modern Italian State shall stipulate with the religious confessions must obviously not be conceived as "open" trade union negotiations, nor as treaties in the context of international law. Such "pacts" not only have an indisputably high symbolic and sacred value, at least concerning the confessions, but, as we have seen, even from the "secular" point of view they are linked directly with the universal foundations of religious freedom.

> *On their part the Muslims should take into account the legal principles that are the foundations of our legal system and of the relative limits of public order. Without an agreement they would be forced to live and operate in a context of common law, under those conditions that are easily comprehensible in a Country with a strong Catholic majority, and that in the past did not allow them an easy development. One should remember that no law was ever enacted with them in mind, and therefore one must not lose the opportunity that is now being offered to them for the first time, to have their rights recognized by the law on the basis of an agreement.*[39]

The State and religious confessions are situated on different planes. These contexts, however, can and must coexist within the same "civilization", just as they can naturally coexist within a person who is a "citizen" and "religious" at the same time. The system of "agreements" provided for by article 8 of the Italian Constitution may be one of the highest manifestations of religious freedom because it is not only the premise for effective freedom of worship but also the premise for protecting the religious context from interference and manipulation of any kind, by acknowledging that religion is one of the fundamental aspects of "civilization". In this sense the

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[38] From the point of view of legal history, in fact, it is perhaps not a coincidence that one of the very first "concordats" was precisely that "legacy of Sicily" conferred by Urbanus II on Roger, count of Calabria and Sicily, on the 5th July 1098, on the occasion of the island's changeover from Muslim domination to the Normans, when the latter had preserved a good part of the state structures of the former.

[39] M. Tedeschi, "Aspetti giuridici dei rapporti tra ordinamento italiano e Islam", in *Scritti di diritto ecclesiastico*, Giuffré, Milano 2000, pp. 332-333.

"secularism" of the State is displayed by keeping the same attitude towards all the religions, without preference to one or discrimination towards another. On the other hand, as the Muslim jurists themselves strongly recommend, religious confessions cannot shirk from the observance of the constituted order, by virtue of which religious practice is permitted and guaranteed against the dangers of arbitrariness and anarchy.[40]

At present the protection of religious freedom corresponds to one of the most significant aspects of the Western world, by virtue of which it can achieve emancipation from the strictly nationalistic and positivist dimension which is inherent in the meaning of *civilization*. In fact, without abandoning its secular dimension, the State can take up the defence of what constitutes the essence of all "civilizations", in "Abraham's sense", that is the protection of spirituality. In this way the perspective of the inevitable "clash" between civilizations, theorized by certain politologists during the last quarter of the 20th century who did not succeed in distancing themselves from an essentially materialistic and colonialist concept of "civilization", will be overcome.[41]

6. Similarly to Roman law, classical Islamic law, *hurr*, "free", denotes principally someone who is not a "slave", *'abd*, but the term also has an ethical value that can be translated by "nobility of character", "gentleness" and "readiness to suffer for a noble cause". "Freedom" is therefore identified with the manifestation of the original nature of man, *fiYra*, which is noble and generous. In the traditional Islamic perspective the achievement of "freedom" corresponds to the freedom from all that hinders the manifestation of the original nature in which man was created by God. The aim of divine law itself is to bring man back to his spiritual origins, coherently with the etymological meaning of *sharī'a*, which means "a path which leads to the stream".

Contrary to Western law, in the Islamic world the dimension of freedom strictly implies the perspective of religious freedom. This

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[40] Al-Ghazālī, *Kitāb al-iqtijād fī 'l-ĭtiqād*, cap. 3, cit. in D. Santillana, *Istituzioni di diritto musulmano malichita*, Roma, p. 29.

[41] With particular reference to the well-known theories of S. Huntington.

implication lies under both the religious and the strictly legal aspect. The juridical ability of the free man is actually called *dhimma*, a word which also denotes the foundation of an obligation. The *dhimma* is therefore both the possession of the "right" to freedom, and the obligation towards divine law which guarantees freedom itself. One should note that the term which in Islam denotes "religion", *dīn*, derives from a root which expresses the idea of "being in debt", with particular reference to the fixed-term debt. The word *dhimma*, thus defines also the legal status of the religious communities that are different from Islam and are present in the State, and in this sense the word is generally translated by the word "protection". The classical Islamic State, that is the caliphate, "protected" and recognized the other religious communities which could not only practice their own cults but also enjoyed considerable legal autonomy, especially in the context of what Western law defines as "personal status".

