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CONTENTS

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FOREWORD

THERESE CACHIA AND PATRICIA MALLIA
Guest Editors

This special edition of the *Mediterranean Journal of Human Rights* is dedicated to a selection of the dissertations produced by students who successfully completed the Mediterranean Master's course in Human Rights and Democratisation in November 2002.

The Mediterranean Master's is one of the regional human rights programmes funded by the European Commission and is mainly intended for nationals from MEDA countries, although lately a few students from other regions have also followed the course. In the three years it has been in existence the course has produced over 100 graduates and has gained a reputation in all the Euro-Med region and beyond. This post-graduate course is co-ordinated by the University of Malta on behalf of a network of universities and human rights institutions, and receives the financial aid of the European Commission.

The Master of Arts in Human Rights and Democratisation is a one-year full-time course in which an interdisciplinary approach is adopted. The course acknowledges the strong link existing between democracy and the promotion of human rights and therefore focuses on the integration of human rights and democratic principles. In this way, the programme is of great importance to the future of the Mediterranean and efforts to create co-operation therein.

The first semester is dedicated to offering a comprehensive overview of human rights principles from the operational and policy-oriented views. Later, in the second semester, the students are given the opportunity to specialize in an area of human rights by traveling abroad and conducting research into an approved subject under the supervision of an appointed tutor. A taste of the result is the contents of this volume of the journal.

The *Mediterranean Journal of Human Rights* shares a strong link with the Master of Arts programme and it therefore seemed fitting to select five dissertations and publish them as a special

edition of the journal. The dissertations contained herein are summarized pieces from the original 25,000 word works. Through this publication, it is augured that the significant contribution made by this programme will be more easily ascertainable and appreciated.

DISSERTATIONS

COMBATING THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN SMALL ARMS AND LIGHT WEAPONS

LARA S. ARABIAN

Introduction

Until quite recently, the threat of nuclear war and the proliferation of heavy weapons dominated the global security debate. However, since the beginning of the 1990s, the small arms and light weapons discourse has displaced the nuclear debate as the greatest threat to global security on the international agenda. Thanks to the efforts of the Secretary-General of the United Nations (UN), Kofi Annan, the international community was reminded in 1998 of the impact of the proliferation of conventional weapons, especially small arms and light weapons. Hence, in a report on Africa to the Security Council in April 1998, Mr. Annan made several important recommendations to tackle the trade in small arms and light weapons, both legal and illicit.

Confronted with this reality, the international community is increasingly realizing the excessive and destabilizing accumulation of small arms and light weapons and their negative effects on socio-economic development generally, and specifically on the reconstruction of post-conflict societies. Hence, some initiatives have been taken on the global and regional levels, in the past few years, to address the problems associated with small arms and light weapons proliferation. However, much more has to be done to solve

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this grave problem, the international community should consider this issue very seriously and governments should cooperate and agree to implement the necessary measures to combat the destabilizing accumulation of small arms and light weapons, through legally binding conventions. They should begin by acceding to the already existing *UN Protocol against the Illegal Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*[1].

CHAPTER ONE

1. The Illegal Manufacturing of and Trafficking in Small Arms and Light Weapons

There is an urgent need today to address the issue of illegal manufacturing of and trafficking in small arms and light weapons, knowing that the uncontrolled spread of small arms and light weapons may lead to drastic results and increase the rate of violence and crime in the world.

Moreover, in many countries illicit trafficking in small arms and light weapons does not constitute an isolated process in the context of international organized crime. Arms-trafficking, drug-trafficking and terrorism are phenomena that are intrinsically related and it is almost impossible to combat them separately. In addition, these phenomena generate enormous profits, use the same routes and have similar characteristics, which makes the combating of the illegal traffic in small arms and light weapons as urgent as combating drug-trafficking and terrorism.

2. What are Small Arms and Light Weapons

Small arms and light weapons are conventional weapons in that they are not weapons of mass destruction. However, they can also be distinguished from the major conventional weapons (e.g. tanks)

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[1] Doc. A/55/383/Add.2. This Protocol supplements the *UN Convention against Transnational Organised Crime*. As at 20/03/03 52 States had signed the Protocol and 3 States became parties to it.

for, they are typically smaller, weigh less, cost less, are more portable and less visible than major conventional weapons. Broadly speaking, small arms and light weapons are conventional weapons that can be carried by an individual or a light vehicle[2].

However, the 1997 Report of the UN Panel of Governmental Experts on Small Arms provided a more refined and precise definition that has become internationally accepted. This definition distinguishes between small arms which are weapons designed for personal use and light weapons which are weapons designed for use by several persons serving as a crew. The category of small arms includes: revolvers and self loading pistols, rifles and carbines, submachine guns, assault rifles and light machine guns. Light arms include: heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable missile system and mortars of caliber less than 100mm. In addition, ammunition and explosives form an integral part of small arms and light weapons used in conflicts[3].

Since small arms and light weapons are mostly the weapons used in current conflicts, it is useful to mention the ones used in current intrastate conflicts. Small arms include revolvers and self-loading pistols, rifles and carbines, submachine guns and assault rifles. Light weapons, on the other hand, include, heavy machine guns, handheld under barrel and mounted grenade launchers, portable antiaircraft guns, portable antitank guns, recoilless rifles, portable launchers of antitank missile and rocket systems, portable launchers of antiaircraft missile systems and mortars of caliber up to less than 100mm inclusive[4].

Nevertheless, in describing small arms and light weapons, four types of weapons need to be considered. First, there are weapons manufactured according to military specifications such as pistols, revolvers, automatic firearms, non-automatic firearms, machine-guns and hand grenades manufactured for State use or with the State's cognizance according to military specifications and are part

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[2] Laurence E., *'Light Weapons and Intrastate Conflict'*, Carnegie Corporation of New York, 1998, pg. 16

[3] United Nations, Report of the Panel of Governmental Experts on Small Arms, A/RES/54/258

[4] Laurence E., above at note 2, pg. 17

of the internal security and defense apparatus that every State in the world possesses. This is a legitimate aspect. A second type of weapons comprises those small arms that serve no military purpose, yet are lethal. These include rifles for hunting, firearms, and handguns... The third category is composed of home-made weapons that can be produced in the backyards of small communities, for example, in the northeast frontier of countries in Asia, in some parts of southern Africa and perhaps in a few regions of Latin America. These are home-made weapons produced by small family industries. The fourth category of weapons are either not primarily weapons or not intended to be weapons when manufactured, but their use renders them weapons, such as machetes, spears and knives.

3. The Dangers Behind the Uncontrolled Spread of Small Arms and Light Weapons

Small arms and light weapons are often used in a manner that violates international human rights and humanitarian law. Their proliferation and illicit trafficking is contributing to terrible suffering and violence throughout the world and are in general, a major factor in the destabilization of conflict-prone regions and weak States. They threaten the public order and render post-conflict nation-building efforts meaningless. They contribute substantially to the dynamics of violent conflict in many regions. In addition, individuals and groups operating outside the reach of the State and government forces make extensive use of small arms and light weapons in internal conflicts. Insurgent forces, irregular troops, criminal gangs and terrorist groups use all types of small arms and light weapons. The illicit trafficking in such weapons by drug cartels, criminals and traders in contraband goods has also been on the increase[5].

Therefore, small arms build-ups and flows can simply increase tension, alter regional or national balance of power and destabilize regions or societies. The availability of small arms tends to escalate, exacerbate or prolong conflicts and intensify the suffering caused. It may encourage some parties to a conflict or dispute to attempt a violent rather than a peaceful resolution of differences. Access to

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[5] As above, pg. 21

lethal weapons such as assault rifles can transform what would otherwise have been a minor and manageable incident to a massacre demanding retaliation. It can enable children to become lethal killers and enable their exploitation as child-soldiers.

Risks of internal violent conflict are increased and exacerbated by the wide availability of highly lethal small arms and light weapons. Without effective police and judicial systems corruption, crime and gun-violence can grow with impunity. The diffusion of small arms will tend to empower certain social groups and challenge the traditional authority structure in societies facilitating social and economic breakdown and the brutalisation of social relations[6].

Nevertheless, the increase in the use of light weaponry increases the destructiveness and lethality of conflicts. Individuals and groups who politically disagree more easily resort to violence instead of resolving conflicts peacefully. Large accumulation of light weapons, especially assault rifles and land grenades, increase the lethality of conflict when compared to other weapons such as handguns and knives. This leads to a greater number of civilian casualties and refugees, which overwhelm health care systems and in general disrupt the economic, social and political development of the country[7].

Another basic effect of guns flow and accumulation is the increase in criminal or non-political acts committed with these military style weapons: armed robberies, hijacking, terrorism, stealing of livestock, drug trading and smuggling. The criminal elements in a State are in some cases better armed in quantity and/or quality, than the legitimate security forces of the State. Availability of such weapons also enhances the proliferation of agents of violence, including drug dealers and criminal gangs.

A third effect is that the level of violence promoted by these weapons is so high that it forces citizens to arm themselves, either personally or through private non-governmental security organizations. Additionally, the availability and use of military style weapons emboldens the disaffected in many parts of the world. Faced with little or no economic or social development desperate citizens

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[6] Annan K, Secretary-General, 'Small Arms Big Problems', http://www.un.org/Depts/dda/CAB/smallarms/sg.htm, date accessed 06/05/2003

[7] As above

opt for acquiring a weapon for survival, adequate living standards, or for commercial purposes. The end result is an overall increase in the number of weapons in the society.

Finally, the increase in the availability and use of this class of weapon increase the threat to peace building. Recently reformed or reconstituted security forces in States making their transition to democracy revert to repression when faced with increased criminal activity or interstate violence[8].

It is also useful to mention here the kind of conflicts in which small arms and light weapons play a significant role. These conflicts can be categorized into three types:

- The first is civil war and/or genocide, where ethnic differences determine the actions of the government, the military and the population. Genocide or mass murder are often the result of the massive influx of small arms and light weapons, as in the destruction of the political system and the move toward anarchy and chaos.
- The second type is the case of a post conflict situation, where political stability is threatened by an increase in crime and frustration among the population that could lead to the resumption of the armed conflict.
- The third type concerns those countries that are in the process of transition from an authoritarian rule and a centralized economic system, to a democratic and free market system. In these cases the hardships that naturally accompany such transition are worsened by armed violence and instability, made possible by the accumulation of small arms and light weapons in the hands of those dissatisfied and frustrated with the new political and economic situation. As in the second type, the danger is that such violence will coalesce around rival groups and escalate into civil war based on political goals.

In conclusion, small arms and light weapons represent a serious danger in that they largely contribute to the development of a culture of violence. It has become common today to think of guns as a first solution to solving problems and more alarmingly, attitudes

[8] Laurence E., above at note 2, pg. 21,22

displaying dependence on weapons to solve problems are especially recognized among the youth, who are the future leaders of a State.

4. The Illicit Manufacturing of Small Arms and Light Weapons

Although illegal manufacturing is not as common as illegal trade or trafficking, nevertheless, it exists and therefore, should be considered.

Small arms and light weapons being portable and easily transferable, give arms manufacturers added incentives to manufacture them illegally. Thus much of the traffic in these weapons is illicit, carried on by private firms and criminals to whom lack of transparency is critical for success.

For these reasons, the international community and the United Nations are attempting to use transparency as a tool to deal with the negative effects of excessive armaments. Hence, the UN Register for Conventional Arms, of 1991, provided for the voluntary disclosure of national arms transfers of major conventional weapons systems. The UN register was created as a means to ensure transparency in armaments with the goals of serving as a confidence-building mechanism and promoting stability and restraint among member States. Under the register, States submit data relating to their arms levels, transfer, imports and exports. States are also encouraged to submit information relating to their arms import and export policies, as well as legislation and administrative procedures[9].

However, to combat the illicit manufacturing of small arms and light weapons national measures are the most important. Hence, States should ensure effective national controls over the manufacture of small arms and light weapons, through the issuing, regular review and renewal of licenses and authorization of manufacture. Licenses and authorizations should be revoked if the conditions under which they were granted are no longer met. In addition, States should ensure that those engaged in illegal manufacturing and production can and will be prosecuted under appropriate penal codes.

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[9] Carnegie Commission on Preventing Deadly Conflict, 'Preventing Deadly Conflict', final report, pg. 77, Carnegie corporation of New York, 1997

The register of production has three main functions. It guarantees the quantities, identifies the weapons and indicates their destination.

Therefore, national governments have a major role to play here, because illegal manufacturing usually takes place within the borders of a country. Hence, stricter control should be applied to fight it more efficiently.

5. The Illicit Trade in Small Arms and Light Weapons:

After having examined the illegal manufacturing of small arms and light weapons and the need for more transparency, a more serious and widespread problem falls to be considered, that is the illegal trafficking in these weapons.

Since the right of self-defense has been accepted and adopted even in the UN Charter, it is to be expected that States will continue to acquire and transfer small arms and light weapons to other States and this will continue to be considered a legitimate process and activity. State-to-State transfers therefore, will continue to be considered legitimate except where the recipient State is under an international (UN-sanctioned) embargo. As long as such transfers and acquisitions remain restricted to the use of military and other armed forces of the State, the risk emanating from them will remain limited to the traditional ones related to inter-State conflict and war.

However, great numbers of illicit transfers of small arms have taken place and were defused to actors and entities outside State control and society in general.

There are various ways to illicitly acquire of small arms and light weapons. The first type of such an acquisition is the covert or secret transfer of arms to a government or non-State actor from another government. This mode is less prevalent in the post-Cold War period but continues to be an option for those States supporting separatist forces outside their borders. A second variant of illicit transfer is the black market. As United Nations arms embargoes have increased, and more and more conflicts involve non-State groups, black market suppliers have become the only source for countries under embargo. Additionally, underground political organizations and criminal organizations such as drug cartels, are also forced to rely on this means of acquisition. The portability, low cost and concealment of small arms and light weapons make this mode of acquisition and

transfer particularly effective. A third variant is illicit in-country circulation. The first such type of acquisition is theft from governmental arsenals. Another type is that arms transfers can take place between sub national groups of criminal organizations, especially when the former are used by the latter to protect their illegal activities[10].

Another serious problem is that illicit networks developed for drugs and laundered money have been adapted to illicit trade in light weapons. In general, more and more groups rely on violence due to the increased availability of weapons. The number of actors who owe their existence to the possession and use of these weapons makes any attempt at solutions very challenging. Finally, this spiral of weapon accumulation and violence has the tragic consequence of creating fear among previously secure populations, which often respond by acquiring small arms for their personal protection and security:

> *'Perhaps most grievously we see a vicious circle in that insecurity leads to a higher demand for weapons, that itself breed still greater insecurity and so on.'*[11]

Another major problem is that during the Cold War many countries manufactured small arms and light weapons but their proliferation and availability were seriously attenuated by superpower control and competition. These weapons have now become much more easily available to groups and individuals who have succeeded in using them to wage wars to destabilize legitimate governments and social systems, and most importantly the very manufacturers set up during the Cold War, have become an important source nowadays, freely supplying the highest bidder.

The best and most efficient way to combat these illegal transfers is transparency. In the case of major conventional weapons some progress has been made with the UN register of conventional arms. The register calls upon the member States of the UN to report the export and import of weapons in seven categories - tanks, armoured vehicles, long-range artillery, combat aircraft helicopters, ships and

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[10] Laurence E., above at note 2, pg. 24 - 26

[11] A/RES/54/258, above at note 3

missiles and missile launchers[12]. For the first time in history governments are making information public on the arms trade.

However, we first should evaluate the success of this register in order to decide whether the same method should be applied to small arms and light weapons. By examining the period from 1992 till 1995 we can see that: 91 countries submitted replies for 1992, 89 countries for 1993, 85 countries for 1994 and 93 countries for 1995. Hence, less than half the 185 members of the UN replied in any one year and the numbers of replying have not improved since 1992. A closer examination is more encouraging, since a total of 131 countries or 70% of the UN membership have reported on one or more occasions. There is also an increasing improvement in the quality of reports, for since the first replies to the register were submitted, a growing number of States have been willing to provide detailed information on the type and model of the weapons that are being exported and imported.

Therefore, States seem to be co-operating with the UN register and although it may not be the only solution to the problem of illegal trafficking, the register seems to be an efficient method by which to reduce the problem.

However, as already mentioned, transparency in the production, acquisition and proliferation of small arms and light weapons is far behind that of major conventional weapons. Since much of the flow of light weaponry is illicit, the value of simply adding this class to the UN register is problematic.

There are some types of information that could be made more transparent. That alone could enhance the work of those dedicated to preventing the effects of conflict with light weaponry.

First, not all of the trade in these weapons is illicit. A first approach to monitoring and transparency is to increase information on the legitimate trade flow of arms. Perhaps some types of light weaponry could be added to the UN register of conventional arms. An alternative approach is to make this type of information transparent at the regional level. A second possibility is to identify in a transparent way the legitimate owners of weapons, allowing the focus to concentrate on those who would be more likely to conduct armed violence.

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[12] Carnegie Commission on Preventing Deadly Conflict, above at note 9, pg. 77

In November 1997, member States of the Organisation of American States signed a convention against the illicit manufacturing, traffic, sale and transfer of firearms, ammunitions, explosives and other materials, which calls for the creation of a *'register of manufacturers, traders, importers and exporters'* of these commodities[13]. The European Union has adopted a similar approach.

A more controversial suggestion is to develop a system that registers a weapon with an international serial number upon manufacture, so that weapons can be traced to end-users. The UN small arms panel recommended that the UN initiate a study on *'the feasibility of establishing a reliable system for making all such weapons from the time of their manufacture'*[14] and it is also part of the EU program. States can help to deal with this problem if they take steps to clarify which types of weapons are strictly for military or police work, as a precursor to establishing control mechanisms to restrict or prohibit ownership of such weapons by civilians.

Another efficient way of controlling small arms is having a law on firearms control with it objective being the establishment of a register and a system of firearms control in the country, and setting requirements for their importation, sale, registration, possession and use. This would prohibit private individuals from holding or possessing a range of weapons, such as sawn-off shotguns, machine-guns, sub-machine guns and devices using gases corrosive substances and so on; it would also establish a strict and rigorous control and registration system for these weapons, whose possession is permitted under the supervision of the State agencies.

Finally, due to lack of knowledge and the low level of international cooperation on the subject, some countries have not received appropriate advice on improving the monitoring of imports and exports, the registration and control of arms and the training of the police force.

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[13] The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Explosives and Other Related Materials, www.oas.org/juridico/english/treaties/a-63.html, date accessed 06/05/2003

[14] A/RES/54/258, above at note 3

CHAPTER TWO

1. Controlling Measures

Despite their dangerous effects, no international norms exist to date which effectively address the problem of small arms and light weapons. This is contrary to the position which exists with respect to weapons of mass destruction. Since most of the factors inherent in conflict and arms proliferation are transnational, international co-operation is needed to address them, whether regional or global.

Given the extent and nature of illicit transfers of small arms that have already taken place and the diffusion of these arms to actors and entities outside State control and society in general, will make controls to regulate such transfers and diffusions a very difficult task. Measures of protection have to be institutionalised in an integrated manner at national, regional and global levels, since they will not be especially effective when addressed at any single level alone.

In this chapter the regional and global initiatives that States have agreed to undertake will be discussed, progressing from the regional to the more important global initiatives.

2. Regional Initiatives

The first international initiative to combat the illicit manufacturing of and trafficking in small arms and light weapons was a regional one, undertaken by the Organization of American States. In effect, regional organizations such as the European Union, the Organization of American States, the Organization of Security and Cooperation in Europe and the Organization of African Unity are adopting increasingly more programs to combat the illicit trafficking in these weapons. An overview of these initiatives will show that they are taking as their starting point, the linkage between excessive arms accumulation, the outbreak and exacerbation of armed conflicts.

3. The Organization of American States (OAS) Initiatives

The most important initiative that the OAS undertook in controlling illicit arms trafficking is the *Inter-American Convention*

Against the Illicit Manufacturing of and the Trafficking in Firearms, Ammunitions, Explosives and Other Related Materials. Therefore it is important to concentrate on this convention and study it thoroughly.

This convention that came into force in 1998 and was the first international agreement designed to prevent, combat and eradicate illegal trans-national trafficking in firearms, ammunitions and explosives. To date, 33 States of the 34 OAS members have signed this convention, and 16 of them ratified it. It is significant to note that the United States, being one of the world's major arms manufacturer and dealer, has only signed the convention and not ratified it yet.

This convention came into existence through an awareness of the States parties of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, due to their harmful effects on the security of each State and the region as a whole. However, for this convention to be truly effective, it is essential for the major arms dealers and manufacturers like the United States, to ratify and implement it completely.

The purpose of this convention is to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, ammunitions, explosives and other related materials. In addition to promoting and facilitating cooperation and exchange of information and experience among States parties to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms ammunition, explosives and other related materials.

4. European Union (EU) Contributions

EU countries have particularly important roles and responsibilities in relation to small arms and light weapons proliferation, being one of the world's major arms manufacturers and dealers. In addition, they themselves are confronted with problems of crime, terrorism and social violence associated with the availability and flow of small arms which, in the context of the European integration, they must tackle co-operatively. EU States are in a position to play a leading role in promoting wider international action to tackle light arms proliferation. One key area of EU influence is as major aid donors. The European

Commission and member States not only can provide substantial direct assistance to help other countries tackle problems associated with light weapons proliferation, but also influence the aid policies of other donors and international financial institutions.

Awareness of the problems of small arms and light weapons proliferation grew substantially in the EU and elsewhere during the mid-1990s. The terrible events during and after 1994 in the Great Lakes region had a major impact in this context; as did the experience from the peacekeeping and peace-building missions in the Balkans, Africa and elsewhere and as a result of independent research and NGO lobbying activities[15].

Since early 1997, the EU has developed substantial initiatives on this problem. Most notably in June 1997, the *EU Program for Preventing and Combating Illicit Trafficking in Conventional Arms* was established. In June 1998 the EU States agreed to adopt the *EU Code of Conduct on Arms Exports* including export of small arms and light weapons. In autumn 1998 they began negotiations towards a more binding *EU Joint Action on Small Arms*.

5. Developing and Implementing the EU Program of Action on the Illicit Trafficking of Arms and Their Proliferation

The establishment of the EU program owes much to the efforts of the Netherlands government during its presidency of the EU between January and June 1997. It was motivated by a concern to develop a comprehensive EU program to address light weapons proliferation. At the time however, some EU States were reluctant to agree to a program which explicitly focused on restraining legal as well as illicit arms accumulations, and transfers, which singled out small arms and light weapons for attention. The Netherlands government thus decided to promote an EU program on illicit trafficking recognizing that illicit activities play a particularly important role in the flow and accumulation of small arms and light weapons especially in regions of conflict and that programs to tackle

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[15] Green O., 'Tackling Illicit Arms Trafficking and Small Arms Proliferation: EU Roles and Programs', Yearbook 1998/99, *Conflict Prevention Policy of the European Union - Recent Engagement, Future Instruments*, 1999, pg. 179.

them must in practice be closely linked with efforts to strengthen controls on legal arms transfers and holdings[16].

This initiative is comprehensive in scope, focusing on ways in which the EU could support other countries and regions, as well as itself on preventing illicit trafficking of firearms, however this program has one major weakness as it is not a legally binding instrument, in regards to its implementing power, which is weak since it is not a legally binding document.

6. The EU Code of Conduct on Arms Export

The EU code of conduct on arms export, which was agreed by the EU member States in June 1998, represents an important first step toward the development of a common and restrictive EU arms export policies. This code covers all conventional arms and military equipment and is not especially focused on small arms and light weapons. Nevertheless, it does cover such weapons and by promoting control and restraint in legal exports it fills an important gap left by the EU program on illicit trafficking.

The overall message contained in the preamble and guidelines of this code of conduct is concerned with the promotion of restraint and responsibility in arms transfers. The preamble recognizes *'the special responsibility of arms exporting countries'* and articulates the member States' determination

> *'to prevent the export of equipment which might be used for internal repression, international aggression, or contribute to regional instability'* as well as to *'reinforce their co-operation and to promote their convergence in the field of conventional arms exports'*[17].

As to the guidelines, the respect for human rights under criterion two is the most developed subject. Of particular significance is the fact that the human rights guidelines actually specify the circumstances under which an export license should be refused, stating unequivocally

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[16] As above, pg. 4-5

[17] EU Code of Conduct on Arms Exports, adopted on 8 June 1998, http://europa.eu.int/comm/development/prevention/codecondarmsexp.htm, date accessed 20/3/2002

'member States will not issue an export license if there is a clear risk that the proposed export might be used for internal repression'[18].

7. The Adoption of a Joint Action by the European Council

This Joint action was agreed upon in Brussels on the 17th December 1998, and was adopted later by the European Council.

There are three main objectives for this joint action:

- To combat and contribute to ending the destabilizing accumulation and spread of small arms.
- To contribute to the reduction of existing accumulation of these weapons to levels consistent with countries' legitimate security needs.
- To help solve the problem caused by such accumulation.[19]

Although these EU initiatives did not solve the problem of the illicit flow of small arms and light weapons, by recognizing the need of such a control and pinpointing the dangers of small arms and light weapons, they can be regarded as a step forward towards a more effective and binding agreement.

8. The Organization for Security and Co-operation in Europe (OSCE) Initiatives

As mentioned above, the EU initiatives can be considered as an admission that small arms and light weapons are a problem. This admission paved the way for other important initiatives such as that of the OSCE which has introduced the issue of controlling small arms and light weapons to its agenda.

The most important initiative that the OSCE undertook in this respect is the adoption of the OSCE document on small arms and light weapons on 24 November 2000. This document sets concrete norms, principles and measures to be followed by OSCE

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[18] As above

[19] 'Joint Action of 17 December 1998', *The Official Journal of the European Community*, 1999/34/CFSP

participating States on the issue of small arms and light weapons including information exchange on the export and import of weapons.

The participating States discussed in detail how to combat illicit trafficking in all its aspects: manufacturing, marking and record keeping. Then the States agreed on the following:

- To ensure effective national control over the manufacture of small arms.
- All small arms manufactured in their territory after 30 June 2001, will be marked in such a way as to enable individual small arms to be traced easily.
- Record keeping and
- Transparency measures.

They agreed *inter alia* that the problem of small arms and light weapons should be an integral part of the OSCE's wider efforts in early warning, conflict prevention, crises management and post-conflict rehabilitation[20].

9. Guidelines Adopted by The Organization of African Unity (OAU)

There are several initiatives that the OAU undertook regarding illegal small arms and light weapons. A brief mention is to be made of the more significant ones:

- In June 1998 the OAU adopted a decision on the proliferation of small arms and light weapons stressing the role that the OAU should play in coordinating efforts to address the problem in Africa and requesting the Secretary-General of the OAU to prepare a comprehensive report on the issue.
- In 1999 the Assembly of heads of States and government of the OAU, adopted a decision on the Illicit proliferation, circulation and trafficking of small arms and light weapons.

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[20] Organization of Security and Co-operation in Europe, OSCE Document on Small Arms and Light Weapons, Vienna, 24 November 2000, http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm, date accessed, 06/05/2003

- In 2000 the OAU held a ministerial meeting at Bamako on the issue of small arms and light weapons. The meeting adopted the Bamako Declaration.

In the Bamako Declaration the participating States agreed that in order to promote peace, security and sustainable development on the continent, it is vital to address the problem of the illicit proliferation, circulation and trafficking of small arms and light weapons in a comprehensive, integrated, sustainable and efficient manner[21].

Furthermore, the participating States recommended measures the member States should take on the national and regional levels.

On the national level they recommended mainly the adoption of necessary legislative and national programs and other measures for criminalizing the illicit manufacturing of and trafficking in small arms and light weapons, while raising public awareness and encouraging the active involvement of the civil society.

On the regional level they recommended to coordinate and harmonize plans and efforts to address the illicit proliferation, circulation and trafficking of small arms and light weapons. To strengthen regional and continental cooperation among police, customs and border control services.

Again, unfortunately this agreement is only a declaration, that is, it is not a legally binding document. Which makes it weak, with no implementation powers.

10. Global Initiatives

Some important global initiatives have been made in the past few years, when the issue of illegal small arms and light weapons started attracting increasing attention.

11. INTERPOL and Its Role

INTERPOL is an intergovernmental organization with 177

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[21] Bamako Declaration on an African Common Position on Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 30 November-1 December 2000, http://www.basicint.org/bamako.htm, date accessed 24/4/2002

member countries. In terms of membership it is second only to the UN[22].

The police division of the INTERPOL constitutes the major operational unit of the agency. It operates primarily in cooperation with the National Central Bureau, which has been established in each member State. INTERPOL's activities are focused on law enforcement action having international ramification in all sectors of criminal activities, which most importantly include: crimes of violence against persons, crimes against Property (one example is traffic in and criminal use of firearms and explosives), offences involving cultural property, economic and financial crime, drug trafficking and money laundering[23].

Interpol's involvement in the control of arms, emerged from its involvement in the fight against international terrorism that evolved during the 54th General Assembly in Washington in 1985, when a new resolution was passed mandating the creation of a special group to *'coordinate and enhance cooperation in combating international terrorism'*. The anti-terrorism branch was subsequently established in 1987. As part of the anti-terrorism branch, the arms section was initiated to suppress international firearms proliferation. Interpol's arms section was focused on joining with its member countries in an atmosphere of sharing information that will result in the elimination of firearms trafficking and the violent crimes that are associated with it[24]. An example of Interpol's international co-operation and exchange of information to combat firearms is the INTERPOL Weapons and Explosives Tracking System, commonly referred to as IWETS. IWETS is currently the only international analytical database designed to collate information on illegal firearms trafficking. IWETS provides current indexes of firearms manufacturers and other information that facilitates the

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[22] Manross D., 'Developing New Links with International Policing', ed. Pericles Gasparini Alves and Daiana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda*, pg. 101, United Nations Institute for Disarmament Research, Geneva, 1998

[23] Hippchen, L., and Yim, Y., *'Terrorism International Crime and Arms Control'*, Charles C Thomas Publishers, U.S.A., 1982, pg. 179,180

[24] Interpol's Firearms and Explosives Proliferation Intervention Efforts, http://www.interpol.int/public/weapons/default.asp, date accessed 06/05/2003

identification of firearms. IWETS is also the only international system for stolen and recovered weapons[25].

INTERPOL has a major role to play in combating the illegal manufacturing of and trafficking in small arms and light weapons. It has already started to take some positive steps, but more has to be done, not necessarily by creating new mechanisms, but rather by strengthening and evolving the already existing tools and systems.

12. The UN's Latest and Most Important Contributions

The United Nations, has taken some steps to combat this crime, recognizing its great dangers and the real need for control. It has established a Disarmament Commission and an Institute for Disarmament Research. Another important initiative was the UN conference on the illicit trade in small arms and light weapons in all its aspects, in July 2001. Yet the most important contribution remains the drafting of a protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, as a supplement to the UN convention against transnational organized crime.

13. The UN Disarmament Commission (DC) and Institute for Disarmament Research (UNIDIR)

The UN Disarmament Commission (DC) was established in 1978 as the General Assembly's deliberative body on disarmament issues, it was initially established to work on nuclear weapons and large scale arms, but afterwards it also started to work on the issue of small arms and light weapons[26].

It has been stated that

> *'the activities of the UN DC are most significant not for what they reveal about the persisting disagreements among member States, but for the light they shed on the basic objectives that unite all such States'.*[27]

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[25] As above

[26] UN Disarmament Machinery, http://www.igc.org/disarm/dismachinery.htm, date accessed 06/05/2003

[27] Dhanapala J., as quoted in *Disarmament Times* 'DC Begins Amidst Much Cause for Despair' April, 1999

The DC produces reports, which embodies the widest lines of consensus on small arms control among UN member States. However, the guidelines are not a cure, the world will not be free from the threat of small arms anytime soon. The reports developed in the DC demonstrate that countries around the world are opening their eyes to the destruction wrought by the proliferation of small arms and light weapons and the States are willing to propose concrete steps towards a less threatening world.

Passing on to the UNIDIR, this was established by the General Assembly in 1980 to conduct independent research free from national bias. Its researchers issue studies on emerging problems and foreseeable consequences of disarmament[28]. Like the DC, UNIDIR was also established to work on the issue of nuclear weapons and large-scale arms, but with the small arms issue taking importance in the last few years, it started to focus as well on this issue.

Since there is a real need today to address the issue of illicit trafficking in small arms, it is important that an effort be made to assess the illicit trafficking problem in different regions of the world. This has been the challenge that the UNIDIR has faced over the last several years. In an attempt to clarify the problem of illicit trafficking, it has organized different meetings on what are small arms, what constitutes their illegal trafficking and the kind of conflicts in which these weapons are being used. The UNIDIR initiative is also stimulated through how institutions and governments can be better prepared to counter illicit trafficking. There is a quest to highlight perspectives for new and improved synergies and international cooperation. In the area of small arms intensive efforts are under way at global and regional levels to reach agreement on curbing illicit trafficking in certain categories of small arms, ammunitions and explosives. Yet, given the nature and status of the problem today, any such agreement would not have great practical effect if the responsible authorities are not given adequate means to enforce the law, not only on the national level but also as regards the region-wide strategies of surveillance, tracking and intervention.

What is needed today is an increase in the level of cooperation between and among those institutions and communities that could

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[28] UN Disarmament Machinery, above at note 26.

together, more effectively than alone, take action to combat illicit trafficking in small arms[29].

14. The UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

This conference, held in New York City in July 2001, is regarded as a significant step forward taken by the international community to address one of the most urgent problems facing world peace and security today, the tragedy of the uncontrolled spread of small arms and light weapons.

The opening day of the UN conference on the illicit trade in small arms and light weapons, was proclaimed 'small arms destruction day'. States around the world were encouraged to destroy confiscated, collected, seized or surplus small arms and light weapons, taking into account the report of the Secretary-General on the methods of destruction of small arms and light weapons, ammunition and explosives.

The States participating in the conference committed to take measures at the national, regional and global levels through a comprehensive program of action containing mechanisms to oversee its implementation and further development.

The participating States also recommended the General Assembly to take the following steps as an effective follow-up to the conference:

- To convene a conference no later than 2006 to review progress made in the implementation of the program of action.
- To convene a meeting of States on a biennial basis to consider the national, regional and global implementation of the program of action.
- To undertake a United Nations study, within existing resources, for examining the feasibility of developing an international instrument to enable States to identify and trace in a timely and reliable manner illicit small arms and light weapons.

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[29] Salomone P., 'Strengthening International Cooperation: A New Agenda for Control Regimes?' ed: Pericles Gasparini Alves and Daiana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* pg. 223, United Nations Institute for Disarmament Research, Geneva, 1998

- To consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons.

15. UN Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition; Supplementing the UN Convention Against Trans-national Organized Crime[30]

The UN General Assembly adopted this Protocol in 2001, as a supplementing protocol to the *Convention Against Transnational Organized Crime*. The general purpose of the Protocol is stated in article 3 to be the combating of the illicit transfer of firearms from one country to another. To accomplish this, other activities such as the illicit manufacture and the illicit transfer of parts and components and ammunition are also addressed and additional requirements, such as the marking of firearms for identification purposes and the keeping of records to permit tracing are also imposed.

Certain provisions deal with the criminalisation of illicit manufacturing and trafficking within the legal systems of the State parties (article 5) and the confiscation and forfeiture of proceeds of crime and crime-related property (article 7). The focus here is mostly on the disposal and liquidation of forfeited property or assets for use by the States or to compensate victims.

Articles 8, 9 and 14 deal with the identification and tracing of firearms. A central policy of the protocol is the creation of a series of requirements to ensure that firearms can be uniquely identified and traced from one country or owner to another, which deters offenders and facilitates the investigation of both purely domestic firearms offences and cases of trans-national trafficking. There is general agreement that firearms should be required to be marked with a serial number or similar identifier at the time of manufacture to permit subsequent identification (article 9). There is also general agreement that records should be kept for at least ten years of transfers from one country to another (article 8) and that countries should co-operate closely in furnishing the information needed to

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[30] A/55/383/Add.2, above at note 1.

trace a firearm when requested to do so (article 14(3)). Firearms, which are deactivated or destroyed, are generally removed from national records and to prevent cases of inadequate deactivation and the subsequent reactivation of un-recorded firearms, the protocol also provides minimum requirements for deactivation (article10).

Article 11 deals with the import-export requirements, noting that the basis of the offences of 'illicit trafficking' is that firearms, parts, components or ammunition are transferred from one State to another without the legal authorization of the States concerned. For that article 11 provides standard requirements for the licensing or authorization of such transactions.

Articles 14 to 17 address the issue of international cooperation to combat illicit manufacturing or smuggling. However State parties are required to keep shared information confidential, where requested, subject to legal disclosure requirements (article17). Specific bilateral or regional co-operation agreements are encouraged (article 15).

This protocol has not yet entered into force yet. It will do so on the 90th day after the date of the deposit of the 40th instrument of ratification. This instrument has many weak points, the most important ones are that, first it is a only a protocol supplementing a convention, and because of that it is bound by the provisions of the convention, which is the UN convention against trans-national organized crime. Hence, article 4(1) of the protocol States that, it applies to the investigation and prosecution of the manufacture of and trafficking in firearms, their parts and components and ammunition when those offences are trans-national in nature and involve the participation of an organized criminal group. This is a major weakness and leaves a big gap in prosecuting arms traffickers and manufacturers internationally, in case there is no organized group or the offence is not trans-national in nature. Another problem is that, this protocol cannot come into force before the entry into force of the convention (article 18), and this convention is not entered into force yet, so there are two steps to overcome instead of one, first the convention has to enter into force, for the protocol to be able to enter into force afterwards. Finally we must say that, from reading this protocol we realize that it does not propose any implementing mechanism, as a follow up, which makes it a weak instrument without real implementation powers. Nevertheless, it is a first step that should consider seriously signing and ratifying.

CHAPTER THREE

1. Non-Governmental Organizations and Scholars, and their Role in Promoting Further Awareness

One of the major problems in fighting illicit traffic in small arms and light weapons is identifying the dealers, the routes and methods most commonly used for such traffic. NGOs and scholars have a major role to play in this area.

2. The Role of Scholars

Action is being taken at all levels of the international community to lessen the effects of excessive and destabilizing accumulations of light weaponry. In many cases these policies, both actual and proposed, are based on a general sense that the weapons are a problem. This general sense that arms and conflict are linked is enough to generate the action, but as with other policy issues, better knowledge of the causal links between arms acquisition and transfers and conflict would clearly enhance the solutions in those circumstances, as it would allow the more precise application of tools best suited for success. Additionally, as long as weapons-focused policies negatively affect certain actors such as governments stockpiling weapons for future contingencies and arms dealers. These actors will resist cooperation by citing the lack of evidence that weapons are the problem. In short, despite a great deal of information on conflict situations, academics need to get much closer to a theory of conflict that can better pinpoint the role of weapons[31].

However, past and present research work in this area plays an important role in the efficiency of implementing improved control regimes. Nevertheless, there is a recognized need to establish a re effective and continuous means of monitoring illicit traffic in small arms and light weapons[32].

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[31] Laurence E., above at note 2. pg. 77

[32] Salomone P., above at note 29, pg. 246, United Nations Institute for Disarmament Research, Geneva, 1998

Furthermore, the Disarmament and Conflict Resolution project of the Geneva-based United Nations Institute for Disarmament Research (UNIDIR) has produced a series of case studies on Somalia, Rhodesia/Zimbabwe, Bosnia and Croatia, South Africa, Cambodia, Angola and Namibia, Liberia, Nicaragua, El Salvador and Haiti. UNIDIR's basic premise is that *'the combination of internal conflicts with the proliferation of light weapons has marked UN peace operations since 1990'*. Although recognizing that social and political development issues are critical sources of violence, they have as a mandate a focus on the material vehicles for violence, in particular the elimination of excess weapons and munitions.

Other major efforts undertaken so far by the United Nations are the study conducted by the panel of governmental experts on small arms in 1996 and 1997, which analyzes the types of weapons used in contemporary conflicts and the nature and causes of their excessive accumulation[33]. Also the parallel study of member-States' firearms regulations conducted by the UN Commission on Crime Prevention and Criminal Justice in the same two-year period[34].

There is also a study undertaken by one of the academics, Edward J. Laurance, who concentrated on the small arms and light weapons impacts on intra State conflicts. His work was completed in July 1998 and it can be considered a good base for us to build on.

However, whatever is said is worthless without action. Hence, words and action should complement each other. Deeds must follow words and recommendations for they alone change the status quo[35].

3. The Importance of NGOs

In the sphere of non-governmental organizations, several efforts are underway directly focusing on the linkage between the accumulation and availability of small arms and light weapons and armed violence.

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[33] UN, 'Report of the Panel of Governmental Experts on Small Arms', report #A/52/298, from the Secretary General to the UN General Assembly, August 27, 1997

[34] UN, 'Measures to Regulate Firearms for the Purpose of Combating Illicit Trafficking in Firearms', UN Economic and Social Council, Vienna, July 28, 1998

[35] Salomone P., above at note 29, pg. 250

NGOs have been active creating networks of scholars and activists; producing case studies of both effects and solutions; engaging in fieldwork that has resulted in the illumination of negative effect and illicit arms acquisition; hosting workshops that bring together governments, NGOs and other elements of the civil society and actively lobbying supplier States to adopt laws and cooperate to reduce illicit trafficking in arms.

However, the most important role that NGOs play is as data providers. A comparison with the success of environmental and humanitarian NGOs and those NGOs that participated in the land-mines campaign is instructive. In all these cases national governments came to rely on NGOs for data critical to the policy process. NGOs became allies in a coordinated process because of their ability to provide governments and international organizations with information. NGOs addressing the problem of small arms and light weapons are just beginning such an effort. The policy agenda laid out for the UN gives NGOs new opportunities through supplying critical information. As one example, it appears that a focus on ammunition may be fruitful. Arguably it may be easier to deal with the fewer number of ammunition sources than the weapons themselves. Which firms manufacture ammunition? Where in the developing world are the ammunition plants exported during the Cold War? How is ammunition shipped? What does it look like? This type of information is hard to come by in the usual published sources. It is interesting to note that the report of the UN small arms panel includes a table on the production of assault rifles, a table produced not by governments but by the independent Institute for Research on Small Arms in International Security. Just a few years earlier attempts to insert similar types of information into a report on the UN Register of Conventional Arms were dismissed[36].

After giving a brief idea on the extent that scholars and NGOs can effect the control of small arms and light weapons, we are going to examine some of the work of the major NGOs working in this field.

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[36] Laurence E., above at note 2, pg. 76

4. Major NGOs Working in this Area

Several NGOs are working in this field with the effort to control small arms and light weapons and their deadly effects.

5. Amnesty International (AI):

Amnesty International was established in 1961. It works on several human rights issues *inter alia* human rights abuses with small arms and light weapons.

In its 2000-2001 report, Amnesty stated that small arms are now the principal weapons used in most armed conflict characterized by mass human rights abuses by governments and opposition forces. Conflicts are prolonged and intensified by influxes of these weapons. Small arms are made easily available in large part because of the poor regulation of supply. The result is a proliferation of weaponry, which contributes to gross violations of human rights, crimes against humanity and war crimes, in many parts of the world[37].

In another report Amnesty said that, thousands of people worldwide are killed every year by the weapons categorized as small arms and light weapons, handguns, assault rifles, sub-machine and machine-guns, grenades, mortars, shoulder-fired missiles and landmines. Many more are injured. Most of the victims are unarmed civilians who find themselves in the path of rival armies or criminal gangs. Transnational networks of brokers, dealers, financiers and transporters are the key players in small arms markets, yet most States do not even register them, let alone require each of their deals to be licensed[38].

In a nutshell, Amnesty International calls for transparency, the closure of loopholes, accountability and international assistance.

6. Human Rights Watch (HRW)

HRW seeks to protect and promote human rights around the world.

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[37] AI, 'Human Rights Abuses with Small Arms', Illustrative Cases from Amnesty International Report 2000-2001, AI-index: POL 34/007/2001, 09/07/2001.

[38] AI, 'The Terror Trade Times 2001, Selling Out Human Rights', part 1, Amnesty International, http://web.amnesty.org/web/tt.nsf/June2001/index, date accessed: 12/3/2002

It puts pressure on governments by publishing reports on their human rights abuses and organizes campaigns for that purpose, in addition to other activities.

HRW firmly believes that controlling the trade in small arms and light weapons is a Human Rights imperative. It holds that the unregulated proliferation of small arms and light weapons contribute to violations of international humanitarian law by signaling to abusive actors that their conduct is not subject to serious international scrutiny[39].

HRW maintains that that the unregulated proliferation and misuse of small arms and light weapons contributes to abusive conduct by making arms available to an expanding circle of actors with decreasing levels of training, discipline and accountability, including civilians and especially children. The resulting culture of impunity encourages further human rights abuses and has the potential of making armed conflict more protracted and intractable[40].

Human Rights Watch made a Statement before the second meeting of the Preparatory Committee for the UN Conference on the illicit trade in small arms and light weapons in all its aspects. During which it expressed its point of view on this matter, by saying:

> *'It is far too easy and not at all persuasive to throw up one's hands in anguish over the horrendous abuses this world has witnessed and then sit back and blame the traffickers. The last decade has seen terrifying abuses of human rights in armed conflicts around the world. We owe it to the victims to remove at least one significant contributing factor and that is the unregulated proliferation of small arms and light weapons. We are counting on you, the States participating in this conference, to play your part in upholding the human rights imperative: Do not supply weapons to human rights abusers anywhere, anyhow or anytime'*[41].

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[39] HRW, 'Controlling the Trade in Small Arms and Light Weapons - Licit or Illicit - Is a Human Rights Imperative', HRW World Report 2001: Arms Division, http://www.hrw.org/campaigns/small-arms/salw011801.htm, date accessed 06/05/2003

[40] As above

[41] As above

Following the UN Conference on small arms in July 2001 Human Rights Watch produced an evaluating report, stating that this conference failed to produce a serious plan of action and may even prompt a walkout by some key member States since it was set to produce a *'program of inaction'* and had failed to put forward a serious plan for stopping this terrible human rights problem.

The mentioned report then gives recommendations by saying that, States should take responsibility for stopping the spread of small arms by strengthening arms trade controls to keep weapons out of the hands of human rights abusers, enforcing those controls better, reining in private traffickers, doing more to secure arms stockpiles and disposing responsibly of vast quantities of cheap surplus weapons[42].

7. International Alert (IA)

The creation of International alert, was a response to the rise in violent conflict within countries and the subsequent abuse of individual and collective human rights in conflict situations[43].

The main mission of this NGO is *'to address the root causes of violence and contribute to the just and peaceful transformation of violent internal conflict'*,[44] and it considers light weapons transfers, one of the main issues contributing to conflict situations.

8. British American Security Information Council (BASIC)

BASIC is an independent research organization that analyzes government policies and promotes public awareness of defense, disarmament, military strategy and nuclear policies in order to foster informed debate[45].

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[42] HRW 'UN Program of Inaction on Small Arms: Conference Ending With Little Results', http://www.hrw.org/press/2001/07/smallarms0719.htm, date accessed 06/05/2003

[43] International Alert, http://www.international-alert.org/aboutus.htm, date accessed 06/05/2003

[44] As above

[45] British American Security Information Council: Weapons Trade, http://www.basicint.org/wtindx.htm, date accessed 14/3/2002

BASIC maintains that both light and heavy weapons sales are currently subject to minimal coordination and control. Arms exporters exercise little restraint over their own sales and participate in only vague and non-binding international cooperation. States with dubious human rights records or those caught up in regional conflict find it easy to obtain the weapons they need to perpetrate violence and repression. Codes of conduct on arms transfers in Europe and America, as well as participation in the UN register on conventional arms, would go a long way towards controlling international weapon sales[46].

BASIC is committed to reducing the flow of small arms and light weapons domestically and internationally, through a project on light weapons.

9. Saferworld

As we have seen, many groups have proposed regimes to control light weapons. One such group Saferworld, a London-based NGO, has proposed an initiative for the EU to help constrain the proliferation of light weapons. It proposes a presumption of denial of weapons transfers to areas in conflict or tension or with serious human rights abuses and to any destination posing a significant risk that weapons will be diverted[47].

10. International Action Network on Small Arms (IANSA)

One of the major recent NGO contributions on the issue of small arms was the creation of the international action network on small arms. IANSA is an international network of over 340 organizations from 71 countries working to prevent the proliferation and misuse of small arms and light weapons. It was set up in 1998 at an international NGO meeting in Canada and was officially launched at the Hague Appeal for Peace in the Netherlands in May 1999. The network helps co-ordinate activities and campaigns by bringing together a wide range of organizations such as human rights groups, relief and development agencies, gun control groups, religious and

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[46] As above

[47] Carnegie Commission on Preventing Deadly Conflict, above at note 9, pg. 79

public health groups. IANSA also provides a framework within which organizations can support and learn from each other[48].

11. World Council of Churches (WCC)

Churches are ideally positioned to address the small arms epidemic by identifying its material, moral, ethical and spiritual dimensions. They are able to inform, mobilize and guide their communities, offering a unique and holistic contribution to the international micro-disarmament campaign.

The WCC presents the concerns of national and regional church and ecumenical bodies at an international level. It believes that something can be done about the problem of small arms and light weapons and encourages churches and individual Christian committed to building a culture of peace to help end the proliferation of small arms.

Working with other NGOs and governments, the WCC can effect policy decisions on a global level. The WCC is a founding member of the IANSA of over 200 member organizations in more than 40 countries all seeking to address the epidemic proliferation of small arms in a holistic way[49].

12. Conclusion on NGOs

NGOs play an important role in relation to the issue of controlling small arms and light weapons; by pinpointing the dangers of the uncontrolled accumulation of small arms and light weapons and their deadly effects, they help to build a greater awareness among the people regarding this issue.