I have had other occasions to clarify the fundamental dimension that the recognition of other religions has in Islam, and therefore here I may avoid insisting on this determinant aspect.[42] Here I wish to stress the fact that in Islam religious freedom is a legal principle contained in that of freedom in general. On the other hand Islamic law does not refrain from reminding us that the *dhimma* concerns a primordial pact whose violation will be punished till the end of time, as asserted by the Prophet Muhammad in the *aḥādīth*, the prophetic "sayings", which have a well-known value as a legal "source".

> *In the Day of Judgement I myself will act as prosecutor towards anyone who has oppressed a person who was under the protection of Islām.*[43]

The *dhimma* is essentially a "pact" between the Islamic State and the religious communities that are different from Islam, and it therefore belongs to the legal context, which is directly reflected in "religious freedom". The greatest difference in the Islamic world, when compared to Western law, is the solidly "religious" and "community" character that religious freedom has acquired. Being

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[42] Amad 'Abd al-Waliyy Vincenzo, *Islām, l'altra civiltà*, Mondadori, Milano 2001.

[43] Balādhurī, *Futū*, p. 162, cit. in I. Goldziher, *Introduction to islamic Theology and Law*, Princeton Univ. Press, Princeton1981, p. 35.

a legal-religious principle, rather than a philosophical one, it showed up on the actual life of the communities, each of which, as we have seen, operated within the original "pact", continually renewed with the State, which recognized and "invested" the different confessional representatives.

In fact Islamic law charges the community, the *umma*, with a series of collective obligations which cannot be seen as simply personal duties. It is in fact a collective obligation, *fary kifāya*, that concerns the entire community but which, performed by a group of Muslims, exempts the others from performing it, contrary to the ritual duties, like prayer, which are the duty of each individual with no exceptions, as a personal obligation, *fary 'ayn*. A series of actions considered as particularly useful to the good of the whole community have the legal status of "collective duties". In fact the following activities are equally considered as *fary kifāya*:

1) to do one's best in any way for sciences related to the law (a context which comprises almost the whole Islamic knowledge, since in the traditional dimension nothing is truly extraneous to a sacred perspective), as well as giving legal responses, *fatwā*;
2) keep away from Muslims (and from the ahl al-kitāb, the peoples of the book, that is Jews and Christians) what is harmful to them, as, for example, hunger, by feeding the hungry when alms and public funds cannot provide enough;
3) the office of the judge, qāḍī, held in very high esteem;
4) testimony in a lawsuit, compulsory to the individual who is required to do so by authority;
5) the supreme office of the imam, that is the caliphate, which can be compulsory to the individual who possesses all the qualifications required by law;
6) order the good and prohibit the bad;
7) cultivate the most important occupations that are necessary to life;
8) answer greetings, that is love the other believers as yourself;
9) perform the last rites to the dead;
10) ransom Muslim prisoners from the hands of the enemy;

11) The *jihād*, the "effort for a spiritual aim", considered as something "internal" as well as "external" and that in certain circumstances that are dangerous to the community may also become military action.[44]

A firman (edict) of the Ottoman Sultan Mehmet III, dated March 1602, clearly indicated that the "pact" of the *dhimma* should have been considered a *far? kifāya*, a collective obligation for the community and a *far? 'ayn*, a personal obligation for the sovereign and his governors.

Considering that, in accordance with what God Almighty, Lord of the Universe, has commanded in His Book about the community of the Hebrews and of the Christians, who are peoples of the *dhimma*, their protection and defence and the safeguard of their lives and possessions are a *perpetual and collective duty* of all the Muslims and a *necessary obligation* that is encumbent on all the sovereigns of Islām and the honourable governors.

> *It is therefore necessary that my concern, that is high and spiritually inspired, tends to ensure that, in accordance with the sharī'a, each of these communities that pays its taxes to me, in the days of my imperial reign and in the period of my happy caliphate, live in tranquillity and peace of mind and may go about their business, that nobody hinders them from doing it, and that nobody offends their person and possessions, in violation of God's command and in contravention of the Holy Law of the Prophet.*[45]

The relations that bound the religious communities of the State could be different, but they were all included in the unitary regime of the *dhimma*: the principle was in force that different cases in point, like the various cults, could be governed in different ways, barring the principle of the freedom of worship and the legal autonomy of the respective communities, submitted to their respective confessional authorities. For instance, under the 'Abbāsids, the Hebrews, were entrusted to the government of an exilarch *ra's*

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[44] See Khalil Ibn Isāq, *Sommario del diritto malichita*, vol. I, Milano 1919, pp. 386-387.