NGOs should continue this work, because much more has to be done to solve this big problem. They should continue their mission in making this issue known worldwide and also their direct and indirect pressure on governments, especially the strong ones, who have a great effect in the international policy making process.

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[48] IANSA, About IANSA, http://www.iansa.org/mission/htm, date accessed 14/3/2002

[49] WCC, 'Small Arms Light Weapons, A Challenge to the Churches', http://www.wcc-coe.org/wcc/what/international/challenge.html, date accessed 06/05/2003

CHAPTER FOUR

1. The Crucial Need for Combating the Illicit Manufacturing of and Trafficking in Small Arms and Light Weapons

The excessive and destabilizing accumulation and transfer of small arms and light weapons is closely related to the increased incidence of internal conflicts and high levels of crime and violence. Therefore, there is an urgent need to combat the illegal manufacturing of and trafficking in small arms and light weapons, especially if one adopts the human security approach in dealing with this issue.

The core of the human security agenda in the small arms context is to ensure people's safety from physical violence due to armed conflict, repressive government or crime. A human security approach suggests a shift in focus from weapons to people. While a general concern for the widespread availability of weapons is justifiable, the overall numbers of weapons are far less important than their impact. Adopting a human security perspective focuses attention on the *human costs* of the widespread availability of small arms. This signifies a greater attention to violations of human rights and international humanitarian law. The small arms issue is currently framed to respond principally to the interest of State security and international peace and security.Today there is a global threat to human security from the spread of small arms and light weapons and their illegal trade. These pose a great humanitarian challenge, especially in internal conflicts where a high proportion of the causalities are civilians who are the deliberate targets of violence. This constitutes a gross violation of international humanitarian law[50].

Therefore, it is important to study why there is a need today for arms control, and what is the importance of considering the crime of illegal arms manufacturing of and trafficking in small arms and light weapons as an international crime and finally we should also consider other measures that can and should be taken to combat this crime more effectively.

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[50] UN, DDA, 'A Global Threat to Human Security', http://www.un.org/Depts/dda/CAB/smallarms/brochure.htm, date accessed 06/05/2003

2. The Need for Arms control

The main aim of arms control and disarmament policies is peace and increased security through agreed limitations and reductions of armaments, measures that will reduce the danger of war or lessen its destructiveness, if efforts to avert war fail.

It has been shown that although in many conflict situations small arms and light weapons are clearly a destabilizing factor, they are not yet subject to any effective arms control policy. The most important characteristic of recent conflicts is the fact that widespread death and suffering result not from the major conventional weapons traditionally associated with war – tanks, aircrafts and warships, for example – but from small arms and light weapons[51].

The unchecked flow of small arms and light weapons to areas of conflict represent a significant threat to world peace and security. Increased attention to the lethal effects of easily available small arms and light weapons on the part of humanitarian relief agencies, national governments, international organizations and media should translate into a greater public appreciation of the need to better control the production, supply and diffusion of these weapons.

It is essential to mention here, that the problem is incredibly complex and policies to control and regulate these weapons will not come easily. Nonetheless, the scale of death and injuries caused by small arms and light weapons is such that the international community must continue to search for effective means of controlling and reducing the lethal commerce of small arms and light weapons around the world[52].

3. The Importance of Considering this Crime as an International Crime due to its Deadly Effects on the International Community

It has been seen how the United Nations, the OAS, the EU and several other alliances of regional governments worked and are still working to strengthen global gun controls. Largely initiated by the

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[51] Boutwell J. and K., Michael, 'Small Arms and Light Weapons: Controlling the Real Instruments of War', http://www.armscontrol.org/act/1998_08-09/mkas98.asp, date accessed 06/05/2003

[52] As above

law enforcement community these initiatives aim to trace and record the movement of weapons over borders and to reduce the availability of guns for crime, conflict and all forms of violence[53].

Till today all the regional and global initiatives are focusing on the prevention and control methods, even though they say that the illegal manufacturing and trafficking of small arms and light weapons should be considered as a criminal offence in the domestic laws, they never said that this crime could be prosecuted internationally.

However it has been shown that small arms and light weapons accumulation bring with them great dangers in that they contribute to great violations of Human Rights, crimes against humanity and war crimes. Hence, the illegally trafficked small arms and light weapons are often the tools used to commit crimes against humanity and genocide. Therefore it is arguable that the illegal manufacturing of and trafficking in small arms and light weapons should be liable to prosecution on the international level, especially that most of these crimes are themselves international and transnational.

It is maintained that this is the right time to make such a move towards an international criminalisation of this crime, especially with the establishment of the International Criminal Court. The Rome Statute entered into force on 1st July 2002 and the Court is expected to be fully functioning by mid-2003. The ICC will be a permanent court for trying individuals accused of committing genocide, war crimes and crimes against humanity. I believe that the illegal firearms' trafficking is firmly related to those crimes in that it provides the primary means in committing them. Therefore it is arguable that this crime be also introduced on the list of crimes within the competence of the ICC. It is essential to mention here that the ICC is only a supplementary court, that is, the national courts are the primary competent bodies to prosecute these crimes, but if a State is unwilling or unable to try individuals who committed such crimes, that is when the ICC gains jurisdiction, so as not to let such a serious crime that effects the international community as a whole unpunished.

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[53] International Gun Violence Prevention, http://www.pcvp.org/pcvp/firearms/intl5.shtml, date accessed 25/6/2002

4. Further Measures to be Taken for Combating and Controlling this Crime

From all that has been learned about the international trade in small arms and light weapons, it is evident that no single policy initiative will be sufficient to deal with this problem. This effort demands a host of initiatives, covering the international arena and also, regional, national and local levels. National governments especially will have to go beyond their support for cracking down on the illegal trade in small arms and light weapons and examine their own role in the current legal weapons trade[54].

Various initiatives may be proposed that may combat the illegal transfers of small arms and light weapons more effectively. The first and perhaps the most important step is the adoption of international norms against the uncontrolled and destabilizing transfers of small arms and light weapons to areas of tension or conflict. These norms should come in the form of a legally binding covenant or a convention. However as we have seen before some initiatives have been already taken on the UN level, like the work undertaken by the UN Panel of Governmental Experts on Small Arms, and the *UN Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition*. Therefore the basic groundwork is provided, but much work is needed to strengthen these norms and to promote their acceptance by governments. As in the worldwide campaign against landmines, the media can focus public attention on the dangers posed by such weapons, especially to civilians and children. However the issue of small arms is admittedly more complicated than that of anti-personnel landmines, due to the fact that national governments and military and police forces can demonstrate a far greater legitimate need for light weapons for purposes of self-defense and national security[55].

Another important step that has to be taken is to increase international transparency. There are no efficient means at present, to monitor and control the diffusion of small arms and light weapons and to provide detailed information on the production, sale and

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[54] Boutwell J. and K., Michael, as above at note 51

[55] As above

transfer of such weapons. Few governments actually provide data on imports and exports of light weapons, and the UN Conventional Arms Register covers major conventional arms only. Therefore efforts to increase transparency must be made at the national, regional and international levels. National governments should be encouraged to publish detailed annual tallies of weapons imports and exports, while regional arms registers covering light weapons should also be encouraged. Finally, at the international level, the UN register should be gradually extended to cover all types of munitions, including small arms and light weapons.

Another measure that has to be taken is to increase State accountability, especially that in the current situation, control over the import and export of small arms and light weapons rests with national governments; thus efforts to better regulate the trade in such munitions will be most effective at the national level.

Finally, it is essential to establish effective and reliable mechanisms for the oversight of the arms market. Technology should be developed and used internationally to assist in the flow of small arms and light weapons, identify the illicit sources of supply, and improve law enforcement and customs prosecution of illegal suppliers and traders.

CONCLUSION

The most immediate need today is for the human development community to publicize the effects of these weapons, for there is an urgent need in making the world aware of the gravity of the problem of small arms and light weapons. Moreover, civil society and NGOs should become more active in this sphere, by promoting further awareness and pushing governments to take the appropriate measures in controlling the excessive flow of small arms and light weapons.

Most urgently governments should be encouraged to ratify the *UN Protocol against the Illegal Manufacturing of and Trafficking in f\Firearms, their Parts and Components and Ammunition*, so that it may enter into force and be implemented as soon as possible. Hence, civil society and NGOs should continue their work and publicize all the violations that are caused by small arms, the failure of governments in controlling them and their unacceptable conduct in transferring small arms and light weapons to countries where

systematic violations of international humanitarian law is taking place. Most significantly a focus should be made on the major small arms exporting countries, which are, the US, the Russian Federation, France, the United Kingdom, Germany, Italy and Canada. These countries are contributing to human rights violations and undermining the prospect for social and economic development around the world by transferring small arms and light weapons to countries where governmental or non-governmental groups are systematically violating human rights. NGOs should also lobby governments and make recommendations.

As has been discussed through this paper, small arms and light weapons bring with them great dangers. However, it is an acceptable fact that small arms and light weapons have also a legitimate use – for security forces, hunting and sports. Therefore, it is useless to argue that these weapons should be completely banned. Nevertheless, the illegal manufacturing of and trafficking in small arms and light weapons, as has been argued in the paper, should be definitely eradicated and controlled.

BIBLIOGRAPHY

Amnesty International, 'Human Rights Abuses with Small Arms', Illustrative Cases from Amnesty International Report 2000-2001, AI-index: POL 34/007/2001, 09/07/2001.

Amnesty International, 'The Terror Trade Times 2001, Selling Out Human Rights', part 1, Amnesty International, http://web.amnesty.org/web/tt.nsf/June2001/index, date accessed: 12/3/2002

Amnesty International, 'The Terror Trade Times 2001, Proliferation: Global Growth in Small Arms', http://web.amnesty.org/web/ttt.nsf/June2001/proliferation Date accessed: 06/05/2003

Australian Institute of Criminology, 'Illegal Trafficking of Small Arms', http://www.aic.gov.au/media/990303.html, Date accessed: 06/05/2003

Bamako Declaration on an African Common Position on Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 30 November-1 December 2000, http://www.basicint.org/bamako.htm, date accessed 24/4/2002

Boutwell, Jeffrey and Klare, Michael, 'Small Arms and Light weapons: controlling the Real Instruments of War', http://www.armscontrol.org/act/1998_08-09/mkas98.asp, Date accessed: 06/05/2003

British American Security Information Council: Weapons Trade, http://www.basicint.org/wtindx.htm, date accessed 14/3/2002

Carnegie Commission on Preventing Deadly Conflict, 'Preventing Deadly Conflict',
Final Report, Carnegie Corporation of New York, 1997.
Clegg, Elizabeth, 'Controlling Legal Arms Transfers: The EU Code of Conduct', yearbook 1998/99, *Conflict Prevention Policies of the European Union, Recent Engagements, Future Instruments*, 1999.
Dhanapala, Jayantha as quoted in Disarmament Times ' DC Begins Amidst Much Cause for Despair' April 1999
Dunay, Pal, 'Conventional Arms Control: Elusive Victories', Newsletter number 39, UNIDIR, *Disarmament and Security: The Past Decade,* printed in UN, Geneva, October 1998.
EU Code of Conduct on Arms Exports, adopted on 8 June 1998, http://europa.eu.int/comm/development/prevention/codecondarmsexp.htm, date accessed 20/3/2002
EU, 'Joint Action of 17 December 1998', *The official journal of the European Community*, 1999/34/CFSP
Green, Owen, 'Tackling Illicit Arms Trafficking and Small Arms Proliferation: EU
Roles and Programs', yearbook 1998/99, *Conflict Prevention Policy of the European Union- Recent Engagement, Future Instruments,* 1999
Hippchen, Leonard, and Yim, Yong, 'Terrorism International Crime and Arms Control', Charles C Thomas Publishers, U.S.A., 1982.
HRW, 'Controlling the Trade in Small Arms and Light Weapons- Licit or Illicit- Is a Human Rights Imperative', HRW World Report 2001: Arms Division, http://www.hrw.org/campaigns/small-arms/salw011801.htm Date accessed: 06/05/2003
HRW, 'Arms Transfers to Abusive End Users', HRW, World Report 1999 http://www.hrw.org/worldreport99/arms/arms4.html, Date accessed: 06/05/2003
HRW, 'UN Program of Inaction on Small Arms: Conference Ending With Little Results', http://www.hrw.org/press/2001/07/smallarms0719.htm Date accessed: 06/05/2003
IANSA, About IANSA, http://www.iansa.org/mission/htm, date accessed 14/3/2002
International Alert, http://www.international-alert.org/aboutus.htm Date accessed: 06/05/2003
International Gun Violence Prevention, http://www.pcvp.org/pcvp/firearms/intl5.shtml, date accessed 25/6/2002
Interpol's Firearms and Explosives Proliferation Intervention Efforts, http://www.interpol.int/public/weapons/default.asp Date accessed: 06/05/2003
Intriligator, D., Michael and Brito, L., Dagobert, 'On Arms Control', ed: Edward A. Kolodziej and Patrick M. Morgan, *Security and Control,* vol. 1, Greenwood Press, 1989.

Laurence, Edward, *Light Weapons and IntraState Conflict*, Carnegie Corporation of New York, 1998.

Lorenzo, J., Ruben, 'The Role of Arms Manufacturers and Traffickers', ed: Pericles Gasparini Alves and Diana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* UNIDIR, Geneva, 1998.

Manross, Donald, 'Developing New Links with International Policing', ed. Pericles Gasparini Alves and Diana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* United Nations Institute for Disarmament Research, Geneva, 1998.

Manross, Donald, 'Strengthening International Cooperation: A New Agenda for Control Regimes?', ed: Pericles Gasparini Alves and Diana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* UNIDIR, Geneva, 1998.

OAS, The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Explosives and Other Related Materials, www.oas.org/juridico/english/treaties/a-63.html Date accessed: 06/05/2003

OAU, Bamako Declaration on an African Common Position on Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 30 November-1 December 2000, http://www.basicint.org/bamako.htm Date accessed: 06/05/2003

Organization of Security and Co-operation in Europe, OSCE Document on Small Arms and Light Weapons, Vienna, 24 November 2000, http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm Date accessed: 06/05/2003

Rana, Swadesh, 'The Role of State', ed: Pericles Gasparini Alves and Diana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* UNIDIR, Geneva, 1998.

Salomone, Patricia, 'Strengthening International Cooperation: A New Agenda for Control Regimes?'ed. Pericles Gasparini Alves and Diana Belinda Cipollone, *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda,* United Nations Institute for Disarmament Research, Geneva, 1998 Small Arms, http://www.auswaertigestm.de/www/en/aussenpolitik/friendenspolitik/abrundr/kleinwaffen_html, Date accessed: 25/6/2002

UN Economic and Social Council, 'Measures to Regulate Firearms for the Purpose of Combating Illicit Trafficking in Firearms', Vienna, July 28, 1998

UN Report of the Panel of Governmental Experts on Small Arms, report #A/52/298, from the Secretary General to the UN General Assembly, August 27, 1997

UN, DDA, 'A Global Threat to Human Security', http://www.un.org /Depts/dda/CAB/smallarms/brochure.htm, Date accessed: 06/05/2003

UN, Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001, A/CONF.192/15

United Nations Department for disarmament affairs, DDA 2001 Update, publication, issue June-July 2001, http://www.un.org/Depts/dda, Date accessed: 06/05/2003

UN Disarmament Machinery, http://www.igc.org/disarm/dismachinery.htm Date accessed: 06/05/2003

United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Trans-national Organized Crime, Distr: General, 20 March 2001, A/55/383/Add.2

United Nations, Report of the Panel of Governmental Experts on Small Arms, A/RES/54/258

United Nations: 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', ed: Christopher Gane and Mark Mackarel, *Human Rights and The Administration of Justice,* International Bar Association, Human Rights Institute, 1997.

United Nations: 'Code of Conduct for Law Enforcement Officials', ed: Christopher Gane and Mark Mackarel, *Human Rights and The Administration of Justice,* International Bar Association, Human Rights Institute, 1997.

Vitzthum, G., Wolfgang, 'Arms Control and International Law', ed: Institute for Scientific Co-operation, vol. 41, *Law and State: A Biannual Collection of Recent German Contributions to These Fields,* Tubingen, Federal Republic of Germany, 1990.

WCC, 'Small Arms Light Weapons, A Challenge to the Churches', http://www.wcc-coe.org/wcc/what/international/challenge.html, Date accessed: 06/05/2003

FREEDOM FROM WANT: INTERNATIONAL RESPONSES IN THE ALLEVIATION OF POVERTY

ALBERT GHIGO

CHAPTER 1

1. Freedom from want

Freedom from want, alongside with freedom from fear and the freedom for future generations to sustain their lives on earth are the three principal areas identified as needing particular attention from the world community at large in the Millennium Assembly. In his Millennium report, the Secretary-General of the United Nations (UN) Kofi Annan clearly underlined under Agenda item 49(b) the fact that while the eradication of poverty will become the most pressing challenge in the years to come, its elimination is the responsibility of everyone and not only of the leaders of those States which have a high proportion of poor within their populations.

When in Human Rights discourse, reference is made to the category of rights which refer to the 'freedom from' type, one tends to generalize that this category of rights has to do with the so-called first-generation rights and that these rights call for acts of omission rather than commission. For this reason these freedoms are also referred to as *'negative liberties'*[1]. However, nothing can be further from the truth. The origin of the phrase 'freedom from want' dates back to the Four Freedoms address made by the President of the United States, Roosevelt, who in 1941, called for measures to ensure

[1] Leader 'The politics of Human Rights' (2001) The Economist, August 18, 10-11

the enjoyment *'everywhere in the world'* of the four freedoms, one of which was freedom from want. The same freedom was reiterated months later under Principle 5 of the Atlantic Declaration, adopted by the same American President and the British Prime Minister, Churchill, in the securing of improved labour standards, economic advancement and social security[2].

In his Millennium report, Annan recognises that freedom from want constitutes one of the founding aims of the UN. This furnishes proof, if any was needed, that *'freedom from want is an achievement which eludes us still'*[3], even though over the years, this noble aim has given rise to a number of acts from the global community.

The goals which have been set by the UN at the Millennium Assembly refer to many inter-related goals. Among these, one finds: achieving universal primary education, reducing under-five and maternal mortality, as well as gender equity in an ongoing commitment to social progress in freedom from want and fear, with the most urgent and pressing goal being that of halving the proportion of people living in extreme poverty, by 2015.

2. A Single Kind of Poverty?

Nothing is simpler, one tends to believe, than to give a definition of the term 'poverty'. Since it has the opposite meaning of wealth, then it can be easily deduced that poverty is a condition which will impede one or many to secure resources to obtain goods and services and thereby the enjoyment of a better, if not a higher standard of living. Nevertheless, poverty is much more than a measure of standard of living since it has to do also with lost opportunities of people living in this condition. It is possible to reach a an elaborated meaning of poverty and also, to distinguish between various types of poverty, since poverty may be defined on the basis of criteria other than material criteria, such as cultural or spiritual factors.

The *terminal poor*, then, are people who are most often at their early stage of their family-building or become poor during their old

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[2] Asbjorn, E., 'Economic and Social Rights' in Symonides, J., (ed) *Human Rights; Concept and Standards* (UNESCO Publishing 2000) 4,117

[3] Annan, K., 'We the peoples: the role of the United Nations in the tenty-first century' Report of the Secretary-General to the General Assembly, A/54/2000,10

age[4]. They are referred to as terminal poor because, given the necessary opportunities these people will try their best to integrate with mainstream economic activities. This group of people are also referred to as living in conjunctional poverty, meaning that they are subjected to poverty because of climatic crises such as droughts or political turmoil, or civil wars, where famine (as famines in African countries demonstrate) was used as a political weapon by the State against secessionists.

Those who are *chronically poor* or *destitute* are then those who will be poor during the entire course of their lifetime, possibly also because these people may have somebody in their family who suffers from a disability[5].

On the other hand, those who are termed as *acutely poor* or *living in structural mass poverty* are those who will remain poor during their lifetime, even if opportunities are present during their lives. It is probable that a characteristic of this last group would be the inability to adjust food expenditure patterns,[6] though the worst off will remain those who, even if their food expenditure pattern is adjusted, would still be exposed to serious nutritional deficiency.

The problem of relative poverty as distinct from absolute poverty, which is related to the problem of social justice, is then very closely associated with the question of distributive justice. Relative poverty does not define the poor falling under this category as falling below a certain fixed level of subsistence, but as those whose incomes are too far removed from the rest of society in which they live[7]. However, no matter how one prefers to analyse poverty, these problems demonstrate that an inverse relationship exists between poverty and justice.

On the other hand, a yardstick usually identifies absolute poverty: the poverty line, if reached, allows people to be just physically

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[4] Ramprakash, D., Ratnayake, R.M.K., 'Defining the problem and Characterising the poor' in C. Easter, *Strategies for Poverty Reduction; Technical papers from a Commonwealth consultation on Rural Poverty Alleviation* (Comm. Consultation on Rural Poverty Alleviation Colombo 1992)25

[5] As above, pg. 26

[6] As above, pg. 27

[7] Holman, R., *Poverty Explanations of social deprivations* (Richard Clay Ltd., Suffolk 1978) 14

efficient[8]. Whoever falls below this level of subsistence is therefore considered to be living in absolute poverty. There is no complete agreement on the methods used to calculate who would fall in the category of absolute poverty, for the *per capita* expenditure level required to achieve an adequate calorie intake depends on food consumption norms. These are, however, not fixed norms since they in turn are dependent on many biological and behavioural considerations[9].

Apart from definitions of poverty which are based on income or food consumption levels, it is possible to define poverty as a denial of human rights, be they economic and social rights such as the right to health, adequate housing, food and safe water, the right to education, or civil or political ones, such as the right to a fair trial, political participation and security of the person. Perhaps, the most comprehensive and rights-sensitive definition of poverty is that reached by the Economic, Social and Cultural Rights Committee of the UN which defined poverty as a

> *'human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, economic, political and social rights*[10]*.'*

3. Dimensions of Poverty

It has been estimated that in the world today, there are over 1 billion people who live on only a single dollar per day, and who are as such considered to live in extreme poverty. It has also been estimated that as much as 4.5 billion people still live today with nearly 2.5 dollars per day, while other figures reveal that as much as 85% of the poor living in extreme poverty conditions live in the rural areas of developing countries and that 60% of those falling within this category are in fact, women.

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[8] As above, pg. 1,7-8

[9] Ramprakash, D., above at note 4, pg. 28

[10] www.unhchr.ch

The World Bank (WB) estimates that half of the poor were in South Asia in 1990 while sub-Saharan Africa's (SSA) share of the poor has increased to 27% of the total in 2000. While the issue of poverty is not endemic to any particular society or continent (since poverty exists also in the American continents and Europe) it is the poverty situation in these former continents which, more than anywhere else, preoccupies the international actors concerned with poverty reduction, amongst which one finds the UN, the World Bank (WB) and other international lending agencies. This is so because it is projected that a very high percentage of the increase of world population over the next 25 years is expected to take place in these same regions of the world.

Poverty is a multidimensional phenomenon,[11] and although it is possible to some extent to delineate some common characteristics, which are often the major factors of poverty, such as household size, demographic structure of households, education attainment and the marital status of the main income earner,[12] nevertheless, the poor remain a heterogeneous group as opposed to a single category.

While it is possible to State that at the heart of the problem of poverty one finds material deprivation such as hunger and food insecurity, the persistence of poverty is linked to the dimensions of gender, age, culture, institutions and location-specificities, while the pattern of poverty varies by social group, season, location and country[13].

It is interesting to note that while an estimate of the number of poor is reached by applying nutritional efficiency levels, which, in turn are also dependent on income-related values, the poor themselves hardly regard income as one of the most important assets for survival. On the other hand, physical, human, social and environmental assets are of extreme importance to the poor because it is thought that through the managing of these assets, they would be better able to cope with their vulnerability and insecurity[14].

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[11] Healey, J., Killick, T., 'Using aid to reduce poverty' in F Tarp, (ed), *Foreign aid and development: Lessons learnt and directions for the future* (2000) 9,223

[12] Ramprakesh, D., above at note 4, pg. 2,28

[13] Narayan, D., Patel, R., Schafft, K., Rademacher, A., Koch-Schulte, S., *Can Anyone Hear Us? Voices from 47 Countries* (World Bank, 1999) 6-7,26-27

[14] As above, pg. 39

Physical assets would include usually land and material belongings. Human capital, especially for those who do not possess material and productive assets, would include health, education, training and labour power. Social capital, on the other hand, includes the extent of social networks such kin, neighbours and associations, while environmental assets would relate to trees, forests and the provision of water.

In particular, for the poor living in the rural areas, poverty means a lack of access to basic infrastructure: roads, transportation, water and basic services, such as health care and schools. It is possible to reach a conclusion that poverty in rural areas becomes more severe with changes of season, in general in early spring, before crops can be planted and after food supplies have finished[15].

A psychological dimension derived from the condition of poverty, would then induce poor people to feel powerlessness, voicelessness, dependency, shame and humiliation. However, it is believed that a way of reacting to this despair is by keeping alive their cultural identity and the social norms of solidarity.

4. Globalisation, the Poor and Digital Advancement

The problem of poverty has reached large proportions over the years. If, for the sake of the argument, the major improvements in medicine are not to be accounted for, it is possible to argue that the gap between rich and poor countries has continued to widen over the last decades.

Globalisation, at least in its economic aspect, is still a long way from working for the benefit of all, especially since national governments, still more in the least developed countries, are not being given a choice other than to follow what the major lending institutions prescribe for healing the economic woes, and in particular for reducing poverty within their countries.

In a world where power is increasingly becoming a prerogative of trans-national corporations (TNCs), it has become even more difficult for developing countries to build development strategies which take into account a human dimension.

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[15] As above, pg. 58

It is then debatable whether the advancement of technology is to be seen in a manner which exacerbates the divide between the rich and the poor of the world, or else, if it is contributing towards the reversal of this phenomenon. It has become common jargon to refer to the world as a 'global village', principally because of the elimination of time and space factors from our daily lives. The increasing importance of the World Wide Web and Internet services with ever faster connection speeds, as well as the high technology used in even more sophisticated mobile telephony services, makes a person living in the developed world believe that boundaries are a thing of the past.

On the other hand, for the poor living in regions of the world where food insecurity is still their major everyday preoccupation, the advancement in technology is most likely to be perceived, at least in part, with scepticism, since this is equated with an increasing sense of powerlessness on their part.

Furthermore, the technological divide can be seen in the eyes of the developing world to increase the economic growth, and hence, the wealth of the richer countries at a faster rate than developing countries can or would like to. The question again is that of justice or, better still, equity.

On the other hand, there are exponents who argue that technology is a major aid to the development of the countries which need to forgo enormous debts accumulated over the years, partly because of lack of efficiency from the State's institutions, and partly because of poverty reduction programs which were imposed on these countries, by the WB and the International Monetary Fund (IMF). These programmes have in most cases aggravated the problem of poverty as opposed to addressing it equitably.

Some have argued that despite the controversy, especially in Europe, about GM technology, anything that raises, finally, the rural incomes of the world's poor should not be met with any controversy, especially since there is no sufficient proof that GM products are harmful to men or the environment.

In the field of medicine, it is arguable that a lot more can be done by pharmaceutical companies to invest on health research to provide those drugs which can cure the ills of the poor. For even with regards to medicine, it is possible to conclude that a higher percentage of the monies spent on research and the eventual number of drugs introduced to kill the ills in the last quarter of a century,

disproportionately favoured the rich. In fact, out of 1,223 drugs introduced over this period of time, only 13 were specifically aimed at tropical diseases. As regards to monies spent on research, while the total sum of monies spent reached US $70 billion, only US $300 million were directed at developing an Anti-Immune Deficiency Syndrome (AIDS) vaccine, and only US $100 million directed at malaria research.

With regards to progress made in expanding the access of the Triple Antiretroviral Therapy (TAT), thanks to differentiation in pricing and licensing in production, the price of the TAT has dropped from a staggering $12000 in 2000 to $350 in the poorest countries today. However, for the poorest communities, this price is still unreachable and more positive government action is needed to commit more funds to purchasing medicines and ensuring that these drugs reach the poorest of society.

Another problem is related to 'biopiracy' where some firms which become aware of certain healing properties of plants which are endemic to poor countries with rainforests, patent the active ingredients without giving any return to the countries in question.

The Global Compact, as proposed by the UN General Secretary to the World Economic Forum in 1999, if successful, would be one step in the right direction, especially as this would commit TNCs to respect *inter alia* the Nine Principles proposed at Davos, and in particular Principle 1, as regards the support and respect of international human rights by TNCs in their spheres of influence and to ensure, under Principle 2, that their own corporations are not complicit in human right abuses.

It has been suggested that the digital revolution is actually helping the poor more. Furthermore, as communication is becoming cheaper, this has had the positive effect of creating new opportunities for developing States since tasks that can be digitized have created new employment opportunities at a distance. The benefit here is two-fold: the consumers benefit from lower charges while making use of these services and especially, the workers in developing countries provide the services to many firms of the developed world without having to leave their own countries.

In a world where power is increasingly becoming even more with education and the use of information technology, technology can, if certain conditions prevail, improve the lives of many in the developing world.

5. Poverty Alleviation or Eradication?

The concept of alleviation of poverty was coined after it was conceded late in the 1960s from the mixed experiences in Africa, Latin America and most of Asia, that even if development took place at the national level, which was only the case in the latter two continents, there was no automatic assurance that this would actually improve the well-being of all sections of the population.

Poverty alleviation, in itself a development policy, was coined by UN agencies, most notably in the International Labour Organization (ILO), the International Fund for Agricultural Development (IFAD) and the Food and Agricultural Organisation (FAO) documents and conferences that were promoting the need for the productive capacity of the poor to reduce under-nutrition and alleviate rural poverty[16]. At the same time, in the late 1970s, even the WB under the leadership of McNamara, used similar jargon such as the advocacy of equal rights for the small producers in order to promote equity in development strategies. Nevertheless, this harmony between the ideals of UN agencies and the WB was abruptly halted when in 1981, at the heart of the Structural Adjustment Programmes (SAP) which the WB devised for African nations, emphasis was made on *market forces*, and no longer on *people*.

This abrupt shift in policy, which went against the expectations and objectives of the African governments as devised in the Lagos Plan of Action of 1980, was met with dissatisfaction from the African countries but not enough to forgo the WB loans. So much so that, despite the fact that the UN Programme of Action for African Economic Recovery and Development of 1986-1990, the FAO Document on African Agriculture of 1986 and the Khartoum Declaration of 1988 all criticized the WB policy, it was not before 1989 that the Economic Commission for Africa (ECA) protested at the fact that the SAP contained no human dimension which could solve the realities of Africa's poor.

Although a whole decade was lost, the ECA Document, entitled

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[16] Mafeje, A., 'Conceptual and Philosophical Predispositions' in Wilson, F., Kanji, N., and Breather, E., (ed) *Poverty Reduction: What Role for the State in Today's Globalized Economy* (CROP, Cape Town, 2001) 2, 15-16

African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP) of 1989, demonstrated that the WB was mistaken in assessing that through the adjustment programmes SSA was on the right track. On the contrary, it was shown and never refuted by the WB itself, that SSA countries with strong SAPs featured as the worst of any group, which adhered to the SAPs. In fact, according to this study, the sub-Saharan countries had registered a negative annual rate of 0.53 % from 1980-87, while those countries of the same region which had no SAPs, had managed to grow by a positive rate of 3.5% for the same period of time. Far from reducing poverty, the IMF conditionality made living harsher for the most vulnerable, since they had to forgo any benefits derived from the State through subsides during this period.

The concept of poverty eradication was first spelt out by the United Nations Development Programme (UNDP) in 1997, at a time when the so-called Bretton Woods Institutions had begun to admit their fault for realising quite late in the day that the non-incorporation of the human dimension for equity in the programmes they devised for decreasing poverty in the least developed or developing countries, had resulted in a failure of the goals planned[17]. Other UN agencies, most notably IFAD and ILO, had been very critical of the WB's programmes as early as 1992, declaring that nowhere had the poverty alleviation programmes in the Third World brought about poverty amelioration or distributive justice. In 1995, the Copenhagen Declaration on Social Development had posited that a post-Cold War society should make the eradication of poverty a priority, while the decade 1997-2006 became known as the UN Decade for the Eradication of Poverty.

By promoting the use of the poverty eradication paradigm, UNDP wanted to underline the notion that the poor had a definite role to play in the development process of their countries, and that no real development strategy is possible if a human development aspect is lacking.

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[17] As above, pg. 21-22

CHAPTER 2

Would Decreasing Inequalities Between Peoples be Conducive to an Environment of Human Freedoms?

1. Human Rights And Human Development

The obvious link between human rights and human development is human freedom, for in order for human beings to pursue their capabilities and realise their rights, it is necessary that a degree of freedom is present[18]. Moreover, it is possible to trace the legal foundation for human development in major human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICCESCR) and the International Covenant on Civil and Political Rights (ICCPR).

In the Universal Declaration, already in the Preamble, it is Stated that the UN is determined to promote social progress and better standards of living in greater freedom, while Article 25, recognises the right to a standard of living adequate for the health and well-being of the self and family, including food, clothing, housing, medical care, necessary social services and the right to security in the event of unemployment, sickness, disability, age or other lack of livelihood in circumstances beyond one's control. Articles 26 to 28 refer respectively to the right to education, the right of participation in the cultural life of the community and to a social and international order in which rights and freedoms can be realised[19].

The ICESCR and the ICCPR both State in their first Article that, by virtue of the right of self-determination, all peoples should freely determine their political status and pursue their development. Article 11 of the ICESCR then, also reiterates the right to an adequate standard of living and continuous improvement of living conditions[20].

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[18] UNDP, Human Development Report 2001, 9

[19] Ghandhi, P., *'International Human Rights Documents'* (2nd ed Blackstone Press London 2000), pg.21, 24, 25

[20] As above, pg. 83

People living in poverty might know or be ignorant of the existence of such rights. What is certain however, is that they perceive themselves as being excluded from the rest of society. This, in itself, is a discriminatory method which foments inequality and which at the same time runs counter to the culture of human rights where every human should be considered equally before the law[21].

This notion goes far in explaining why poverty constitutes a denial of the universality principle of human rights. In fact, poverty is increasingly seen nowadays as an infringement of the freedom which the poor should have as human beings, possessing dignity in determining their capabilities according to their needs and interests. It emerges that the indivisibility of human rights has not yet attained the status of being a common practice.

In so far as international texts are concerned (such as, the UN Declaration or Covenants or the regional Conventions of Europe, America or Africa) nowhere are the rights accompanied by coercive elements which would make it possible to sanction States in the event that they fail to protect the rights of their peoples.[22] The problem is that when these international documents were conceived, not one of them was designed to cater for the problem of poverty, not even the African Charter on Human and Peoples' Rights of 1981, even though poverty was already then one of Africa's severest problems.

Despite declaring that freedom, equality, justice and dignity were to be the legitimate aspirations of African peoples, the Charter of the then Organization of African Unity (OAU) nevertheless regarded the principles of sovereign integrity of States of non-interference in domestic affairs as inviolable. This was at the expense of the protection of the human rights of the peoples themselves[23].

Nevertheless, the fact that international human rights law focuses on discrimination and that at least 168 States have undertaken to

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[21] Pettiti, L.E., Meyer-Bisch, P., 'Human Rights and Extreme Poverty', in *Symonides,J., Human Rights; Concept and Standards* (UNESCO Publishing 2000) 6,158

[22] As above, pg. 163-164

[23] Odinkalu,C, A., 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights' in *Human Rights Quarterly* (Vol 23,3, 2001) 328-329

apply the Convention on the Elimination of All Forms of Discrimination against Women, shows that States have begun to realize the important link of gender equality to their country's human – and economic – development. That is to say that

> *'[i]mproving access to education for girls and women reduces child mortality and improves the nutritional status of children, and improving gender equality in secondary education has been linked to increases in per capita income'*[24].

According to the UNDP, poverty and inequality are often responsible for undermining human rights as these conditions fuel social unrest and violence and increase the precariousness of any rights, whether socio-economic or political[25].

An explanation as to why poverty and inequality may bring about unrest can arguably be forwarded: if poverty is associated with the violation of the right to a reasonable standard of living, this in turn also on the infringement of all other human rights, thereby rendering the lives of the poor even more miserable to sustain.

However, if poverty within a country decreases or if inequality decreases, can it be concluded that as a result of this amelioration, more people would be able to exercise their human rights freely? Although a straightforward answer would be in the affirmative, one has also to consider that poverty calculations at a certain point in time do not give a complete picture with regard to the situation of human freedoms within a particular country, or whether human rights are being enforced or not. It may seem very encouraging for a country to be able to State that it has reduced the number of people living in extreme poverty, meaning those living with less than one US Dollar per day. However, at this stage one needs to consider whether this number has been shifted into the category of those who might be living with less than two Dollars a day; this latter group are still considered as poor by society at large.

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[24] Robinson, M.,'Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance', Lecture by the United Nations High Commissioner for Human Rights, the World Bank, Washington D.C.3 December 2001, 7-8

[25] UNDP, Human Development Report 1997, 7

Other considerations would be to find out if there are any factors which accompany a trend of decreasing inequality within countries; whether this trend is long-term; and if this is accompanied by a poverty reduction strategy containing elements of gender equality, human development, good governance and therefore transparency, accountability, the rule of law and democratic principles.

2. Inequality, HDI and Poverty Indexes

In a real world, given that there is already an initial inequality within countries, it has been demonstrated that it cannot be taken for granted whether inequality will rise or fall within a developing country if this is experiencing a *per capita* growth.

As mentioned above then, globalisation is assumed to have been a major cause for increasing inequality between countries. In this way, inequality has increased not only *within* many countries but also *between* the rich, industrialized States and the least developed nations. The UNDP reached this conclusion in its Human Development Report of 1999 while using the ratio between the average unadjusted income *per capita* in the countries comprising the richest quintile of the world's population compared to the poorest quintile, as a measure of world inequality.

Using the Gini coefficient as a measure of inequality between the period 1960-1997, the UNDP Stated that the ratio had increased from 30 in 1960 to 60 in 1990, to 84 in 1995 and finally, to 74 in 1997. These results would indicate that the overall inequality between countries increased, though the very fact that in the last two years of observation, the Gini coefficient decreased by 10 points does also indicate that inequality started to decrease.

What is surprising is that when the same ratio between the average income *per capita* is based on purchasing power or PPP data, it became possible to State that overall there was a small decline between the world's richest and the world's poorest fifth. An explanation given by the second analysis is that overall there was a higher economic growth among the poor than among the rich, for they conclude that while the *per capita* income of the poorest fifth was 551 dollars (PPP) in 1965 and 1137 in 1998, the income of the richest quintile was only approximately 75% more for the same period of time, i.e. from 8315 to 14623 dollars (PPP). Although the increase in incomes in the poorest quintiles was more than in the richest

quintile, this does not mean that the share of the poorest quintile as a percentage of world income increased over the same period of time. Moreover, SSA together with Eastern European countries stand out as exceptions to pattern of the poorest quintile, for according to the same study, 12 countries in Sub-Saharan Africa and 16 countries world-wide experienced a reduction in income during the same period, with the Congo, formerly, reducing its income by 60% during the same period.

Until now, it was possible to reach some conclusions regarding the incomes of the poorest and richest quintiles in the world. The fact that overall there is an indication of an increase in global income and a decrease for the same period of time in inequality, would indicate that poverty reduction should follow. In fact, the WB has acknowledged this overall trend in the world since the proportion of poor between 1987 and 1998 decreased from 28% to 24%; however, owing to an increase in population, especially in Asia and Africa, the change in absolute number does not change that significantly.

Nevertheless, these studies would indicate indirectly that the perseverance of poverty in SSA is mostly due to local factors and that other measurements or indexes should be used besides economic indicators to establish the extent of deprivation of human freedoms in these countries.

One index – the Human Development Index (HDI) – was developed as a measure of those primary factors which limit freedom of choice: that is health, knowledge and standard of living. This is of particular importance to this study as it reveals important information on human rights in developing countries.

The HDI for every country is reached by the arithmetical average of life expectancy at the moment of birth, of adult literacy, the average number of school years and of the purchasing power of the gross domestic product as calculated per individual. The HDI, though a socio-economic measure of progress or development within a country, is nevertheless based on national averages and as such can hinder differences or inequalities between gender geographical region, urban and rural areas, race or ethnic groups within countries. For this reason, it would be ideal to have separate HDIs for specific countries as this would better render the idea of the profile of human deprivation in that country, especially in SSA.

If reference is made to the Human Development Index List of the last ten years, one would immediately observe that two out of

three factors contribute to the HDI of any country: life expectancy and adult literacy, are factors which, save particular exceptions, are slow to change over time. In the SSA countries, the facts that it is mostly here that gender bias in favour of educating men exists, and that life expectancy is lower when compared to the rest of the world do not help much in ameliorating their respective HDI.

The Human Poverty Index (HPI) also includes factors such as daily caloric intake or the percentage of malnutrition among children under five years of age and lack of access to public and private resources such as accessibility to health services and to safe water in the analysis of human poverty.

In the last few years, the HPI has been decreasing for Africa. Despite this average, however, the fact that more than a third of Africa's population according to the HPI lived in poverty in 1998,

Table 1

***Per capita* Human Development Index (HDI) of selected Sub-Saharan African countries**

Country	GNP *per capita* (PPP US$)	HDI (scale 0 to 1)			HDI Ranking	
	Highest value during 1975-99	1980	1995	1999	1995	1999
Uganda	1,167 (1999)	-	0.402	0.435	160	141
Senegal	1,535 (1976)	0.327	0.398	0.423	158	145
Tanzania	502 (1990)	-	0.427	0.436	150	140
S. Africa	11,109 (1981)	0.661	0.722	0.702	89	94
Benin	933 (1999)	0.323	0.392	0.420	145	147
Congo	1,170 (1984)	-	-	0.429	143	142
Namibia	5,772 (1980)	0.530	0.624	0.601	107	111
Botswana	6,872 (1999)	0.558	0.621	0.577	97	114
Burkina-Faso	965 (1999)	0.247	0.301	0.320	172	159
C. Afr. Rep.	1,596 (1977)	0.350	0.368	0.372	154	154
Niger	1,249 (1979)	0.253	0.260	0.274	173	161
Zambia	1,359 (1976)	0.462	0.431	0.427	146	143

Note: HDI Ranking for 1995 is out of 174 countries; Ranking for 1999 is out of 162 countries

Sources: African Development Report 1998; African Development 1999; Human Development Report 2001

while in individual countries such as Uganda, Senegal, Burkina-Faso, Central African Republic, Niger and Zambia, there are even higher proportions living in poverty, is proof that a lot more needs to be done by concerted action.

The under-five mortality rate uncovers further deprivations and conditions poor people suffer from, such as malnutrition (especially of key micronutrients such as iron, iodine and Vitamin A) which is linked to diseases, injury and the death of children[26].

The fact that so many peoples in these countries still lack access to health services and safe water to name but a few, suggests that if freedom from want is to be attained in the years to come, increasing public spending on health and on infrastructural projects should take priority. In so doing, inequalities between peoples could be relaxed, accessibility to basic freedoms could be acquired and human development could become sustainable.

3. Freedoms for Development and Good Governance

Inequalities render an assessment of the lack of basic human freedoms which people have. This deprivation leads to a shorter life expectancy amongst the poorest person and in turn, to low human development. Human development, nevertheless requires other factors such as democracy and good governance, if development within these countries is to become sustainable. In fact, five inter-related types of freedoms essential for development have been distinguished: these are political freedoms, economic facilities, social opportunities, transparency guarantees and protective security[27].

While the link between political freedom and economic freedom may seem straightforward, the link between political freedom and protective security, especially in the case of Africa, is less easy to understand since the link implies that only in a true democracy will the political incentives to prevent famine be secured by the checks

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[26] ECA, African Development Report 1998, (Economic Commission for Africa) 158-159

[27] Tungodden, B., 'A balanced view of development as freedom', CMI Working Paper, Chr. Michelsen Institute, Development Studies and Human Rights (Norway 2001)16-17

and balances of the system and by a free press which contributes to famine prevention[28].

As far as Africa is concerned, it was only in the 1990s that most States of the African continent, with due pressure from their aid donors, realigned themselves to democratic constitutions; a step which many hoped would reduce corruption and offer greater transparency in the way in which African States would be governed. Only Botswana and Senegal can claim to have had working multi-party systems before this new wave of democratisation began in Africa. Benin, Central African Republic, Namibia, South Africa and Zambia are countries where the incumbent governments implemented democratic reforms and subsequently accepted electoral defeat[29]. As far as the Congo is concerned, the degree of democratisation was increasingly mixed with large-scale violence, while Uganda remains as one of those few countries in Africa which still refutes a freely functioning multi-party system, even though political parties do exist[30].

The fact however, that the majority of States in SSA used democracy as an instrument for authoritarian restoration or simply as a form of elite competition demonstrates why the advent of democracy in most cases failed to bring about the desired effects which donor countries had hoped for. On the other hand, African scholars insist that while the notion of democracy as known in the Western world is rooted in political and social rights for the individual, in African societies it is the issue of the collectivity or ethnic group (rather than individuals) that demands social justice[31].

An effective legislative and an independent judicial system besides democracy, government accountability and transparency are all factors of what it is usually termed referred to as 'good governance'. Good governance is a process whereby public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights. Recognising, through Resolution 2000/64, the link

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[28] As above, pg. 17

[29] Ellis, S., 'Democracy in Sub-Saharan Africa; Where did it come from? Can it be supported?' (ECDPM Working Paper 6) Maastricht: ECDPM; 7-8

[30] As above, pg. 8

[31] Skinner, E, P., 'African Political Cultures and the Problems of Government', in Human Rights and Governance in Africa, African Studies Quarterly (1998)2, 3; 4-5

between good governance and an environment conducive to sustainable human development, the UN Commission on Human Rights also States that the test of good governance is the degree to which it delivers on the promise of human rights[32].

In attempting to give an answer to the test of good governance in Africa, it is relevant to understand the relationship of the rule of law and poverty and whether this rule of law is offering opportunities to the poor. According to the President of the WB,

> *'the quality of the legal norms in a society and the manner they are administered have clear and direct impacts on the extent to which citizens have voice in the government decisions that affect their lives, the extent to which there are official safety nets and mechanisms that help them to cope with economic and natural shocks, and the ways open to them to overcome disadvantages and to grasp opportunities'*[33].

The fact that some countries manage to register a small growth, which is nevertheless not enough for poverty reduction to follow, is a good indicator, though in general there is lack of responsiveness to economic stimulus in many African countries. The lack of responsiveness then is related to the system of governance of the State, where according to the Fifth African Governance Forum or AGF-V, decentralisation within many African countries has failed to contribute to the strategy needed to tackle poverty. This is because, more often than not, decentralisation has only contributed *'to reinforce the power of local elites and has worsened spatial inequalities'*,[34] thereby impinging negatively on poverty reduction.

Considering that over half of African countries are still affected by regional conflict – a situation which in itself has brought about deaths of millions of people besides reducing food production – Africa cannot be said to be in a position to address the powerlessness and the vulnerability of the poor.

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[32] Human Rights in Development, www.unhchr.org

[33] Wolfensohn, J., 'Rule of Law is Central to Fighting Poverty', OPINION,The Insider (Harare)July 31, 2001

[34] UNDP, (2002) Local Governance and Poverty Reduction in Africa; AGF-V Concept Paper, 5

Conflict is counter-productive to a human rights environment and in fact it has become one of the most significant causes of poverty in Africa leading to mass displacements of people, denying access to lands, as well as reducing production and growth in the agricultural sector. According to the International Food Policy Research Institute, the loss of production through conflict in Africa averages 12%, while the loss of growth accounts for 3% *per annum*[35].

Despite the commitment reached at the Millennium Summit that in order for freedom from want to become a reality, States should show their willingness in creating an environment built on good governance within each country and also at the international level, it is far from certain whether the poorest of nations, particularly those of SSA, will make enough progress to fulfill the promises made to the international community and above all to their peoples at the Millennium Summit. The following chapter will examine why is this so.

CHAPTER 3

Mixed International Signals to Poverty Eradication

1. The Time is Always Right or ...

In March 1995, at the World Summit for Social Development in Copenhagen, and, later that same year, in September, at the Fourth World Conference on Women in Beijing, commitment to the so-called 20/20 initiative was made in order to come to terms with the problem of insufficient financial resources directed at providing basic social programmes in developing countries.

The noble goal of the Initiative was that of conceiving of developed and developing States as partners in providing on average, 20% of official development assistance and 20% of the national budgets respectively, towards the financing of the basic social programmes. The aim was that of encouraging donor States in particular, to

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[35] FCO, *The causes of conflict in Sub-Saharan Africa*, Department for International Development, (Foreign & Commonwealth Office, London, 2001), 11-12

Table 2

Relationship between Life Expectancy and GNP *per capita*

Life Expectancy at Birth, 1999 (in years)						
GNP *per capita* (1999 PPP dollars)	Under 50	50-59	60-69	70+	Mean life Expectancy	Total No. of Countries
Under 600	5	0	0	0	43	5
600-1,199	8	7	0	0	49	15
1,200-1,799	2	4	1	0	53	7
1,800+	4	1	2	2	56	9

Sources: UN Population Division and the World Bank

allocate more resources and to use them more effectively wherever it was most needed. The initiative was complementary to the commitment of industrialised countries to allocate 0.7% of their GNP to development co-operation and to other measures to combat poverty[36].

Despite many commitments, however, total development assistance fell in 2001 to $51.4bn from $53.7bn in real terms the year before, and while the proportion as a percentage of gross national income remained unchanged at 0.22%, this remains far short of the 0.33% value reached in 1990-92[37].