[45] B. Lewis, *Gli ebrei nel mondo islamico*, Sansoni, Milano 1991, p. 48 (My italics).

al-jālūt, an official representative of the Hebrew community at the caliph's court in Baghdād, and of the *gaon*, a representative of the Talmud academies of Iraq. The Hebrew exilarches, together with the Nestorian *Catholikoi* and the orthodox patriarchs resided in the capital city where they obtained their investiture from the Caliph in confirmation of the original "pact". These same communities did not hesitate to appeal to the Caliph when they did not reach agreement on a candidate.[46]

Besides the principle of the "freedom of worship", the Islamic State was keen to guarantee also the "freedom of religions", that is the safeguard of the respective confessional contexts. The Islamic State was very careful not to let confessional pluralism be used as a pretext to create conflicts within the State and tended to reduce the risks inherent in proselytism, which is extraneous to the Islamic tradition, where monasticism and missionaries are unknown. So long as the "classical" model of the Islamic State could survive, from the Umayyad and 'Abbaside Empires up to those of the Ottomans and Moguls, "religious" peace was practically general and persecution was absolutely unheard of,[47] while with the end of the respective States interethnic conflicts arose which often had a "religious" character: for example, the violent conflict between the Druses and the Maronites in Lebanon in 1860 coincided with the entry of that country in the French sphere of influence; the massacre of the Armenians in Anatolia happened after the revolution of the Young Turks had toppled the Caliph 'Abd al-Hamīd in 1908; the first clash between Hindus and Muslims took place in 1893, after the Mogul state had ceased to exist following the revolution of 1857 against the English.

However, the system of the *dhimma*, with its consequent distinctions especially in the fiscal sector, could have lent itself to manipulation. At first, in fact, the *jizya*, the scaled taxes that the "people of the Book" had to pay the State, compensated for the non payment of the *zakat*, or ritual alms, that Muslims paid in their

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[46] C. Cahen, entry *dhimma*, *The Encyclopaedia of Islam*, Brill, Leiden 1999.

[47] With the only exception of the caliph fāimide al-Hakīm (985-1021), who destroyed the Holy Sepulchre in Jerusalem, and who was literally mad. In the end he disappeared mysteriously or, more probably, was made to "disappear" by his own subjects.

turn.[48] The difference in the fiscal regime could have led to forms of discrimination against minority groups. Some of the apologetists and the literalist theologians would have liked to force the meaning of the text of the Koran that, when referring to the *jizya* as a personal tax or "capitation" ("from the hand", *'an yadin*), add the words *wa-hum Hāghirūn*, which literally means "and making themselves small (in the sense of submitted)".[49] In this way there have been sporadic attempts during the centuries to link the payment of the *jizya* to forms of "humiliation" towards religious minorities. In actual fact the meaning of the text of the Koran simply indicated that the payment of the *jizya* should have symbolized the submission to the authority of the State, as every tax shows in principle. In fact the fiscal treatment of the subjects, in its formal difference, turned out to be substantially fair.

> *The condition of one who had to pay the jizya was not worse than that of the Muslim who had to pay the zakāt, since the former was exempt from paying it by definition.*[50]

The more important jurists had always stigmatized every sort of bad treatment meted out to those who were subject to the *dhimma*. In fact one reads in the *Kitāb al-Kharāj* di Abū Yūsuf, one of the first treatises on public law (8th century):

> *Not one of the dhimma people must be beaten to make him pay the jizya, nor must he be forced to stand in the sun, nor anything of the sort: He should rather be treated with indulgence.*[51]

Most of all it was the jurists and the learned ones, who embodied the most spiritual dimension of Islam, who were the point of reference for the observance of the universal principles of religious freedom. On their example the State put into practice the *dhimma* system without the restrictions that some would have liked to include in it:

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[48] Exemption from paying the *jizya* was conceded to minors, women, senior citizens and the mentally ill.

[49] The Koran IX, 29.

[50] C. Cahen, *L'Islamismo*, Feltrinelli, Milano 1969, p. 112.

[51] Abū Yūsuf, *Livre de l'impôt foncier*, Geuthner, Paris 1921, p. 189.