Seven years later, the Conference on Financing for Development was held in Monterrey, Mexico in March 2002. It was organised by the UN, with major stakeholders being the World Bank, the IMF and the World Trade Organisation (WTO). This conference came within days that both the United States and the European Union had publicly pledged to increase financial aid to developing countries over the coming years; in fact, while the EU decided to boost the average annual foreign aid spending of their Member States to 0.39% of GDP by 2006, the US declared that over the next three fiscal

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[36] *Implementing the 20/20 Initiative: Achieving universal access to basic social services*, Joint publication of UNDP, UNESCO, UNFPA, UNICEF, WHO and the World Bank, (New York, September 1998); 7-8

[37] Source: OECD (2002)

years, it was ready to contribute $5 billion in extra aid. Presently, the US holds the position of the world's largest aid donor but it is still at the bottom of the table in terms of aid given as a proportion of the gross national income.

Although this aid when quantified would still not suffice, according to Kofi Annan, to secure that the Millennium Goals are met for all, (since according to economic estimates, what is needed is twice the current amount of $50 million a year of world-wide aid to achieve the goal of freedom from want), still he is confident, that such actions could act as catalysts in instigating similar action.

Nevertheless, if the long-term approach as associated with poverty reduction should be that of making the poorest nations partners in this relationship, it is of utmost importance that dangerous trade policies do not counteract the potential of the recent increment in foreign aid.

African countries argue that foreign aid might well be directed in part, towards their setting up of export businesses, but then their exports, which are usually agricultural products, do not find their way into donors' countries. The reason for this lies mainly with tariff barriers to trade imposed by the richest countries in protecting their agricultural sector.

These mixed signals by donor countries, especially America and European countries, prevent real opportunities directed at poverty eradication in the poorest countries. The dumping of very cheap US maize or the dumping of EU subsidised beef in African countries does in fact impinge negatively on those countries' ability to export and in turn, on their yearly total export earnings.

Moreover, in SSA countries commodities prices such as cocoa, coffee and copper have been dropping constantly for the last twenty years where it has been also calculated that SSA's non-oil commodity export revenues dropped by at least $3 billion between 1997 and 2001. This is equal to 3.6% of non-oil export revenues in 1997 and a quarter of total official development aid to these countries in 1999[38].

What is needed in the near future, if both donors and recipients of aid should be considered as partners in the partnership envisaged by Stern, is that the launch of the 'development round' following

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[38] World Bank, *Global Development Finance, Financing the Poorest Countries*, (The World Bank, Washington D.C. 2002) 1,16

the Doha meeting of the WTO leads to a negotiation of market access issues including agriculture, services and manufactures. However, if new opportunities to developing countries should result from such a round, this must entail, according to the World Bank, that the same developing countries co-operate by strengthening their infrastructure to support trade and be willing in turn, to lower their own trade barriers.

2. Aid, Debt-Relief and Strategies to Combat Poverty

The question of aid and debt is then two-fold. Usually donors condition their aid to the poorer countries on the fact that the governments of these countries rightly commit themselves to development, but also at the same time to be able to manage trade and financial flows with some discretion, thereby following the East Asian economies. The poorest countries in the world, being also the most highly indebted and the most vulnerable to IMF-mandated structural adjustment policies, are not in a position to selectively choose the right timing as to when to open or close their economies as the East Asian economies had done in the past[39]. It is also not possible because if the poorest countries should commit themselves to promote development, such a policy would have to include a human rights dimension – a dimension which was absent for the success of the Asian tigers.

Apart from this, there is no complete guarantee that poor countries that follow the adjustment policies as administered by the IMF and the WB are ensured of effective and sustainable poverty reduction within their countries. In fact, according to Easterly, since most of the income derived from African countries in rural areas comes from the informal sector, adjustment policies do not really contribute to eradicate poverty since they are principally designed for the formal sector[40]. Another criticism directed at structural adjustment policies is that there are unequal power relations between those who

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[39] Schulz, B., *Poverty and Development in the age of Globalisation*, (CROP, New York 1999) 101-104

[40] Easterly, W., 'The Effect of International Monetary Fund and World Bank programs on Poverty', Policy Research Paper 2517, The World Bank, January 2001, 22-28

Table 3

Income Poverty, Human Poverty Index (HPI) and related factors of selected sub-Saharan African countries

Country	Pop. in % living on $1 a day (1993 PPP US$)	HPI (in %)		Pop. with access to health services	Pop. with access to safe water	Under 5 mortality rate (per 1,000)
	1983-99	1995	1998	1992-96	1993-95	1999
Uganda	-	42.1	39.7	49	42	148
Senegal	26.3	48.6	47.9	90	-	99
Tanzania	19.9	39.8	29.2	42	49	116
S.Africa	11.5	-	20.2	-	-	89
Benin	-	-	29.2	18	70	120
Congo (DRC)	-	41.1	-	26	25	116
Namibia	34.9	30.0	26.6	59	57	124
Botswana	33.3	27.0	28.3	-	70	98
Burkina Faso	61.2	58.2	58.4	90	-	148
Central African Republic	66.6	40.7	53.0	52	-	139
Niger	61.4	62.1	64.7	99	57	163
Zambia	63.7	36.9	37.9	-	47	124
Africa	-	**40.6**	**36.6**	**64**	-	**117**

Sources: Human Development Report 2001

administer the process and the indebted countries; so much so that the poverty strategy devised by the countries themselves does, at the end of the day, reflect an attitude to 'placate' the IMF[41]. Bearing this in mind then, it is not difficult to understand why none of the interim PRSPs attempt to integrate major international human rights principles in their poverty reduction strategy[42].

[41] E/CN 4/2001/56, (United Nations, 18 January 2001)12
[42] E/CN.4/2001/54,(United Nations, 16 February 2001)18-20

As far as aid is concerned, then, despite the fact that donors have committed themselves to combat poverty as their main goal in their aid policy, nevertheless, it is often the case that other motivations are more important as decisive criteria for the allocation of aid rather than good policies followed in low-income countries or the number of the poor within the same countries.

In fact, while the trend in aid allocation to low-income countries has gone down in the twenty years leading to the beginning of the new millennium as a percentage of total aid, it is also worth noting that, with the end of the Cold War, despite the share of aid to the low-income countries stabilised for an average of 55.4% of total aid for the last decade of the century as a percentage of GDP, aid to low-income countries following good policies decreased from 1.9% to 1.2% within the last decade of the century[43].

While these facts should be of concern to anyone who has the eradication of poverty by 2015 at heart, it is also possible to argue that a justification for channeling more aid to those poor countries which adhere to good policies is that the effectiveness of aid in reducing poverty is greater in those countries which follow sound policies based on good governance and respect of human rights.

To the concern that development assistance has often not been reaching those who need it most in the poorest countries, Mats Karlsson, Vice-President, External Affairs and UN Affairs of the WB, frankly admits that the WB started very late in applying a human rights approach to development. This thereby implies that this lack of foresight in the past was responsible for accentuating the ineffectiveness of the structural adjustment policies to the detriment of many developing countries, especially of SSA. Mats Karlson adds that a participatory budgeting policy should nowadays be adopted by the WB in close collaboration with the poor themselves. The notion implies engaging poor people at the local level to take decisions on projects which they identify as necessary for their human development as a community, and concurrently securing the necessary external finance for the implementation of the project from national governments and agencies, such as the WB[44].

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[43] World Bank; OECD (2002)

[44] Mats Karlsson, 'Will development assistance ever reach the poor?' Lecture given at the Palais des Nations, Geneva on April 8, 2002

The main impediment to poverty reduction projects and strategies in SSA remains accumulated debt and debt servicing. This is so despite the fact that no other region of the world receives as high a level of foreign aid. The problem of debt in Africa is in fact intrinsically related to aid flow, as debt is owed by more than four-fifths to bilateral and multilateral donors. As such, it can be argued that the volume of aid is so high because international donors know that in order to ensure that debt servicing is paid regularly, there must be a considerable amount of aid inflows to these same countries.

Debt in fact reduces the effectiveness of any poverty reducing strategy anywhere, but especially in those highly indebted countries. Until recently, the fact that many donors tied a high percentage of the aid channeled to the least developed countries was increasing additional administrative costs for the recipient States, thereby rendering the aid received less effective at reducing poverty. An explanation for this seems to be that the least developed countries, especially those of the SSA region, receive more tied aid such as food aid and technical assistance than other regions.

The decision taken in May 2001 by the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development was to untie as much as possible the amount of tied aid to the least developed countries. In this way, from 2002, up to 70% of all aid to the least developed countries was scheduled to be untied, including balance of payments support and debt forgiveness[45].

Moreover, over the last couple of years, the effectiveness of aid to the least developed countries has been strengthened by an increase in the concessional debt relief to the same countries. According to the DAC, at least $29 billion in debt have been forgiven in the last thirty years by its donors. More importantly, through the launch of the so-called Highly Indebted Poor Country Initiative (HIPC) in 1996 and its eventual widening in 1999, 42 countries, mostly in SSA, have started to receive debt relief.

The aim of debt relief is to bring the heavily indebted poor countries' debt burden to sustainable levels, where subject to satisfactory policy performance which is monitored by the Executive

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[45] World Bank, Global Development Finance (2002) 4,103

Boards of the IMF and the WB, these countries receive debt relief in two stages. This relief should ensure that adjustment and reform efforts are not put at risk by the continued debt and debt servicing.

Of the 42 countries eligible to receive debt relief however, only Uganda, Bolivia, Mozambique, Tanzania and Burkina Faso have, by mid-2002, reached the completion stage of the Initiative. In Africa, Benin, Cameroon, Gambia, Guinea, Guinea-Bissau, Madagascar, Malawi, Mali, Mauritania, Niger, Rwanda, Sao Tome and Principe, Senegal and Zambia have at least completed the first stage of the HIPC Initiative, thereby receiving at least 30% of the total amount of debt relief to be granted to them by completion of the programme.

While the WB remarks that HIPC Initiative has not lost its momentum, pointing out that recently also Ethiopia and Sierra Leone made it to the programme,[46] still others, such as Sudan or the Democratic Republic of the Congo, have not made it to the programme due to war and civil strife. What is more worrying however, is that fewer countries than expected are meeting the performance targets as laid down in their respective poverty reduction strategy papers (I-/PRSPs) as agreed with the IMF, and where as such, the interim debt relief-debt forgiveness had to be halted by the IMF for at least seven countries following the programme at the end of 2001[47].

The United Nations Conference on Trade and Development (UNCTAD) argues that despite the enhanced HIPC Initiative, the debt problem in poor countries cannot be resolved if mechanisms are not set up to counteract external shocks which occur from time to time, and which in turn *'can easily derail country led-poverty reduction efforts'* since the poorest countries would have to rely on foreign aid to smooth out the consequences of these shocks for their foreign exchange and governments' revenues[48].

Nevertheless, if Senegal is taken as a case study of one of the 24 countries which has reached the first stage of the HIPC Initiative, one finds that the effect of debt relief on this country, which is amongst the poorest in the world, was equivalent to 18% reduction

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[46] www.worldbank.org/developmentnews/, date accessed 25/04/03

[47] As above

[48] UNCTAD, The PRSP Approach and Poverty Reduction in the Least Developed Countries (2002)8-9

Table 4

Impact of HIPC Initiative in 24 countries reaching the first stage of the programme

	Before HIPC debt relief (1998-99)	After HIPC debt relief (2001-03)
Net present value of total external debt	$57billion	$25billion
Debt as % Av. of GDP social spending as percent of GDP	60%	28%
	16.8	8.2
Av. debt service as a percent of GDP	3.7	2.1
Av. debt service as a percent of revenue	27.4	11.9
Av. social spending as percent of GDP	5.8	6.9
Av. social spending as percent of revenue	35.5	39.9

Source: World Bank

in the Net Present Value of the country's debt burden, or $450 million[49]. It is worth noting that Senegal's debt servicing in 1999 totaled $237.3 million out of a total GDP of $4.8 billion, or 4.9% of the GDP. Even more important according to first estimates, is that Senegal would be still paying out more for debt servicing by 2018 than today, despite debt relief. The same would apply in the cases of Tanzania and Zambia[50].

If these estimates stand, then it can be argued that the Millennium goals would be difficult to achieve by 2015 for the poorest countries, even more so when it is considered that Senegal, despite having one of the lowest incomes *per capita*, has over the years improved its HDI. Such considerations in fact should warrant added momentum and more concrete action at the cancellation of debts; if not, the poorest countries risk remaining forever poor.

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[49] Whaites, A., Currah, K., Phillips, W., Muwonge, J., and Forner, P., Submission to the Comprehensive Review of the PRSP Approach by World Vision, December 2001, Policy and Advocacy Department, World Vision,18

[50] E/CN.4/2001/56, 15

3. The Way Forward; Empowerment of the Poor

It is also possible to argue that the HIPC Initiative focuses more on containing the external debt service, with the yardstick being how much debt a country has in relation to its exports. In fact, if a said country's debt exceeds 150% of exports, then the country in question would qualify for debt relief under the Initiative in order to lower this percentage to 150% or below.

Nevertheless, what is missing in this approach is that it is taken for granted that the ability to service debt is the same in all countries. This is not possible however, as even the costs of achieving basic poverty reduction objectives, such as using essential expenditures to provide clean water or health services, is not the same for all poor countries. Furthermore, even the percentage of poor people living below the poverty line is not the same in different countries with different populations.

In reality, if the HIPC Initiative is to become more effective reducing poverty, then each poor country's maximum ability to service debt should be assessed, without compromising essential poverty spending to debt servicing. In so doing, priority would be given first, to essential poverty spending and then to debt servicing. This approach would in the long run be more conducive to poverty reduction, especially if the international financial institutions would concede to erase the extra amount of debt servicing which these countries cannot afford to pay from available resources, that is from fiscal revenue and donor grants.

In effect, one needs to remember that volatility of commodity prices of HIPC exports makes it already difficult for countries following the present enhanced HIPC Initiative to remain within the 150% debt-to-export ratio target as devised by the IMF and WB. So much so, even one of the few countries to complete the Initiative, Burkina Faso, had to be conceded an additional topping up relief to remain within the target.

A second advantage over the current enhanced HIPC Initiative would be that money spent on AIDS prevention would be spent as part of the essential needs spending, along with monies for basic health services, clean water supply and education. This measure, if applied, would be in line with the call by the Commission on Human Rights urging States, international financial institutions and the private sector to alleviate the debt

problem of those countries which are mostly negatively effected by the HIV/AIDS syndrome,

> *'so that more financial resources can be released and used for health care, research and treatment of the populations in the affected countries'*[51].

As of now, however, though the issue of HIV/AIDS has been included to be tackled in most interim PRSPs of SSA countries, nonetheless, with the exception of Uganda, no other HIPC country has suggested a response to counteract the negative effect of the disease on human capital and economic growth in any of their PRSPs[52]. As a result, the current debt relief channelled to the HIPCs was not to include in the equation HIV/AIDS as a cause of poverty and a major impediment of human development.

What needs to be achieved now in and by these countries is a commitment to ownership of the proclaimed strategies and positive sustainable action in favour of the poor. According to Younis, it is also important that the poor become empowered. Although he perceives this as a radical change for many societies, since this brings with it a balancing or shifting of power, he believes that the empowerment and participation of the poor is essential for the materialisation of civil, political, social or cultural rights within a country[53].

Empowerment of the poor is vital in any poverty reduction strategy in SSA as in any other regions, because it is extremely important that the voices of the poor be heard and given the necessary weighting at the policy-forming stage, as this gives more substance to the notion of ownership of the strategy itself.

According to the ILO however, in many PRSP countries from SSA, there have been considerable restrictions on the freedom of association where landless rural workers, small tenant farmers, as

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[51] Commission on Human Rights resolution 2002/29, Effects of Structural Adjustment Policies and Foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights,17

[52] Adenji, O., Hecht, R., Njobru, E., Sourcot, A., The Essential HIV/AIDS Content in PRSP and HIPC Documents, 3 22

[53] Sfeir-Younis, A., Implementing the Right to Development: Fundamental Conditions for Immediate Results; Statement delivered at the 58th Session of the Commission on Human Rights, Geneva, 22 March 2002.

well as small traders and producers, are excluded from laws permitting the legal establishment of workers' associations.[54] Moreover, while in their respective PRSPs, all countries agreed that income from work is overwhelmingly the most important means for survival for the poorest, no country has considered the raising of the quality of conditions of work as part and parcel of the Poverty Reducing Strategy at eliminating poverty.

While the ILO believes that this hindsight might also be possible because typically there are no Labour Ministries in these countries, the ILO believes that by working in partnership with the WB, UNDP and other agencies, it will be possible, that in the near future, participation through social dialogue, action in favour of equal opportunities on labour markets, skill acquisition and social protection would form part of the strategy directed at reducing poverty[55].

If empowerment of the poor should take place in SSA, then it is likewise very important that while the national strategy for the reduction of poverty be implemented, the government of the country should use transfers or safety nets to protect small farmers who are more vulnerable in the short term to suffer from adjustment of marketing reforms and pricing[56]. This idea is very similar to the idea of 'positive discrimination' in the human rights jargon. Targeting the poor as a group and providing safety nets for that group would be justified only if this is considered as a certain way for ensuring that benefits and services actually do reach the poor.

However, if mistakes of the past are not to be repeated, it is of utmost importance that a level playing field exists within these countries which guarantees respect and enforcement of human rights. While it would be undoubtedly better if UN agencies such as UNDP, UNCTAD and ILO be drawn into the process of the poverty reduction programmes, it is finally up to the countries themselves to move beyond the gesture of ratification of the main UN Human Rights treaties and implement a human rights approach to development for present and future generations.

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[54] ILO, The Decent Work Agenda and Poverty Reduction: ILO Contribution to IMF/ World Bank Comprehensive Review of PRSP, 14-17 January 2002, 5

[55] As above, pg. 5-8

CHAPTER 4

Sustainable Development for all in the 21st Century

1. Sustainable Development, Poverty and Future Generations Rights

A question worth analysing at this stage is whether there exists a common point of departure in addressing issues of poverty and sustainable development. For it is not easy to tell the least developing countries to restrict or limit the use of natural resources for their development, especially when it is a well-known fact that in the past, the rich industrialised countries had made extensive use of natural resources in the promotion of their development. Nor would it be just to put a brake on the development prospects of the sub-Saharan people when it is considered that the rich, industrialised countries between themselves are mainly responsible for emitting gases which have transboundary effects, such as damaging the ozone layer.

The concept of sustainable development takes into consideration the fact that the needs of human beings should be met through the appropriate use of existing resources. However, this should not mean that the carrying capacity of natural resources be compromised for ever. This is because a cornerstone of human rights is that humans should have the rights to food, clean water and a healthy environment, and this fundamental applies also to future generations[57].

From this it follows that for every right acquired, there are responsibilities which must be honoured. However, people living in extreme poverty are not only prevented from the enjoyment of their rights, but are also unable to fulfill their obligations. So it is possible to say that satisfaction of all human needs does not only require

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[56] Bamberger, M.,and Abdullahi, M., The Design and Management of Poverty Reduction Programs and Projects in Anglophone Africa, (EDI Learning Resources The World Bank 1996) 159-165

[57] Roots, E, F., 'Population, 'Carrying Capacity' and Environmental Processes' in Mahoney, K., and Mahoney, P., (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Klewer Academic Publ. Dordrecht 1993) 532-543

natural capital but also other forms of capital which are important in the development process. According to Younis, there are at least six forms of capital which should be used in the process of sustainable development, namely: physical, financial, human, natural, institutional and cultural capital[58].

Considering that those living in poverty usually lack most forms of capital, but also that poverty is an intergenerational phenomenon, it is necessary that any method devised to deal with eradication of poverty within a sustainable environment includes a set of values which recognises collective or solidarity rights.

Solidarity rights deal in fact, with those issues that are *'blind to borders and discrimination thus they are applicable to anyone.'* Besides a healthy environment, these rights include peace, humanitarian disaster relief, political, economic, social, and cultural self-determination, economic and social development as well as participation in the common heritage of mankind[59]. Thus, the right to a healthy environment is linked to human rights for without international awareness and action, none of the natural resources would survive, and life on earth would end.

While the United Nations Conference on Environment and Development of 1992 changed the face of the environment and development landscape, through Agenda 21, a strategy was agreed to by global consensus for achieving sustainable development through a balancing of environment and development issues.

Ten years after Rio, in Africa, while nearly all countries have ratified the Rio Agreements, the region is still generally losing its natural resources at relatively rapid rates when compared to the rest of the world. This notwithstanding that some of these countries have enacted laws and codes for the sustainable use of water and forests, biodiversity and the management of waste through institutional development and participatory processes[60].

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[58] Sfeir-Younis, A., 'Poverty and Sustainable Development for those who are prepared to listen' Address to Working Group on Development,38th Graduate Study Programme, Palais des Nations, July 19, 2000,6

[59] www.eckerd.edu/academics/bes/irga/human.rights/solidarity.html, date accessed 25/04/03

[60] African Preparatory Conference For the World Summit on Sustainable Development, 15-18 October 2001: www.ecs.co.sz/wssd/roa_assessment_of_progress_1.htm, date accessed 25/04/03

Although most governments have reversed their agricultural policies since Rio, thereby encouraging more intensive cultivation of lands in order to earn foreign exchange from exports of primary commodities, this hard-earned foreign currency was mainly directed at debt repayment.Moreover, few land tenure reforms were introduced in favour of the poor in sub-Saharan Africa, though what is needed is in general

> *'the development of transparent, decentralised systems for land administration and dispute resolution [to] ... improve security, land access and provide a basis for sound resource management by and for the poor'*[61].

And so, the depletion of natural resources continues, while at the same time over-populated urban centres find it difficult to cope with environmental management.

The most basic problem encountered in the over-populous urban centres is that of a lack of running water. The shift towards the urban centres by the poor has in fact exacerbated the problem of safe water to cater for their needs and in turn created urban environmental management problems within many countries in SSA. For while most countries in the region do not suffer from high water stress, and will be spared from this condition also in the next fifty years despite an expected rise in population, proportionately Africa has the lowest percentage in terms of accessibility to water[62].

The poor, who cannot even afford the cheapest low-cost housing in urban centres when this is available, often select land which is likely to be unhealthy, sacrificing environmental quality and access to infrastructure and basic services. The only sources of water for the poor are then streams, pools, wells or springs, but due to the fact that safe sewerage systems are more often than not non-existent, even within urban centres, the water procured from these sources by the poor is most likely to be already contaminated.

While it is logical to conclude that improving access to sustainable

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[61] Quan, J., The Importance of Land Tenure To Poverty Eradication and Sustainable Development in Africa: Summary of Findings (1997) www.oxfam.org.uk/landrights/QUANPOV.rtf, date accessed 25/04/03

[62] Motyuki Suzuki., 'Water in Our Future' in H van Ginkel (eds), *Human Development and the Environment* (UNU New York 2002) 197-203

water and sanitation to all would be beneficial to poverty eradication, nevertheless one needs to see in what ways water resources can be utilised to support this goal for present and future generations in this region.

According to the Regional Stakeholders' Conference for Priority Setting which met in Accra in 2002, African leaders should place water infrastructure financing higher on their agenda, possibly also including it in their PRSPs whilst providing transparent subsidy arrangements from public funds to the poor who cannot afford the water service cost. Considering then that Africa suffers increasingly from climate changes such as floods and droughts, the Stakeholders' conference concluded that it would be worthwhile that future investments in large storage infrastructure be designed to counterpoise these changes.

Environmental laws and enforcement mechanisms are then very important in these least developed countries as these can help mediate social conflicts that might arise out of competition between peasants and forest contractors over land, or between the poor and rich living in urban centres over water.

2. 'Preparing for a New Spring'

For quite a long period of time, people from the least developing countries have looked beyond their continent for a lasting solution to their problems. Rule of law, good governance, democracy, observance of all Human Rights, gender equality, ownership, participation and empowerment of the poor have all been prescribed as essential ingredients for their mode of development. What is missing from the equation above is the African willingness to work together as a region of sovereign States for their common development.

With a past ripe with examples of slavery, colonialism, apartheid, ethnic strife and wars, some of the African countries still find it very hard to break free from the traditions of the past and embark on seriously deepening the reform process, let alone working together as a continent.

Reasons for this reluctance nevertheless refer to many issues amongst which are the persistence of poverty in the region and the lack of successes obtained by the strategy invoked for sustainable development in SSA.

The fact that many SSA countries still do not have adequate institutional and technical abilities and are still ruled by specific interest groups, despite the transition to democracy, makes foreign countries doubt their genuine commitment to economic and social development as sovereign nations. Often, these countries remain economically marginalized and this, coupled with imposed substantial political and economic effects coming from neighbouring States at war, serves to induce less international support for urgent reform programmes. While in previous chapters it was argued that that there are ways of dealing with the debt problems of sub-Saharan countries if only political will by the donors is consistent, in the meantime it has become obvious that what is needed now is a courageous plan of action which inspires all the Africans to regain the concept of taking their destiny in their own hands and in the meantime furthering unrestrained international support for their development strategies. Besides, while African regional institutions could provide a useful mechanism for conflict resolution in the region, investing in a policy of peacekeeping could plausibly offer the best social rate of return among African investment opportunities.

This is not to say that no attempts have been made in the past by the Africans States to work together as a continent. Indeed, before the Millennium African Renaissance Programme (MAP) was launched and before the African Union (AU) was born in 2001 as a trade block, a phased economic integration was promoted by the Final Act of Lagos, in 1980, while the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) in 1991, intended to promote the flow of resources from G7 countries to developing Africa. Nevertheless, as there was no political commitment to these plans, momentum to implement such initiatives was lost forever.

Today, MAP and Senegalese President Wade's Plan, Omega, both aimed at poverty reduction and promoting human dignity amongst the Africans through sustainable development projects have been combined into what is now known as a New African Initiative.

In the meantime, it is worth noting that despite the fact that the region's economic problems have made it difficult to develop a modern energy sector, the African Energy Policy Research Network (AFREFEN) was set up in 1989, and with the help of European development agencies, it has been commissioned to see that the region's energy resources sector is used in a sustainable manner.

The importance of an effective use of energy resources has been acknowledged to be directly linked to the well-being of the people, where there exists a positive correlation between energy use *per capita* within a country and productivity *per capita*, as well as live expectancy. It is no wonder then, that SSA with only 1% of the world's energy product but more than 9% of the world's population, has the lowest life expectancy and productivity rates, which in turn halts its own path of development[63].

The fact that joint African action has been increasing in these last years is nevertheless a very positive sign that African people are finally working together on common goals to be achieved for one and all on the continent. A case in point is the Nile Basin Initiative, which was launched in February 1999, and where for the first time ever Burundi, the Democratic Republic of the Congo, Egypt, Eritrea, Kenya, Rwanda, Sudan, Tanzania and Uganda (all of which are Nile basin countries) have met to see how the long-term development and management of the Nile waters could be used in the interests of all countries concerned to fight poverty[64].

Above all, it is significant that the proponents of the New Initiative of Africa, believe that it is extremely relevant for a bridge between the poor and non-poor to be constructed with special emphasis on education, health and welfare programmes for the poor and where participation from the poor themselves is encouraged. As poverty is seen as a denial of human rights, then participation of the poor in the social, economic and environmental life can be used as an instrument for combating poverty. This however, has some preconditions, especially economic ones, which the States themselves should render to the poor, such as cheaper credit and enhancement of opportunities for access to assets with a view to improving their productive capacity.

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[63] Ingvar, B, Fridleifsson., 'Energy requirements for the new millennium' in Hans van Ginkel et al. (eds) *Human Development and the Environment* (UNU New York 2002) 220-225

[64] Elbadawi, I.A., Some Research and Policy Issues for Africa's Sustainable Development www.dse.de/ef/vbws98/13elbada.pdf, date accessed: 25/04/03

3. Winners and Losers

Freedom from want and freedom of future generations to sustain their lives on earth, are the top international goals to be met in the beginning of the 21st century. As both goals deal with how life on earth will become sustainable in this century, then it is worth underlining that in whatever actions are taken by individual States, regional entities and international agencies, a human dimension should be always present.

In a world where human rights are assuming increasing importance to more people around the world, then it difficult to speak about winners and losers anymore. Indeed, the future of those living in the least developed countries and those living in industrialised countries has never been so interlinked. As such, if the Millennium goals are not met within a specific time limit in the following decades, it will not only be a human tragedy but also an affront to human dignity.

Conclusion

As has been demonstrated in this study, meeting the goals set in the Millennium Assembly, foremost of which: the reduction by half, by 2015, of all the people in the world who live in poverty, is proving to be a very demanding challenge to the world community at large.

According to the World Bank, the proportion of those living in extreme poverty at the end of the twentieth century has decreased. Nevertheless, because of an increase in populations, especially in the Asian and the African continents, the change in the numbers of poor did not drastically change. Indirectly, this constitutes an admission that the poverty reduction strategies of the past lacked a human dimension since little of the assistance provided then, ever reached the poor.

After underlining the difference between relative and absolute poverty, and demonstrating that the former had to do more with distributive justice, while the latter was associated with social justice, the first chapter sought to explain who the poor are in today's world and what are their worries and hopes within a globalised world.

In the second chapter, building on the assumption that inequalities limit human freedoms, it was demonstrated that economic growth

by itself within a developing country was not a straightforward factor for determining whether inequality will increase or decrease within the country.

The Human Development Index (HDI) and the Human Poverty Index (HPI) as such, were in turn used to reveal important information on those factors which are mostly limited in sub-Saharan Africa and which in turn, limit the freedom of choice of the peoples there. It is possible to verify that with regards to measures of education, gender equality, life expectancy, purchasing power of gross domestic product, but also with regards to measures of access to health services, access to safe water and the under-five mortality rate, sub-Saharan African countries are still a long way from improving human development for their peoples.

In determining the factors of the persistence of poverty in sub-Saharan Africa, it was moreover discovered that this was due to the fact that many countries in the region only realigned themselves to democratic constitutions, and therefore to good governance principles, in the last decade of the last century, mostly with due pressurizing of their aid donors.

Nevertheless, as it has been also shown in the third chapter, a major factor contributing to the persistence of poverty remains debt. When coupled with the reluctance of the donor countries to increase development aid, and trade policies which work against the interests of the poor, this further limits the ability of these highly indebted countries to devote enough finances to cater for their peoples' needs.

Finally, while it has been suggested that the way forward should be the empowerment and the participation of the poor in formulating their countries' poverty reduction strategy to better reflect what their needs are, in conclusion, it should also be stressed that a sustainable mode of development is nevertheless urgently needed in these countries so that the poor themselves preserve their right to food, clean water and a healthy environment, as fundamentals of human rights, to future generations.

BIBLIOGRAPHY

A/54/2000 UNGA, 'We the Peoples: The Role of the United Nations in the Twenty-First Century.' Report of the Secretary-General, fifty-fourth session, Agenda item 49 (b) The Millennium Assembly of the United Nations. (United Nations, 2000)

Aderji, O., Hecht, R., Njobru, E., Soucat., *AIDS, Poverty Reduction and Debt Relief: A Toolkit for Mainstreaming HIV/AIDS Programs into Development Instruments* (Human Development Paper Series African Region The World Bank Washington D.C 2000)

African Development Report 1998 (Oxford University Press New York 1998) at 58th Session of UN Commission on Human Rights (Geneva March 22 2002)

Bamberger, Abdullahi, Yahie, Matovu., *The Design and Management of Poverty Reduction: Progress and Projects in Anglophone Africa* (EDI Learning Resources Series The World Bank Washington D.C.1996)

Bhalla, A, S., *Uneven development in the Third World* (2nd Ed St. Martin's Press New York 1995)

Caufield, C., *Master of Illusion the World Bank and the Poverty of Nations* (Macmillan London 1996)

Chemillier-Gendreau, M., 'International Law and the developing world' (Le Monde Diplomatique February 2001)

Collier, P., and Dollar, D., Aid Allocation and Poverty Reduction, Policy Working Paper 2041 (The World Bank 1999)

Cooperrider, D, L., and Dutton, J. E., (eds), *Organizational Dimensions of Global Change* (Sage Publications London 1999)

Copenhagen Declaration on Social Development www.un.org/esa/socdev/wssd/agreements/decpartc.htm

Crawford, J., (ed), *The Rights of Peoples* (Clarendon Press Oxford 1988)

Der Hoeven, R,V., and Vard De Kraay, F., *Structural Adjustment and Beyond in Sub-Saharan Africa* (Villiers Publications London 1994)

Development Assessment of Progress on Sustainable Development in Africa since Rio (1992) www.ecs.co.sz/wssd/roa_assessment_of_progress_1.htm

DFID, *The causes of conflict in Sub-Saharan Africa* (Foreign & Commonwealth Office London 2001)

Dollar D and Kraay A, *Growth is Good for the Poor*, Policy Research Working Paper 2587 (The World Bank 2001) *Trade, Growth and Poverty*, Policy Research Working Paper 2615 (The World Bank 2001)

E/CN.4/1998/22 UN ESC Commission on Human Rights Women's real enjoyment of their Human Rights, in particular those relating to the elimination of poverty, economic development and economic resources (Geneva 12 February 1998)

E/CN.4/2001/54 UN ESC Human Rights and Extreme Poverty Report Submitted by Ms A Lizin, independent expert, pursuant to Commission resolution 2000/12 (Geneva 16 February 2001)

E/CN.4/2001/56 UN ESC Commission on Human Rights The Highly Indebted Poor Countries (HIPC) Initiative: a Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP) Report Submitted by Mr. Fantu Cheru, independent expert on the effects of structural

adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights (Geneva 18 January 2001)

E/CN.4/2002/105 UN Commission on Human Rights, The Role of Good Governance in the Promotion of Human Rights (Geneva 29 November 2001)

E/CN.4/2002/58 UN Commission on Human Rights, The Right to Food Report by the Special Rapporteur on the right to food, Mr J Ziegler submitted in accordance with Commission on Human Rights Resolution 2001/25 (Geneva, 10 January 2002)

E/CN.4/2002/WG.18.2 UN ESC Commission on Human Rights Fourth Report of the Independent Expert on the Right to Development, Mr A Sengupta, submitted in accordance with Commission resolution 2001/9 (Geneva 25Feb-8 March 2002)

Easter, C., (ed), Strategies for Poverty Reduction (Commonwealth Secretariat London 1993)

Easterly, W., *The Effects of International Monetary Fund and World Bank Programs on Poverty*, Policy Research Working Paper 2517 (The World Bank 2001)

Elbadawi, I, A., Some Research and Policy Issues for Africa's Sustainable Development www.dse.de/ef/vbws98/13elbada.pdf

Ellis, S., *Democracy in Sub-Saharan Africa: Where did it come from? Can it be supported?* (ECDPM Working Paper 6 Maastricht 1995) www.ecdpm.org/pubs/wp6s_gb.htm

Escobar, A., (ed), *The Making and Unmaking of the Third World* (Princeton University Press New Jersey 1995)

EURODAD Putting Poverty Reduction First (Brussels 2001) www.eurodad.org

Evaluation and Poverty Reduction Proceedings from a World Bank Conference (World Bank 2000)

Evans, A., *Poverty Reduction in the 1990s An Evaluation of Strategy and Performance* (The World Bank Washington D.C. 2000)

Feinstein, O., and Picciotto, R., *Evaluation and Poverty Reduction Proceedings from a World Bank Conference* (The World Bank Washington D.C.2000)

Fizbein, A., and Lowden, P., *Working together for a Change* (Economic Development Institute of the World Bank Washington D.C. 1999)

Forsythe, D,P., *Human Rights and Development* (Macmillan Press Ltd London 2000)

Ghandhi, P., International Human Rights Documents (Blackstone Press London 2000)

Guest, R., *'Getting Better all the Time: Survey of Technology and Development'* (The Economist London November 10th 2001)

Hamm, B, I., *'Human Rights Approach to Development'* HRQ (Johns Hopkin University Press 2001) 23,2

Heyns, C., and Viljoen, F., *'The Impact of the United Nations Human Right Treaties on the Domestic Level'* HRQ (Johns Hopkins University Pres 2001) 23, 2

Holman, R., *Poverty Explanations of Social Deprivations* (Suffolk Pres London 1978)

Human Development Report 1997 (UNDP New York 1997)

Human Development Report 2000 Human Rights and Human Developmen (UNDP New York 2000)

Human Development Report 2001 Making New Technologies Work Fo: Human Development (UNDP New York 2001)

Ikumi, P., *Water and Sustainable Development in Africa-Regiona. Stakeholders'* Conference for Priority Setting www.genderandwate alliance.org/reports/report%20april.doc

International Conference on Financing for Development Adopts 'Monterrey Consensus' by Acclamation UNIC/Press Release/32-2002 www.unic.org. in/News/2002/pr/pr32Mar2002.htm

Karlsson, M., *'Will Development Assistance Ever Reach The Poor'*, An Exchange On Development: Seminar Series Speech Delivered by the Vice President

Klein, M., Aaron, C., Hadjimichael, B., Foreign Direct Investment and Poverty Reduction Research Working Paper 2613 (The World Bank 2001)

Kohler, G., Gore, C., Reich, U-P and Ziesemer, T., (eds), *Questioning Development Essays in the Theory Policies and Practice of Development Interventions* (Metropolis – Verlag Markburg 1996)

Kothari, R., *Human Consciousness and the Amnesia of Development* (Zed Books Ltd London 1993)

Lal, D., and Myint, H., *The Political Economy of Poverty Equity and Growth* (Clarendon University Press Oxford 1996)

Mahoney, K., and Mahoney, P., (ed), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers London 1993)

Mayor, F., Pol, Droit, R., *Letters to Future Generations* (Cultures of Peace UNESCO Publishing Paris 1999)

Mc Kinley, T., *Macroeconomic Policy Growth and Poverty Reduction* (Palgrave UNDP London 2001)

Nankani, G., and Ahmed, M., Review of the Poverty Reduction Strategy Paper (PRSP) Approach: Main Findings (IDA and IMF 2002)

Narayan, D., Chambers, R., Shah, M, K., Petesch, P., *Voices of the Poor Crying Out for Change* (The World Bank Washington D.C. 2000)

Narayan, D., *Can Anyone Hear Us? Voices From 47 Countries* Volume I (Poverty Group, The World Bank 1999)

ODI Briefing Paper Economic Theory, Freedom and Human Rights: The Work of Amartya Sen November 2001 www.odi.org.uk/briefing/

Odinkalu, C, A., 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights' HRQ (Johns Hopkins University Press 2001) 23,3

Paraire, P., *Le Village et Son Chateau: essai contre le FMI, L'OMC et la Banque Mondiale* (Le Temps des Cerises, Paris 1995)

Ravillion, M., Growth Inequality and Poverty Policy Research Working Paper 2558 (The World Bank 2001)

Rawls, J., (ed), *A Theory of Justice Revised* (Oxford University Press Oxford 1999)

Reimer, J., *Estimating the Poverty Impacts of Trade Liberalization* Working Research Paper 2790 (The World Bank 2002)

Resident, External Affairs and United Nations Affairs of the World Bank, (Room XI, Palais des Nations Geneve 8 April 2002)

Robinson, M., 'Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance' (2001) www.unhchr.ch/development/newsroom.html

Robinson, M., 'Poverty and Racism: Challenges for Human Rights and Development in Africa' (2001) www.unhchr.ch/huricane/huricane.nsf/view01

Sarrasin, B., *Adjustment Structural et Lutte Contre la Pauvrete en Afrique La Banque mondiale face a la critique* (Editions L'harmattan Paris 1999)

Sen, A., *Inequality Reexamined* (OUP Oxford 1992)

Serieux, J., Debt *Relief and Poverty Reduction – Is the Link Working?* The North-South Institute June 2001

Sfeir-Younis, A., 'Poverty and Sustainable Development for those who are prepared to listen', Address to the Working Group on Development 38th UN Graduate Study Programme (The World Bank Geneva 2000)

Skinner, E, P., 'African Political Cultures and the Problem of Government' African Studies Quarterly (1998) 2,3

Solidarity Rights www.eckerd.edu/academics/bes/irga/human.rights/solidarity.html

Soucat, A., Yazbeck, A., Knippenberg, R., Diop, F., Wheeler, M., Chao, S., and Luculescu, S., *Rapid Guidelines for Integrating Health, Nutrition and Population Issues into Poverty Reduction Strategies of Low-Income Countries* (Human Development Paper Series African Region The World Bank Washington D.C. 2001)

Steiner, H, J., Alston, P., *International Human Rights In Context* (2nd ed Oxford University Press New York 2000)

Symonides, J., (ed), *Human Rights Concept and Standards* (UNESCO Publishing Paris 2000)

Tarp, F., (ed), *Foreign Aid and Development Lessons Learnt and Directions for the Future* (Routledge London 2000) *'The Politics of Human Rights'* and Special Report: *'Human Rights Righting Wrongs'* The Economist (London August 18th 2001)

Tungodden, B., *A Balanced View of Development as Freedom* (Norwegian School of Economics and Business Administration Norway 2001)

UN Commission on Human Rights resolution 2002/29 Effects of structural adjustment policies and foreign debt on the full enjoyment of all Human Rights, particularly economic, social and cultural rights (Geneva, 22 April 2002)

UN Commission on Human Rights resolution 2002/30 Human Rights and Extreme Poverty

UNAIDS, Statement by the Executive Director of UNAIDS P Piot to the 58th Session of the UN Commission on Human Rights (Geneva 2002)

UNDP Analytical Tools For Human Development www.undp.org/hdro/statistics/anatools.htm

UNDP and ECA, Fifth Africa Governance Forum Local Governance for Poverty Reduction in Africa Concept Paper, January 2002

UNDP, Statement of the United Nations Development Programme 58th Session of the UN Commission on Human Rights (UN Geneva 2002)

UNHCHR, Message of United Nations High Commissioner for Human Rights, Ms Mary Robinson, to the International Conference on Financing for Development (Monterrey, Mexico 18-22 March 2002)

UNICEF, Implementing the 20/20 Initiative Achieving Universal Access to Basic Social Services (UNICEF New York 1998)

Van Ginkel, H., Barrett, B., Court, J., and Velasquez, J., (eds), *Human Development and the Environment Challenges for the United Nations in the New Millennium* (United Nations University Press New York 2002)

Wagstaff, A., Inequalities in Health in Developing Countries: Swimming Against the Tide? (The World Bank 2002)

Warner, D., (ed), 'Human Rights and Humanitarian Law The Quest for Universality' Nijhoff Law Specials (1997) 29

Watt, P., *Social Investment and Economic Growth A Strategy to Eradicate Poverty* (OXFAM Publishing London 1996)

Wilson, F., Kanji, N., and Breather, E., (eds), *Poverty Reduction What Role for the State in Today's Globalized Economy?* (CROP Cape Town 2001)

Wodon, Q., (ed) *Attacking Extreme Poverty* (World Bank Washington D.C. 1992)

Wolfensohn, J, D., Remarks to the Plenary Meeting UN International Conference on Financing for Development Monterrey Mexico March 21,2002

World Bank Development News/March/April/May/June2002 www.worldbank.org/developmentnews

World Bank Policy Research Working Papers and UN Reports
World Bank The Nile Basin Initiative www.worldbank.org/afr/nilebasin/
World Bank The Role and Effectiveness of Development Assistance: Lessons Learnt from World Bank Experience (World Bank Washington D.C. 2002) www.econ.worldbank.org/files/13080_Development_Effectiveness.pdf
World Bank, Global Development Finance: Financing the Poorest Countries (The World Bank 2002)
World Bank, Implementing The Right to Development: Fundamental Conditions for Immediate Results Statement by Special Representative to the United Nations and the World Trade Organisation Mr A Sfeir-Younis
Yogesh, A., and Else, O., (eds), *Poverty and Participation in Civil Society* (UNESCO Paris 1996)

A FORM OF RELIGIOUS EDUCATION COMPATIBLE WITH THE RIGHT TO EDUCATION[1]

ILAN GOLDBERG

1. Introduction

The United Nations (UN) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), recognizing the importance of education to their goals, have made noteworthy progress on the right to education. A few such standard setting requirements are worth mentioning. A UNESCO recommendation clarifies that education of a proper standard is one that: gives a critical understanding of problems, and an ability of rational analysis; eliminates misconceptions; teaches the true interests of peoples, people's real interests, problems and aspirations; and revises its textbooks to ensure that they are accurate and up-to-date[2]. A UN convention stipulates the right of all peoples to be fully and reliably informed[3]. Another UN declaration states that

> *"all states shall take measures to extend the benefits of science and technology to all strata of the population"*[4].

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[1] This is an abridged version of Ilan Goldberg, "A Form of Religious Education Compatible with the Right to Education" (M.A. diss., University of Malta, 2002).

[2] United Nations Educational, Scientific and Cultural Organisation, Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, 1974, Art. 5, 14, 7, 15, 27, 45.

[3] United Nations General Assembly, Convention on the International Right of Correction, 1952, preamble.

[4] United Nations General Assembly, Declaration on the use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, 1975, Art. 6.

Finally, another UN declaration stipulates that education should enable everyone to enjoy the fruits of social progress and contribute to it; enlighten public opinion; and bring awareness of the changes occurring in society as a whole[5].

The object of this work is to justify acceptance of such standards and to articulate and defend a form of religious education (RE) that complies with them. (Throughout, the words 'religion' and 'worldview' are used interchangeably.) We shall begin with a brief introduction of the concepts of Critical Thinking (CT), autonomy and freedom, which we will treat as synonymous. We then briefly outline eight arguments in support of CT as an educational ideal. They are:

1) Voluntary (autonomous) consent is essential for democracy.
2) Wise decisions are necessary for a democracy.
3) CT is necessary for responsibility and moral maturity.
4) CT provides protection from manipulation.
5) CT teaching is demanded by Kantian respect for students.
6) CT is necessary for understanding the content of education.
7) CT is the driving ideal of philosophy.
8) CT is helpful in resolution of disagreements.

We continue in an elucidation and further justification of thirteen criteria that our ideal for RE should comply with. In the process we discuss the concepts of worldview and self-deception as well as Richard Paul's Strong Sense Critical Thinking (SSCT). The criteria are:

1) All educable children must be educated.
2) Education may not transgress the boundaries set by CT.
3) Our ideal for RE should infuse schooling at all levels.
4) Education should be thoroughly scientific;
5) it should teach what is socially essential;
6) it should eliminate non-educative environmental influences;
7) it should give everyone the opportunity to escape the intellectual limitations imposed by the surroundings they were born into;
8) it should integrate society; and
9) it should give an understanding of our constitutive milieu.

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[5] United Nations General Assembly, Declaration on Social Progress and Development, 1969, Art. 1, 5.

10) In teaching CT, the subject of argumentation should be multidimensional cross-disciplinary ethical issues;
11) engagement with the subject matter should be thorough;
12) attention should be given to self-deception; and
13) students should be given experience in detaching themselves from, and criticizing their own deeply held beliefs[6].

Ninian Smart's approach to RE is then outlined as one that adheres to these standards. The work then shifts into a defense of our ideal, divided into three parts. First we reply to the objection that rationality is a function of worldviews and as such it cannot

> *"stand aside from a tradition and assess it from a critical standpoint in principle available to all."*[7]

Since we take it that our ideal is implied by or has science as its justification, the second objection we deal with is Milton Yinger's assertion that science as an ethic or way of life is itself a religion. Finally, we touch briefly on and try to defend our ideal in areas of conflict between other rights and the right to education as we see it. Paternalism, parental rights, toleration, group rights, religious rights, and neutrality will all be mentioned.

The discussion will have contributions from several fields of study. We shall use insights from the philosophy of education, contributed mainly by John Dewey; the work of several scholars from the CT movement; the philosophy of religion; the scientific study of religion, mainly Ninian Smart and Milton J. Yinger; moral philosophy; philosophy of science, with Karl Popper as major contributor; and democratic theory.

As this work is an abridged version of a dissertation twice its size, a brief note on the parts that were excluded from this version is in order. They are: a survey of definitions of CT; relevant defenses of the democratic ideal assumed; several other justifications of CT; Alan Gewirth's moral philosophy and its relationship with democracy and our ideal; an outline of the deficiency of education today; several important elements of Dewey's philosophy; Smart's justifications of his RE, and more.

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[6] These are neither mutually exclusive nor exhaustive.

[7] Mitchell, B., "Tradition," in *A Companion to Philosophy of Religion* ed. Quinn, P. L., and Taliaferro, C., (Massachusetts: Blackwell Publishers, 1997), pg. 595-6.

Lastly, and on a more personal note, I would like to mention the relevance I consider this work has to the Human Rights and Democratisation program that spawned it. This work is meant to highlight an important insight that is crucial for the dialogue we long for. Coming from a region that is paralyzed by hate and misunderstanding, my hope is that the following pages help raise important questions in the reader's mind: Was my right to education respected? Does my worldview seem reasonable because it is so or maybe because of chance of birth and socialization? I hope the reader will agree with me that understanding can come only after arduous self-criticism.

2. Critical Thinking, Autonomy and Freedom

We begin with a quick look at CT, an often-misunderstood concept. Ralph H. Johnson's definition brought below should be fairly illustrative of how CT is seen by CT theorists. Johnson distinguishes three attributes necessary for the critical thinker[8].

1) Knowledge – The knowledge needed for critical thinking can be quite extensive. Siegel, for example, writes of a necessary understanding of both the epistemology of the subject and epistemology in general[9]. For us, knowledge of worldviews and their effects on our thinking will be of special importance.
2) Skills of argument appraisal, where arguments have two tiers:
   - a premise-conclusion tier; and
   - a dialectical tier, which *"addresses alternative positions to the ones we hold, objections to our own arguments, and the wider implications of our arguments."*[10]
3) A disposition to use these skills and knowledge. The critical thinker, for example, must control the natural tendency to avoid being criticized.