Without any doubt the jurists' attitude, more than that of commentators and theologians, reflected more precisely the practice of the Muslim governors and administrators.[52]

The system of government of the various communities, the *millet*, as it was called by the Ottomans, was so deeply rooted in the Islamic legal mentality that it was also applied in international law, since foreign "guests" were placed on an equal footing with the *dhimmī* (those who were subject to the *dhimma*), as we have seen. The internationalization of the *dhimma* system turned out to be a Trojan horse at the time of the "capitulations" with which the Western states created veritable "colonies" in the Ottoman world, and allowed them to interfere widely in the internal policies of the State. This opened a deep crisis in the Ottoman social and political setup. When confessional pluralism was progressively abolished during the 19th century, it was already too late: when the caliphate ended (in 1924) the pluralistic tradition of the Islamic State was seriously compromised.

Many of the States that were born out of the Ottoman collapse adopted Western-type constitutions and set aside the "pact" tradition regarding "ecclesiastical law". The adoption of the Western "confessional" model by the majority of the new Islamic States brought many problems on the implementation of religious freedom. Consequently in many States the result was that, paradoxically, legislation of Islamic origin that should have been only applied to Muslims was actually imposed on everybody, Muslims and "peoples of the Book". In certain cases the discriminatory aspects against minority groups became excessive, especially because of the pressure of the fundamentalists who claimed that they should substitute the pluralistic and moderate tradition which is essentially juridical and spiritual. In some cases the more evidently "secular" aspects were assimilated, and purported to transform "religious freedom" into "freedom from religion", to the extent of hindering not only the religious freedom of the non-Muslim minorities, but also of the Muslims themselves.

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[52] B. Lewis, *Gli ebrei nel mondo islamico*, Sansoni, Milano 1991, p. 21.

The second half of the 20th century brought great delusions and big questions. The talismans of the mysterious West did not produce any miracles; the potions offered by the various foreign quacks did not cure the ills of the Western countries and peoples; the constitutional governments, contrary to expectations, did not produce health, riches or strength; independence only solved a few problems but raised many others, and freedom – now understood as the reasons of the individual against his fellow countrymen and his coreligionists – seems to be more distant than ever. Many remedies have been tried, imported from the East and the West, from Europe and America, North and South, but none have been effective, and an increasing number of Muslims have begun to look at their past – at least at what is felt to be their past – to diagnose the present problems and to find remedies that may procure future welfare.[53]

7. While the Islamic world is actually rediscovering the importance of the essential foundations of the "pact" which is right at the origin of "civilization", even the Western world is going through a phase of deep rethinking. In fact the numbers of those who no longer recognize themselves in the essentially positivist and colonialist perspective of the concept of *civilization* are on the increase. And increasingly frequent are the interventions of those who wish for a more explicit statement on the Hebrew and Christian "roots" of Western civilization, even though some of them, unfortunately, conceive these roots as "anti-Islamic". The issue is not devoid of legal consequences, so much so that the debate which preceded the opening of the proceedings of the European Constituent placed before everything else precisely those relative aspects of the qualification of the term "civilization" and of the religious and intellectual "roots".

The true Mediterranean roots of Europe should be traced back to "Abraham's monotheism", because this corresponds effectively to a unitary tradition, whose overall equilibrium would be lost if one of its elements were to be lacking. The need for the diversity and co-presence of Hebraism, Christianity and Islam is particularly evident

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[53] B. Lewis, Il linguaggio politico dell'Islam, Laterza, Bari 1991, p. 132.

on the legal plane of religious freedom. Particularly, those periods when relations between Islam and Christianity were more intense coincided with the periods of happier freedom.

One often forgets that in actual fact the Inquisition was only established during the 15th century, at the peak of the Humanistic age, when relations with the Islamic world had become more indirect. In one of the earliest European works in favour of religious tolerance, Locke's *Epistola de Tolerantia* (1689), the author argued that it would have been unjust if in Europe procedure was different to that in Istanbul, where the Muslims did not persecute differences of opinion on religious matters.[54] Besides, Islamic law could help draw attention to religious freedom with regard to the community, that is on the specific contents that the principle of freedom took on in relation to the material life of religious communities. This would have contributed to form a more "universal" concept of human rights. Even among Western jurists, whose contribution to the development of religious freedom is undeniable, although attitudes which are openly "secular" and "anti-religious" are still frequent, the definition of human rights itself is increasingly opening up to the recognition of the particular status that the communities assume, particularly religious ones.