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[8] Differences between definitions of CT and the critical thinker are not going to be dealt with here.

[9] Siegel, H., Educating Reason: Rationality, Critical Thinking, and Education (London: Routledge, 1988).

[10] Talaska, R. A., ed., *Introduction to Critical Reasoning in Contemporary Culture* (Albany NY: State University of New York Press, 1992), xxi. The papers contained in this book can be consulted for more relevant definitions of CT. See also Siegel, H., above at note 9; Goldberg I., full dissertation, above at note 1.

Siegel and Talaska pick up on this last point. In CT, criticism is ubiquitous. CT questions not only society but also

> *"fundamental principles of the various traditions of philosophy and of the various paradigms of science – including our own"*[11].

And Siegel writes:

> *"For the possessor of the critical attitude, nothing is immune from criticism, not even one's most deeply-held convictions"*[12].

Defined thus, we take CT to be synonymous with the concepts of freedom and autonomy[13].

Scholars of the CT movement agree that an autonomous person is one who is rational to the maximum of his ability, and capable of making rational decisions on any matter confronting him without falling pray to *"faulty argument, weak evidence, or trendy opinions"*[14]. Such matters include choice of personal beliefs. For autonomy *"alternatives must ... be independently judged by reference to criteria"* that should be reflected upon in turn[15]. Without such reflection, behavior is compulsive. Under this Kantian doctrine of autonomy, not only the beliefs and actions of others, but also personal beliefs and predilection can be an "alien cause" to be opposed[16]. Autonomy is achieved in the degree to which "the general principles one chooses for oneself will have been arrived at by a correct use of reason ..."[17].

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[11] As above, xiv.

[12] Siegel, H., above,at note 9, pg. 39.

[13] As above, pg. 30, 46, 156; Goldberg, I., above at note 1.

[14] McPeck, J. E., "Teaching Critical Reasoning through the Disciplines: Content versus Process," in *Critical Reasoning in Contemporary Culture* ed. Richard, A. Talaska., (Albany NY: State University of New York Press, 1992), pg. 32-3.

[15] Dearden, R. F., "Autonomy as an Educational Ideal 1," in *Philosophers Discuss Education* ed. S. C. Brown., (London: Unwin bros., 1975), pg. 16.

[16] As above, pg. 3. See also Gewirth, A., *Reason and Morality* (Chicago: University of Chicago Press, 1978); Telfer, E., "Autonomy as an Educational Ideal 2," in *Philosophers Discuss Education* ed. Brown, S. C., (London: Unwin bros., 1975); Dewey.

[17] Gewirth, A., *Reason and Morality* (Chicago: University of Chicago Press, 1978) pg. 138.

It is central to our endeavor that the criteria employed in judgment should be rationally reflected upon.

The distinction between definitions of autonomy that include this last requirement and those that do not is reflected in the common distinction between freedom and liberty. According to such a distinction, to be free to make a wrong choice is not freedom[18]. By way of illustration, here are just some of the things Gewirth maintains education for freedom should include: an understanding of science, knowledge of when scientific knowledge is necessary and how to communicate it; the ability and motivation for rational discussion and voting; critical judgment – being able to spot lies, misinformation, ignorance, superstition; knowledge of the components of one's own present and future personality, a will to arrange them reasonably, and so on.

3. Arguments for the Teaching of CT[19]

Taking CT, autonomy and freedom together, and having said that self-criticism will be of some importance, we will now outline some reasons for the adoption of CT as an educational ideal. Many arguments have been used to support our ideal. The reader will forgive me for mentioning only a few, and even these, only in outline. We begin with two arguments for proper education in a democracy that follow from the centrality of voluntariness and wise democratic decisions to the democratic ideal[20]. *Voluntary consent is essential for a democracy* because, as Pericles put it, democracy is "for the many"[21]. This is the principle of popular sovereignty. The democratic government should rule on behalf of the people and be accountable

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[18] Kelly, A.V., *Education and Democracy: Principles and Practices* (London: Paul Chapman Publishing, 1995). See also discussion on Dewey in Wilfred Carr and Anthony Hartnett, *Education and the Struggle for a Democracy: The Politics of Educational Ideas* (Buckingham: Open University Press, 1997).

[19] For reasons of lack of space and ease of reading, arguments put forward by Gewirth to the effect that CT education is a duty to one's self were left out of this abridged version. For more on these arguments and others see Goldberg.

[20] As we take reason to underpin both voluntariness and wise decisions, these arguments overlap somewhat.

[21] Thucydides, "History," Book II, Paras 37-41, quoted in A. V. Kelly, *Education and Democracy: Principles and Practices* (London: Paul Chapman Publishing, 1995).

to them[22]. The ideal of democracy, Israel Scheffler points out, rests society on freely given, informed consent which requires accountability to the public and critical public control or review of policy[23]. Similarly for Dewey, voluntariness or intellectual freedom, is a necessary component of democracy, which demands conscious, controlled decisions. As Dewey explains:

> *"Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education"*[24].

Sovereignty, however, is not the only reason democracy is essentially voluntaristic. The principle of voluntary consent is a society's method of valued progress, amelioration, or growth[25]. A poor and inadequate operationalization of the voluntary principle, - universal suffrage, brings us to the second argument.

Wise decisions are necessary for a democracy. As democracies are driven by what is largely public opinion, it follows that "democracies rely for their health and well being on the intelligence of their citizens"[26]. Education, defined broadly as deliberate socialization, is a powerful influence that can either make or break a democracy[27]. If a democracy is to survive, its citizen must know how to operate democratic institutions; this necessitates education to that effect. Citizens must understand the issues about which they are asked to choose and must have access to ideas relating to these. They should have a background of knowledge to enable them to act wisely and in accordance with the values that underlie the democratic system. This implies a great deal of knowledge[28].

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[22] Kelly, A. V., above at note 18.

[23] Siegel, H., above at note 9.

[24] Dewey, J., *Democracy and Education: An Introduction to the Philosophy of Education* (New York: Macmillan Publishing, 1966), pg. 87.

[25] Goldberg, I., above at note 1.

[26] Siegel, H., above at note 9, pg. 60.

[27] For an example of a broad sense definition of education as deliberate socialization see Cremin, L. A., *Traditions of American Education*. (New York: Basic Books, 1977,) 12 pp. 135-136, in Kelly, A.V., above at note 22.

[28] White, P., "Education, Democracy, and the Public Interest," in *The Philosophy of Education* ed. Warnock, G. J., (London: Oxford University Press, 1975).

For Dewey, if democracy is to survive and grow or ameliorate; if social evil, caused by lack of vital knowledge, is to be prevented; if universal suffrage is to be trusted; if social confusion, the cause of subjugation and result of the complex and changing nature of society, is to be averted and remedied; if society is to be truly flexible and change peaceful; if consensus is to be possible; if society is to be more than "nominally democratic" and surpass the cultural inheritance from "older and unlike cultures;" if we are to pick the fruits of diversity of experience; in short, if society is to be truly social, that is, be socially directed and controlled, then "genuine and thorough transmission" of meaning or knowledge must take place. Such diffusion of knowledge should be from a point of view that includes all others. Critical thinking, which relies on the public method of science, and which adheres to the most advanced methods of free thought and meanings, singularly complies with these, as well as with the voluntary criterion[29].

Agreeing that decisions regarding educational policy should not be left to chance, Amy Gutmann bases her theory of education around this question: "*Who should share the authority to influence the way democratic citizens are educated?*"[30] Her answer is everyone, but after having been educated to deliberate democratically. As all citizens have an interest in determining educational policy, all citizens should be empowered to participate in authority over education. However, a dual obstacle presents itself. First, there are wide disagreements on educational matters, which have to be reconciled. Second, there are dangers in giving imperfectly-educated citizens the right to decide upon future education. Rational democratic deliberation is her remedy to both problems, and so she argues that democratic education should minimally empower citizens for democratic deliberation. Expanding on the second obstacle, democracy can be subverted by damage to the "intellectual foundations of future democratic deliberations" through either restriction of the ability to deliberate rationally ('repression'), or exclusion of some from an adequate education ('discrimination')[31]. The democratic ideal,

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[29] Dewey, J., above at note 24, iii, pg. 331, 4.

[30] Gutmann, A., *Democratic Education* (Princeton NJ: Princeton University Press, 1987), Pg. 3.

[31] As above, pg. 14.

therefore, demands the constraining of the simple procedural majority rule over educational policy with two principles: non-repression and non-discrimination.

CT is necessary for responsibility and moral maturity. We take it that the morally relevant attribute possessed by humans, which gives them moral responsibility (above moral consideration), is the potential or capacity to be rational. Many have argued, however, that potential and capacity are not enough. As Dewey maintains, actual intellectual freedom is necessary for responsibility. In this respect, intellectual freedom is a moral asset, the lack of which is a moral disability[32]. Those who do not critically evaluate their beliefs through seeking and reasonably evaluating relevant facts are "prisoners of their own convictions." This is because they "cannot decide," (we assume for the reason that there is no free choice) whether or not their beliefs are supported, and they cannot change their beliefs where rational support is missing because they are unconscious of this deficiency[33]. Such people are also unaware of the usefulness of CT and so, are unaware of the restrictions imposed upon them by their beliefs. They are oblivious to the fact that their options have been limited by their refusal to examine challenges and alternatives to their "unreasoned but presently held convictions"[34]. Consequently, escape from such impoverished state of mental life is unlikely. Escape is necessary, however, if conscious control, and consequently responsibility, are to be achieved.

CT, then, *provides protection from manipulation.* Autonomy is part of the search for security. It makes us less vulnerable to abuse in the form of "political deception, commercial exploitation and personal manipulation"[35]. Critical thinkers "are in a much better position to defend themselves from the hoards of unscrupulous advertisers, ideologues, and other manipulators of their beliefs"[36]. For Donald Lazere, CT is especially necessary in this age where *"the forms of*

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[32] See also Gutmann, A., as above; Siegel, H., above at note 9, pg.42-3; Gewirth, A., above at note 17, on moral motivation and knowledge; Alan, Montefiore., "Chairman's Remarks," in *Philosophers Discuss Education* ed. S. C. Brown (London: Unwin bros., 1975), Pg. 195.

[33] Siegel, H., above at note 9, pg. 88.

[34] As above.

[35] Dearden, R.F., in Brown, above at note 15, pg. 15.

[36] Talaska, R. A., above at note 10, pg. 100.

manipulation are hidden, sophisticated, and pervasive"[37]. The greatest jeopardy to knowledge, reason, and the survival of democracy, he maintains, are "*anti-rational forces*" in the form of "*mass-mediated thought control and ... reason-numbing effects of mass culture,*" which result in ignorance and gullibility[38].

Siegel provides three more justifications of CT as an educational ideal. Only CT, he maintains, accords with *Kantian respect for students as persons*. Siegel writes:

> "*Critical thinking is the only educational ideal which takes as central the fostering of autonomy and independent judgment which are basic to treating students with respect. Insofar as treating students with respect involves respecting their independent judgment and autonomy, any educational ideal which treats student with respect will centrally involve the ideal of critical thinking.*"[39]

CT is also *necessary for understanding the content of education*. "Students who are critical thinkers stand to gain more from their courses than students who are not"[40]. A proper understanding of the content of education demands "a proper understanding of the relevance of the reasons and rules of inference and evidence"[41]. That is, a necessary part in the understanding of a scholarly tradition is the understanding of that tradition's evolving standards of reasons evaluation. Inasmuch as we take the role of education to be an initiation into the rational traditions, Siegel asserts, we are compelled to inculcate CT. As shall be seen below, Dewey's pragmatism takes a similar approach. CT is *the driving ideal of philosophy*. As Siegel put it, CT as an educational ideal has "impressive philosophical credentials"[42]. Throughout the history of Western philosophy, he

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[37] As above, xx-i.

[38] Lazere, D., "Cultural Literacy and Critical Literacy," in *Critical Reasoning in Contemporary Culture* ed. Talaska, R. A.,, (Albany NY: State University of New York Press, 1992), Pg. 59.

[39] Siegel, H., "Education and the Fostering of Rationality," in *Critical Reasoning in Contemporary Culture* ed. Talaska, R. A., (Albany NY: State University of New York Press, 1992), Pg. 100-1.

[40] As above, pg. 100.

[41] Siegel, H., above at note 9, pg. 43.

[42] Talaska, R. A., above at note 10, pg. 108.

adds, CT has been central to all the major philosophies of education. This is because philosophy has always maintained fidelity to its purpose, the ideal defined by Socrates, as the freeing of our mind from unsupported beliefs through their critical examination[43].

Lastly, CT is also *helpful in resolution of disagreements*. Through a publicly available method of rational persuasion it enables understanding and communication. It is "a fairer and a firmer basis for peacefully reconciling our differences"[44]. Two further justifications, that CT is "the best we can do to move toward increased objectivity;" and the priority of reason, we shall return to below[45].

4. An Ideal for Religious Education

After defining and reviewing several justifications of CT as an educational ideal, we can now attempt an initial characterization of our ideal for RE. We will outline thirteen criteria (numbered in parenthesis) that our ideal will have to comply with. We begin by recalling the above arguments in support of CT and demand that

(1) *"all educable children must be educated,"*[46] and that education properly so-called,
(2) *may not transgress the boundaries set by CT*. All education should be critical[47].

It should inculcate freedom "in each child to the fullest extent of his abilities"[48].

As should be apparent from the discussion thus far, creating a critical thinker is no mean task. Although far from realizing its potential, schooling is at a disadvantage in this respect. Schooling is a relatively superficial influence compared to parenting as a socializing agent, for example. Gutmann answers this difficulty by insisting that democratic education should be life-long, and society-wide, in the sense that all social institutions should be infused with

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[43] As above. For an outline of such a history see Siegel , H., above at note 9.
[44] Gutman, A., above at note 30, pg. 12, 103.
[45] Paul, in Talaska, above at note 10, pg. 143.
[46] Gutman, A., above at note 30, pg: 45.
[47] Siegel, H., above at note 9.
[48] Gewirth, A., above at note 17, pg. 243-4, 319.

it. To produce a critical thinker, Ralph Johnson maintains, *"the support of the whole educational system is necessary. No one course at any level can do it"*[49]. Gewirth too holds the thesis that

> *"education should be embodied not only in public institutions of formal education but also in other political and social institutions of the whole society"*[50].

Further, he claims, education should be public so that its benefits as well as its burdens will be equitably distributed. Siegel takes Popper's attempt to solve the problem as CT in all university level studies, as well as lower levels if possible[51]. Paul advocates his 'strong-sense' CT, elucidated below, across the curriculum. A CT course in college is too little too late, and many do not even go to college[52]. Lazere similarly holds that the solution is a "crash campaign" for CT in all relevant academic fields[53]. As we are primarily concerned with religious schooling, and as we shall argue that our ideal is in practice necessary for CT, we shall say that

(3) *our ideal for religious education should infuse schooling at all levels.*

We now pick up on Gewirth's requirement above to teach science, its relevance, and the methods of communicating it. In the schooling that Bertrand Russell elucidated, he posited that we must understand and apply principles of science to solve the problems of the modern world[54]. For Dewey too, as we shall see below, science was central. For him, the method of education should be the method of thinking and so, the method of science. This method should include the intellectual virtues that are the necessary components of learning and intellectual attitude. They are: open-mindedness, that is, the active seeking of all meaning, even that of a foreign point of view;

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[49] Johnson, R. H., "Critical Reasoning and Informal Logic," in *Critical Reasoning in Contemporary Culture* ed. Talaska, R. A., (Albany NY: State University of New York Press, 1992), Pg. 76.

[50] Gewirth, A., above at note 17, pg. 319.

[51] Siegel, H., above at note 9, pg. 94.

[52] Talaska, R. A., above at note 10.

[53] Lazere, D., above at note 38, pg. 59.

[54] Sadovink, A. R., Cookson, P. W., Jr., and Semel, S. F., *Exploring Education: An Introduction to the Foundations of Education* (Boston: Allyn and Bacon, 1994).

intellectual integrity/honesty/sincerity, meaning "the absence of suppressed but effectual ulterior aims for which the professed aim is but a mask;" and responsibility, part of which is a "responsibility for accuracy and vividness of statement and thought"[55].

For Siegel, a critical science education is crucial in education for CT because scientific education has as one of its aims the understanding of science and an ability to use scientific insight in matters of public or personal importance[56]. In keeping with his 'reasons conception' of CT his scientific education focuses on reasons in three ways. First, scientific education looks at the "nature and role of reasons" in science. Second, it looks into "alternative theoretical and critical perspectives." And finally, it investigates the philosophy of science. All this should inform "our understanding of the principles governing the evaluation of reasons in" science[57]. Siegel takes Michael Martin's approach to scientific education as support: Science education should teach different theories, even discarded ones, how to work easily within them, to change perspective from one to the other, to treat them as working hypotheses. This will help students not to be blinded by their commitments to any one of them[58].

Siegel also generalizes this method with a slight variation. Putting religion into his mold gives the following result:

> *"the study of philosophy of [religion], the contrast between genuine- and pseudo-[religion], and the consideration of alternative theoretical perspectives both within and with regard to [religion] and the problem of the evaluation of those alternatives, all promise to aid in the effort to make the curriculum in [religion] contribute to a critical education in [religion]"*[59].

We will use Siegel's articulation of a proper scientific education in our ideal. Later we will attempt to show that studying the contrast between genuine- and pseudo-religion (that is, the problem of

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[55] Dewey, J., above at note 24, pg. 176.
[56] Siegel, H., above at note 9.
[57] Talaska, R. A., above at note 10, pg. 106.
[58] As above, pg. 109.
[59] As above, pg. 114.

demarcation) should be done scientifically, as well as philosophically. We will also argue that the demarcation line runs between religion and science thereby making science an alternative theoretical perspective with regard to religion. We will also maintain that the problem of evaluating between these alternatives is the domain of philosophy – an activity whose intellectual standards are largely similar to science. For these reasons, the study of religion should be very intimately connected with the study of science. Taking into our ideal of religious education the suggestions from above, this ideal will have to be

(4) *thoroughly scientific.*

Dewey's educational philosophy supplies us with a subject matter and method selection criterion of social worth, whereby what should be used in schooling is that which is most conducive to an amelioration of social life, or what is more humane, in the sense of helping to "appreciate the significance of human activities and relations."[60] Dewey identifies four functions of schooling, which we shall adopt as our criteria five to eight:

(5) *Schooling should teach what is socially essential* out of the huge body of accumulated knowledge.
(6) *It should eliminate non-educative environmental influences.* A society is responsible to transmit that, and only that, which will make a better present and future society. It should guarantee learning from, rather then a recapitulation of the past. It should correct unfair inequality rather then perpetuate it.
(7) *It should give everyone the opportunity to escape the intellectual limitations imposed by the surroundings they are born into.*
(8) *It should integrate society.* As Durkheim held, it should create the moral unity necessary for social cohesion and harmony. It should encourage social unity[61].

Dewey also requires that education will supply us with

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[60] As above, pg. 51, 213.
[61] Sadovink, A. R., above at note 54.

(9) *an understanding of our constitutive milieu*, both natural and social.

As C. A. Bowers held, we should understand the forces that constitute personal identity and social consciousness[62]. This is so, we maintain, so that education will not "close the mind to doubt on the criteria of judgment which we employ." For Dearden this means that the learner needs to be "*an embryonic philosopher*"[63]. Another aspect of this criterion is the understanding of the more "natural" or superficial thinking processes we engage in, as opposed to CT. With this criterion, we are merely following the Existentialist injunction to '*know thyself*'. This brings us firmly within the grip of Paul's Strong-Sense Critical Thinking (SSCT) to which we shall presently turn, and from which four more criteria for our ideal shall be extracted.

5. Worldviews, Self-Deception, and Strong-Sense Critical Thinking

We take Paul's SSCT to be a necessary ingredient of our ideal. His contribution to this effort lies in his critique of what he calls the 'atomistic' method of teaching CT, which our ideal will have to avoid. Before we begin with his argument, a look at two relevant concepts is necessary. They are *worldviews* and *self-deception*.

Put simply, Paul calls worldviews "background logic"[64]. It is what Siegel defines as ideology: "a general framework that shapes individual consciousness, guides and legitimates belief and action, and renders experience meaningful"[65]. The part that legitimates belief is the criterion of judgement, mentioned above. As Yinger put it:

> *"To the believer, magic often seems to work. It is well known that a person's perceptions, the observations that he considers to be evidence, the premises on which his logical*

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[62] Ozmon, H.A., and Samuel, M.C., *Philosophical Foundations of Education* (Ohio: Prentice Hall, 1995).

[63] As above at note 16, pg.18.

[64] Talaska, R. A., above at note 10, pg. 137.

[65] Siegel, H., above at note 9, pg. 65.

> *processes are based, and other cognitive acts are not independent of his personal tendencies and his cultural training."*[66]

Talaska defines worldviews or Nomoi (foundational opinions/ beliefs/mores) as *"the very matrix within which logical skills and cultural knowledge operate."*[67] For him there is a necessary ingredient of self-deception in the Nomoi, which *"not only are they not questioned, but they act as a kind of lens through which all other phenomena are brought into perspective"*[68].

Dewey also held that for humans *"self-deception is very easy"*[69]. Our childish curiosity and openness too easily change into a thoughtless following of routine habits and aversion of change. He writes:

> *"We are made, so to speak, for belief; credulity is natural. The undisciplined mind is averse to suspense and intellectual hesitation; it is prone to assertion. It likes things undisturbed, settled, and treats them as such without due warrant. Familiarity, common repute, and congeniality to desire are readily made measuring rods of truth. Ignorance gives way to opinionated and current error, - a greater foe to learning than is ignorance itself"*[70].

With relation to worldviews as unexamined background logic he held that

> *"the things which we take for granted without inquiry or reflection are just the things which determine our conscious thinking and decide our conclusions"*[71].

Worldviews play a major role in Smart's theory of religious education, mentioned below. He writes of six principal dimensions usually displayed by worldviews. They are doctrine, myth, ethics,

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[66] Yinger, M. J., *The scientific study of religion* (New York: Macmillan Publishing, 1970), Pg. 74.

[67] Talaska, R. A., above at note 10.

[68] As above, pg. 251.

[69] Dewey, J., above at note 24, pg. 176.

[70] As above, pg. 188-9.

[71] As above, pg. 18.

ritual, experience, and social or institutional embodiment. Worldviews include both traditional religious systems of belief and practice and secular systems of a similar nature, such as political ideologies. Worldviews are potent. *"They are a vital factor in the shaping of civilizations and of groups"*[72]. They legitimatize certain ways of thought and action and involve *"a kind of world-construction"*[73]. By way of socialization, he posits, they create a contextually and culturally dependent rationality. Worldviews are like a collage. They are a syncretism. They are made up by an amalgamation of *"very contingent materials,"* both religious and not[74]. These materials are chosen and related to each other in accordance with a particular logic. This logic, however, is *"not altogether precise,"* and allows for a considerable flexibility[75]. The "extraordinary complexity" of our environment and the "rich variety of experience" that facilitate variable selection, and the lack of strict entailment between the materials selected, make for flexibility of both selection and interpretation. Choice from, and interpretation of a worldview, is thus very likely to be "heavily determined by human strivings, social patterns, and so on"[76]. Worldview flexibility, or multiple interpretation, is the reason that a belief system is not one thing[77]. It is the reason that *"every major tradition collapses into a shoal of subtraditions,"* and new ones form where traditions meet[78]. It is the reason why what in theory a doctrine commits adherents to believe can differ from what they believe in practice[79]. And it is also why *"it is hard to falsify a position conclusively"*[80]. Smart is also of the opinion that worldviews necessarily involve a degree of self-deception, that is, that they are unsystematic, or do not have a *"consistency of perspective"*[81]. It is easy for people, he maintains, to hold an

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[72] Smart, N., *Religion and the Western Mind* (London: Macmillan Press, 1987), Pg. 11.

[73] Smart, N., *The Science of Religion and the Sociology of Knowledge: Some Methodological Questions* (New Jersey: Princeton University Press, 1973), pg. 88.

[74] As above, pg. 79.

[75] As above, pg. 153.

[76] As above, pg. 88-9.

[77] As above.

[78] Smart, N., above at note 72, pg. 5-6.

[79] Smart, N., above at note 73.

[80] Smart, N., above at note 72, pg. 21.

[81] As above, pg. 17.

unsystematic worldview, or simultaneously to hold contradictory beliefs[82]. From another angle of self-deception he writes that

> *"human beings are often conservative, and so easily think in the out-of-date categories of their childhood and upbringing"*[83].

Paul agrees that self-deception is very easy and that autonomy is not naturally or normally valued. His SSCT is an effort to remedy this form of intellectual manipulation by making our worldviews and their effects on our thinking explicit. Paul considers the teaching of 'weak sense' CT, or teaching in the atomistic manner problematic in this respect. This form of teaching is one that assumes that CT "can successfully be taught as a battery of technical skills [knowledge of fallacies for example,] that can be mastered more or less one by one without," he adds, "giving serious attention to self-deception, background logic, and multicategorical ethical issues"[84]. His argument is as follows.