> *Human rights are the inalienable powers that in temporal succession and spatial extension scan the rhythm of the individual's emancipation as a person and as a community ...*[55]

It was not by coincidence that certain "pacts" signed in the UN headquarters after the "Universal Declaration" of 1948, as well as that on "Civil and Political Rights" of 1966, show that they are more inspired by the "will (...) to safeguard groups and communities".[56]

Reciprocally, the example of a European State that stipulates agreements with religious confessions may stimulate the countries having an Islamic majority to take up again legislation in matters of religious freedom that corresponds more with the Islamic juridical

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[54] Cfr. F. Ruffini, La Libertà religiosa, Feltrinelli Milano 1992, (1st edition, Torino 1901), p. 67.

[55] G. Capozzi, Diritti dell'Uomo. Filosofia, Dichiarazioni, Giurisdizione, Jovene, Napoli 2001, p. 98.

[56] G. Carobene, "Sulla protezione internazionale della libertà religiosa", in Il diritto ecclesiastico, n. 2, 1997, p. 371.

tradition, naturally without ignoring the Western liberal tradition. This would place Italy in a decidedly central position within the development of ecclesiastical law, not only in Europe but also in the Mediterranean, so long as the resistance of those who want the "closure" of the door of agreements, to bar the Islamic confession, which purportedly is governed on the basis of common law, in a status which is evidently inferior to that of the Christian and Hebraic confessions, which have already signed agreements, is overcome.

The Islamic juridical experience, even in the light of the errors committed during the Ottoman period of the capitulations, could in its turn be useful to the Italian government so as to avoid the internationalization of the system of agreements, that is the pointing out of confessional representations that are strictly linked to foreign nations or to international political movements. This would not be in line with article 8 of the Constitution that provides for the representations to be a "national" expression of Italian citizens who belong to a particular faith. On the other hand, the efforts of some European governments, even if they belong mostly to the separatist tradition, like the French one, seem to be heading decidedly towards the constitution and the recognition of "European" Islamic representations. Even the recent events should provoke further reflection on the risks that result from the political influence of associations, or even nations, that are in some way linked to fundamentalist doctrines or movements.

Modern states seem to be called to an "active" and not "hostile" kind of secularism which would lessen the pressure exercised by fundamentalist movements over the religions and their legitimate representatives in order to subdue them for their own political reasons. Better relations, even on the legal plane, between the Mediterranean countries are therefore extremely desirable. Unfortunately a kind of incommunicability persists between countries belonging to the Islamic tradition and those of Romanist origins, which is mostly due to lack of comprehension of some of the peculiar characteristics of the respective legal systems, as I have tried to show. Consequently a very wide space for intellectual intervention and reflection is opening up for the near future.

There is one last point that requires our attention. In Western thought the possibility of proselytism is sometimes considered as one of the fundamental aspects of religious freedom. In actual fact only Christianity practices proselytism and missionary activities,

and in these last centuries these phenomena have been linked to colonialism and to the establishment of the "progress" of Western "civilization". It would therefore be a step forward towards the definition of a truly "universal" kind of religious freedom if we were to consider placing limits to "proselytism", in so far as this could be expressed above all as the assertion and witnessing of a religion, but not as a negation or denigration of another. Unfortunately proselytism has been widely practised in the past centuries, by the side of and in support of the action of the colonial powers and the post-colonial policies. This is one of the motives of the particular formulation of the second comma of article 10 of the "Cairo Declaration on Human Rights in Islam" (1990), which is rightly considered as one of the points of major discord with the "Universal Declaration of Human Rights" of the UNO (1948).

> *It is forbidden to exercise any form of constriction on the individual or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.*

Religious freedom, as the Catholic jurist Rescigno proposed in the Sixties, must not appear only at the head of relations with the State, but also of the relations between the various confessions.[57] It is here that one sees the juridical importance of inter-religious dialogue, which the Italian Islamic Religious Community (CO.RE.IS) has been trying to put in motion for many years on a more concrete and less demagogical basis, by establishing very good relations with the Italian Hebraic Communities and in the hope of an effective opening on the part of the Catholic Church.

The principal aim of this short study is to clarify the peculiar aspects of some principles that are universally relevant to the Western and to the Islamic worlds, in the hope that better acquaintance may bring peoples together, guiding them to spiritual and intellectual pluralism, which is one of the deepest and safest roots of "civilization".

15 March 2002
1 MuHarram 1423
(on the first day of the Islamic new year)

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[57] P. Rescigno, "Le società intermedie", in Persona e Comunità, Il Mulino, Bologna 1966, pp. 29-68.

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