Those who come to study CT, and people in general we presume, have firmly held but uncritical, biased, stereotypical, egocentric, and sociocentric worldviews. They process their experience in an illusory self-serving manner by misrepresentation of incompatible ideas[85]. Moreover, we tend to see the beliefs we hold as part of our identity, and so their criticism is often experienced as 'ego-threatening'[86]. *"Consequently, most students find it easy to question just, and only those beliefs, assumptions and inferences that [they] have already 'rejected' and very difficult, in some cases traumatic, to question those in which they have a personal, egocentric investment"*[87]. Teaching such people how to "recognize bad reasoning in [egocentrically] neutral cases (or in the case of the opposition)" makes for sophists, not critical thinkers[88]. That is, these students fail to use their newly acquired skills to criticize their own deeply-held

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[82] Smart, N., above at note 73, pg. 107.
[83] Smart, N., above at note 72, pg.23-4.
[84] Talaska, R. A., above at note 10, pg. 137.
[85] As above.
[86] Siegel, H., above at note 9, pg. 16.
[87] Talaska, R. A., above at note 10, pg. 136.
[88] As above.

beliefs. On the contrary, they become more apt and better able to attack other points of view and shield their own. They tend to rationalize and 'intellectualize' their biases. Since worldviews present an irrational obstacle to free thinking, we shall have to be aware of their influence.

Another reason Paul gives is that worldviews can stand in support of any particular part of theirs should it come under attack. Paul's assertion here is that atomistic CT skills, or criticism of particular arguments in isolation from the worldviews of which they are a part, are not sufficient for rational judgement. Where we have a conflict between particular beliefs, which are a part of different worldviews, the worldviews themselves may be implicated in the conflict, and we shall need to judge the *"relative credibility," "vested interests,"* and *"track records"* of these worldviews.[89] Thus, where worldviews are implicated, to be a critical thinker one needs to understand his own as well as opposing worldviews. Likewise, one also needs to be able to reason from a variety of worldviews.

To achieve this effect, Paul gives the following recommendations.

(1) *The subject of argumentation should be multidimensional cross-disciplinary ethical issues.* This way we are directly engaging our worldviews in the conflict[90]. Attention should not be spread to thinly between many ethical issues. In other words, our

(2) *engagement with the subject matter should be thorough*[91]. Obviously,

(3) *attention should be given to self-deception.* And lastly,

(4) *students should be given experience in detaching themselves from, and criticizing their own deeply held beliefs*[92].

Thus elucidated, SSCT enjoys the support of Dewey's *'theory of interest'*. The isolation of subject matter from the individual and social context of the learner, he holds, is the leading hindrance to achieving reason. This is so for three main reasons. First, personal interest is needed if the student is to properly deliberate and be

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[89] As above, pg.145.

[90] As above.

[91] As above.

[92] Siegel, H., above at note 9, pg. 12.

persistent. Second, an isolated subject matter does not enrich experience with its meaning and does not nurture thought. An education that complies with Dewey's theory of interest will take advantage of individual activities and interests that require thought, and so be vital and fruitful. Lastly, deliberation on "the deepest problems of common humanity" and methods that produce "social insight and interest" have moral priority for the enlightenment and social benefit they bring[93]. An education that starts with a student's activity that is socially relevant, and supplies its broader meaning, complies with the criteria of his theory of interest, designed to avert these problems. SSCT fits this description well. Its subject matter is recognized to be of vital importance by the student, it is concerned with problems weighing heavily on associated living, and their understanding requires very advanced thought.

6. Ninian Smart and Modern Religious Education

We shall now take a look at Smart's approach to the scientific study of religion and his religious education. We hold that his form of religious education complies with the thirteen criteria of our ideal. As his religious education mirrors his approach to science, and as we recognize the intimate connection between science and our ideal, we take it that beginning with an elucidation of his science of religion, what he calls "the modern study or religion," will not be misplaced[94].

His modern study of religion "attempts to delineate and explain the nature and effects of worldviews"[95]. Broadly, it includes two interrelated parts. They are the philosophy of religion and the scientific study of religion. Beginning with the former, the philosophy of religion has three roles in his approach.

(1) It attempts an elucidation of the meaning of religious utterances.
(2) It "investigates and attempts to delineate the methodology of the religious sciences"[96]. And most importantly in our respect,

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[93] Dewey, J., above at note 24, pg. 192.
[94] Smart, N., above at note 72, ix.
[95] As above.
[96] Smart, N., above at note 73, pg. 94-5.

(3) it attempts to elucidate criteria of truth "as between and among worldviews," it criticizes and evaluates worldviews with regard to these and other criteria, and it also attempts to construct worldviews with regard to these considerations[97]. As already noted, philosophy as an intellectual pursuit necessitates the use of public scientific standards[98].

The second part of the modern study of religion is the scientific component. It is concerned with a description and explanation of religious phenomena[99]. Smart identifies four characteristics in his scientific study of religion: First, it is *aspectual*. It is an aspect of existence that people behave religiously, and science has to consider this aspect in its entirety. "The aspectual study of religion is bound to be multi-area, multi-traditional [... because it is] intrinsically about religions in the plural."[100] Second, it is *polymethodic*. Differing methods or disciplines are brought to bear on the religious aspect, including history, sociology, phenomenology, psychology, anthropology, sociology of knowledge, history of ideas, political science, philosophy and so on. It is a consequence of the aspectual character of our study that "it makes use of such methods as may be evolved in the disciplines which share in the study of religion," in order to be scientific[101].

The third characteristic is *pluralism*. This is demanded both by the aspectual plurality of the religious phenomenon, and by the comparative method of the social sciences. The former for the reason that, as there are "many different and sometimes mutually challenging religious and atheistic traditions,"[102] he writes,

> *"it would appear that no full study of religion can properly be undertaken without becoming immersed in more than one tradition"*[103].

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[97] Smart, N., above at note 72, pg. 49.
[98] Smart, N., above at note 73.
[99] As above.
[100] As above, pg. 18.
[101] As above, pg. 159.
[102] As above, pg. 6.
[103] As above, pg. 9.

The latter, because *"in the human sciences experimentation is usually impossible. That is, one cannot put a society or a part of a society into a laboratory"*[104]. The scientific study of religion uses cross-cultural comparisons as an analogical substitute to the experimental method. Thus he writes,

> *"The study of religion is essentially plural, crossing boundaries of the human mind, and extending if possible indeed to the whole globe."*

And he adds:

> *"In being crosscultural like this, the modern study of religion is the antithesis of the standpoint of the older, theological model,"*

which tended to confine itself to one tradition[105]. Pluralism, together with the fact that there are new and better methods of discovering the truth, has several implications for Smart. It implies that the question of truth must be considered in any serious attempt to understand the position of one faith among the others. And it implies that *"different religious positions are themselves data, not starting points of theory"*[106]. This means that a serious study of religion must not be *"subordinate to theological concerns,"* and that the phenomenological method (discussed below) ought to be used[107].

Lastly, the forth characteristic is that the scientific study of religion is *without clear boundaries*. It is impossible to generate a clear-cut definition of religion. Any definition will include family resemblances. There are many analogies between religious, less religious, and secular phenomena. As he illustrates, the

> *"methods used in the study of religion may prove illuminating when applied to the Chinese ideological and social scene"*[108].

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[104] As above, pg. 18.
[105] Smart, N., above at note 72, pg. 6.
[106] Smart, N., above at note 73, pg. 19.
[107] As above, pg. 6.
[108] As above, pg. 17.

And so *"religious and political worldviews belong on the same spectrum"*[109]. It would limit our understanding, Smart maintains, if we study religion separately[110].

As we just mentioned, Smart considers a phenomenological approach to be necessary for the scientific study of religion. Owing to the fact that, unlike the natural sciences, we are talking about humans that think and feel, phenomenology begins with the participants, trying to delineate their point of view. Phenomenology attempts to get *"at the meaning of a religious act or symbol or institution, etc., for the participants ... a kind of imaginative participation in the world of the actor"*[111]. It is an *"informed or structured empathy whereby we travel into the minds of other people"*[112].

It is through phenomenology that the science of religion cannot be accused of unjustified reduction. As he points out, some people believe that looking at religion through science is absurd because *"the scientific approach is bound to miss or distort inner feelings and responses to the unseen,"* and *"distasteful, because science brings a cold approach to what should be warm and vibrant."* These beliefs are mistaken because *"a science should correspond to its objects. That is, the human sciences need to take account of inner feelings precisely because human beings cannot be understood unless their sentiments and attitudes are understood"*[113].

Similarly, phenomenology does not reduce religious entities to items of belief. A reduction, according to Smart, occurs where a description *"does not bring out believers' commitments and certainties,"* or where it is *"commentarial rather than attitude-evoking"*[114]. Such cases are reductions since they fail to convey the immanence and dynamic mutual influence of the doctrinal and mythical web (a religion's 'focus') on the participants,[115] or the fact that *"nonexistent objects can be phenomenologically indistinguishable*

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[109] Smart, N., above at note 72, pg. 82.
[110] As above.
[111] Smart, N., above at note 73. pg. 20.
[112] Smart, N., above at note 72, pg. 4-5.
[113] Smart, N., above at note 73, pg. 3.
[114] As above, pg. 50.
[115] As above, pg. 73.

from existent ones"[116]. Thus Smart distinguishes between what is *real* and what *exists*. As he illustrates: "*God is real for Christians whether or not he exists*"[117]. Phenomenology avoids the reduction by looking at the focus or "*the gods as real members of the community.*"[118] He holds that

> "*in principle one should treat the gods and the spirits who inhabit the phenomenological environment of a given cultural group as part of the system. The social system consists not just of humans, but of the gods and spirits as well*"[119].

In an effort to bracket out personal beliefs, 'Methodological Agnosticism' should be used in the phenomenological study of religion. That is, we should not assume truth or falsity with regard to religious beliefs. As we have seen, this was implied by pluralism. It is also necessitated for the purpose of testing and avoidance of circularities. Another reason for holding methodological agnosticism is that for the purpose of phenomenology, judgment on the truth or falsity of religious beliefs is not necessary. The tangible effect they have on the adherent is there in either case. A theological point of view

> "*is not necessary to expound the inner meaning of a religious attitude ... it is enough to bring out the nature of the focus on which the faith is directed and to show how it is real to the individual*"[120].

Hasty judgement and some religious commitments may in fact obstruct good phenomenology. We should also be agnostic about the gods because religious objects are heavily interpreted or theory-laden, and there is wide dispute about their existence. Another reason is that immersion in other traditions helps one to escape the tendency of "*superficially imposing one's own norms of rationality upon another culture*"[121]. Lastly Smart writes that

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[116] As above, pg. 51.
[117] As above, pg. 54.
[118] As above, pg. 52-3.
[119] As above, pg. 52-4.
[120] As above, pg. 57.
[121] As above, pg. 108.

> *"it is in practice sound not to jump to conclusions about the folly of other men's beliefs even if we know very well that mankind is full of folly, because, after all, some of our most profound ideas seem absurd at first hearing..."*[122]

(The argument that the ubiquity of belief in the transcendent, or religious experience, justifies the acceptance of its existence is rejected by Smart.)[123] Phenomenology, and its requirement that we bracket our own views out, demands of us an analysis and an understanding of what these views are. This self-analysis, Smart holds, fits in well with the critical requirement of science. It will be the source of the greatest benefits of the study of religion, he maintains. As has already been mentioned, methodological agnosticism can be discarded at higher and more critical levels of analysis.

It would be hard to distinguish Smart's ideas regarding religious education from our elucidation of his science above. In what could be called Smart's philosophical-scientific religious education, worldview education, or modern religious education (to keep with Smart's terminology), we identify three essential elements:

1) His education is a "*plural*, crosscultural, multi-disciplinary exploration of religion and, more generally, of the worldviews which help to shape human action"[124]. It must not be "culturally tribal."[125] It teaches "all the main worldviews of the world" as well as world histories, and establishes none of them as official[126]. Rather then a localized identity, it should give people "a sense of being human, that is members of a common human family,"[127] – a "historical identity"[128].

2) It is both *descriptive and critical*. It should show "the more profound and inspiring aspects of human worldviews," as well

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[122] As above, pg. 109.

[123] For more on his and other objections to this argument see Goldberg, I., above at note 1.

[124] Smart, N., above in note 72, pg. 3.

[125] As above, pg. 7.

[126] As above, pg. 29.

[127] As above, pg. 24.

[128] As above, pg. 45

as facilitate a "sensitive choice of values"[129]. It should "give facts about worldviews" as well as evaluate the rationality of these facts[130].

3) It is an "*essential element of education*" at all levels of schooling[131]. The level of attainment and complexity of conceptual apparatus will be lower at lower levels of schooling but the subject is the same.

With the description of his modern study of religion, and what we called the modern education of religion behind us, we can see that we have all our criteria answered. His demand that the modern study of religion will be essential to education at all levels answers our first, third, and eleventh criteria. That is, that all educable children must be educated; that it should infuse schooling at all levels; and that engagement with the subject matter should be thorough, respectively. His demand for a descriptive and critical education makes ensures that CT and the requirements of science are not transgressed; that non-educational environmental influences are eliminated; that attention is given to self-deception; and that students are given experience in detaching themselves from, and criticizing their own deeply-held beliefs; - our second, forth, sixth, twelfth and thirteenth criteria respectively. His plural, crosscultural, and multi-disciplinary exploration of worldviews teaches what is socially essential; and takes as its subject multidimensional ethical issues; - our fifth and tenth criteria respectively. And finally, that people should be given the opportunity to escape the intellectual limitations imposed by the surroundings they are born into; that education should integrate society; and that it should give an understanding of our constitutive milieu; - our seventh to ninth criteria respectively, are answered by the conjunction of the three aspects of Smart's education.

7. Objection One: Rationality

An objection may be raised at this point, which should be addressed. This is the objection from the historically relative nature of our understanding. It comes from the recognition that since

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[129] As above, pg. 64.
[130] As above, pg. 11.
[131] As above, pg. 3.

worldviews are constitutive of our thinking, as well as our thinking about rationality itself, we may lack truly rational standpoints from which to either criticize other worldviews, or rationally justify educational ideals.

Together with Dewey and Husserl, we take as uncontroversial the descriptive assertion that our rationality is a result of the all-saturating control of our worldview[132]. We further agree with Gadamer, as does Talaska, that there is no *"completely neutral Archimedean point from which to understand things with absolutely no presuppositions guiding our thought"*[133].

The objection, however, is more serious than this. It is the objection that rationality itself, distinct from a description of what this or another person views as such, is a function of worldviews and that *"rational justification presupposes prior ideological commitment"*[134]. This is the assertion of MacIntyre. Basil Mitchell takes MacIntyre as challenging the *"underlying assumption that reason is a faculty which can stand aside form a tradition and assess it from a critical standpoint in principle available to all,"* and with it the belief that worldviews can be properly criticized[135]. If we cannot criticize from more or less firm grounds, it follows that we cannot properly justify our ideal.

Our reply to the objection will be two-pronged. We begin with the *priority of reason*. As Siegel writes: *"One could non-arbitrarily embrace the thesis of ideological determination only if one had good reasons for doing so – in which case one could not embrace the thesis"*[136]. That is, the objection is self-contradictory. Any criticism of reason must presuppose reason if it is to be universally justified. CT, the language of reasons, is the common language of all inquiry[137]. Brann, Scheffler, and Paul would add that it is presupposed by all reflection, argument, and action respectively[138]. Similarly for

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[132] Talaska, R. A., above at note 10.

[133] As above, pg. 255.

[134] Siegel, H., above at note 9, pg. 63.

[135] Mitchell, B., above at note 7. pg. 595-6.

[136] As above, pg. 73.

[137] Talaska, R. A., above at note 10, pg. 102.

[138] Brann, E. T. H., "Critical Reasoning and The Second Power of Questions: Toward First Questions and First Philosophy," in *Critical Reasoning in Contemporary Culture* ed. Talaska, R. A., (Albany NY: State University of New York Press, 1992), pg. 328.

Gewirth, the priority of reason, and the necessary valuation of reason in every act, is central to his moral theory. In this respect rationality is different from all other worldviews. It is presupposed by all of them, it transcends them, and so it is independent of them[139]. With this much we agree. Siegel's next point in the argument, that it also follows that rationality can criticize worldviews, will require more justification. This we maintain, because the fact that rationality is presupposed by worldviews says nothing about the actual existence of good reasons. What is missing is the scientific vindication of rationality, which shall be considered when we come to Yinger's objections below. For now however, we take this point for granted and turn to the second part of our reply.

Since we are all necessarily inculcated with beliefs that we hold uncritically, at least in early childhood, and since most of us hold uncritical worldviews at later stages too, there is the difficulty of achieving the critical distance from our beliefs that is demanded by rationality. In what way, then, can we approach objectivity with regard to our own beliefs, which determine our conception of rationality? In order to surpass this difficulty an examination needs to be carried out of this or another aspect of our thought processes, and their results[140].

Dewey writes about becoming aware of and passing judgment on the results of our habits, which were formed and influence us without our awareness. For Talaska, to be free from the prejudices of one's worldview one must analyze the original arguments for one's beliefs as well as the arguments rejected by those beliefs. This exposure of concealed origins is a form of intellectual healing whereby we free ourselves in the degree to which we are critical toward our presuppositions[141]. This is because where our thinking is influenced by unspecified presuppositions, we may not be aware of their influence or any errors they might be inflicted with. Through their explicit formulation and investigation, we can become aware of their influence and begin to free ourselves from

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[139] Siegel, H., above at note 9.

[140] For a somewhat alternative or complimentary approach see Reik, T., *Dogma and Compulsion: Psychoanalytic Studies of Religion and Myths* (N.Y.: International Universities Press, 1951), pg. 69.

[141] Talaska, R. A., above at note 10, xxxi-xxxii.

it. Only historical investigations, he maintains, uncover prejudices and problems inherent in foundational belief, and so they are required for critical thinking. For Popper, the only way to advance towards truth is through error elimination. Through becoming aware of our errors we can free ourselves from their influence. His conclusion, therefore, is that as a prerequisite for learning we must consciously look for not only the mistakes of others but also our own. And we must cherish these mistakes "as stepping stones towards truth"[142].

We do not abandon worldviews altogether. Rather we criticize, and so ameliorate them. The fact that beliefs are socially inherited should not disguise the fact that there is a valid distinction in the quality of beliefs held. As Talaska pointed out, this distinction is a cornerstone of philosophical thought. Throughout the ages, the philosophical ideal was a passing from mere opinion to knowledge through the analysis of foundational beliefs. This is the Socratic ideal that we already visited. Our contention is that since we necessarily hold a worldview which is constitutive of our thought, and since worldviews differ in the degree to which they are restrictive to thought or conducive to bias, our *"critical task is then not to forswear ideology, which is impossible, but to adopt the best ideology one can"*[143]. The apparent conflict between the historical nature of understanding and the ideal of free thought points to the importance of the right thinking and teaching methods. The epistemological difficulty in escaping our social inheritance is just what CT and our ideal for RE can help us with.

8. Objection Two: Science

Having defended rationality, we shall have to defend our dependence on science in turn. According to Yinger's functional definition, science as a way of life, as opposed to science as a method or as a group of tested propositions, is itself a religion. Yinger includes several beliefs in his characterization of science as a way of life. First is a *"belief that man can devise secular processes for performing*

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[142] Popper, K., *In Search of a Better World: Lectures and Essays from Thirty Years*, (London: Routeledge, 1992), pg. 149.

[143] Siegel, H., above at note 9, pg. 65.

the functions now served by religion"[144]. Second is a belief that science is the only certain road to truth and that it disproves religion. Similarly, there is the belief that "*the best way to grapple with human problems is to extend our knowledge of nature*," or that "*the gap between knowledge and action can be closed by knowledge itself*"[145]. Another belief, highly important to the subject at hand, is that the scientific study of religion is beneficial to all, or that its "*total, long-run consequences ... are beneficial*"[146].

Yinger defines religion "*as a system of [over-] beliefs and practices by means of which a group of people struggles with [... the] ultimate problems of human life*"[147]. The universal ultimate problems of human life he mentions are the need to find the meaning of existence, of achieving truth, justice, hope and salvation, and the vanquishing of ignorance, evil, suffering, and hostility. The second element of the definition is an alleviation of these burdensome emotional needs, by the third element - a system of over-beliefs, where over-beliefs are "*an attempt to explain what cannot otherwise be explained*"[148]. They are beliefs that go beyond experience, beyond empirical facts. They are '*superempirical*', '*nonempirical*' but not necessarily supernatural. They cannot be substantiated or refuted by science. They are an impulsive and premature response by people where knowledge fails them. Over-beliefs help alleviate the said problems through their "interpretation," and a "lifting up," a Durkheimian 'premature completion' of, or giving an "ultimate formulation" to, other rational or irrational attempts to deal with these problems, - attempts that are at best only partially successful[149].

Why is science as a way of life an over-belief? It is because "*a careful reading of the story of man in the era of science ... would scarcely lead to the conclusion that the evidence on the question is complete*"[150]. This is so because our efforts to find the knowledge we seek, our efforts to deal with the ultimate problems of our life,

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[144] Yinger, M. J., above at note 66, pg. 9.
[145] As above, pg. 12.
[146] As above, pg. 2-3.
[147] As above, pg. 7.
[148] As above, pg. 8.
[149] As above, pg. 7.
[150] As above, pg. 12.

continually fail us. They are at best partial and slow. Even in the most rational society *"secular responses cannot eliminate"* these problems[151]. Our knowledge does not make sense out of existence, our efforts to establish justice through law fail, and while reducing some suffering, our capacity to make more suffering through the evil use of knowledge and technology is larger today then it ever was. Thus science as a way of life, is not *"logically derived from established theory or a generalization based on empirical study"*[152]. Rather, *"it is an emotional and intellectual closing of the gap"*[153]. It is a hasty generalization from the factual trend of science refuting specific religious beliefs to an unsubstantiated conclusion that all religion will one day be proved wrong. In the same manner, *"One cannot hope to demonstrate that the analysis of religion by science is beneficial in its consequences for all people in all times and places [... nor] that the total, long-run consequences of scientific study [of religion] are beneficial"*[154].

As we have already mentioned, our effort crucially depends on a justification of science. By Yinger's definition, our justification shall have to be of science as a way of life. Our contention shall be that Yinger's 'over-beliefs' are actually a suitable demarcation criterion. But while Yinger holds that the demarcation is between science as a method or tested propositions on the one hand, and science as a way of life and religion on the other, we shall put science as a way of life on the other side of the fence. To begin with, let us take a closer look at Yinger's own position on science.

Yinger is concerned with a scientific study of religion. His own 'field theoretical' approach attempts a *"complete analysis"* of religion, because as a scientific approach, it is moved by a wish of maximally understanding the religious phenomenon[155]. He recognizes religion as a *"combined result of man's biological and learned tendencies"*; a creation of humans, subject to their failings; and a complex phenomenon, that is both the result, and an influence on, interdependent societal, cultural, and psychological

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[151] As above, pg. 8.
[152] As above, pg. 12.
[153] As above, pg. 9.
[154] As above, pg. 2-3.
[155] As above, pg. 18.

factors[156]. A study of religion needs to take account of all these factors; it needs to examine the whole field, or risk being *"partial and likely to be misunderstood"*[157]. It needs to be *"simultaneously anthropological, psychological, and sociological,"* as well as historical[158]. It needs to study the relevant dimensions, both individually, at a more abstract level, and their mutual influence. Furthermore, the scientist of religion must not prejudge the perspectives of either the believer, the believer of another faith, or the doubter, *"for each approach may furnish him with data valuable for the development of his theory of religion"*[159]. The believer's perspective on religion fails to take account of all these relevant dimensions, and so is incompatible with the scientific approach. As a partial view, it is "i"[160]. Thus far, we can gather that Yinger too is confident that science as a method is the best way to study religion and arrive at knowledge.

Yinger does not deny his belief in science as a way of life. He writes:

> *"my own position is a belief – which is probably part of my religion, as we shall come to define the term – that the total, long-run consequences of scientific study are beneficial"*[161].

It is also evident, in his elucidation of the four logical possibilities of the relationship of religion and science (or more broadly the intellectual life), that his position is that science as a way of life is harmonious or identical to religion. And further, that science is the best religion. He continues:

> *"it is not that religion is good science but that science is good religion. The rational religion for the enlightenment, Comte's positivism, and contemporary views that science is not only a method but a way of life all express this view"*[162].

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[156] As above, pg. 17.
[157] As above, pg. 18.
[158] As above, pg. 19.
[159] As above, pg. 2.
[160] As above, pg. 18.
[161] As above, pg. 2-3.

Conflicts between religion and science are thereby incidental.

We take it that he agrees with Andrew Dickson White that conflicts are as between science and dogmatic theology not religion. Science, White contends, *"inevitably contributed to the health of religion"*[163]. He goes on: *"The impact of science is to require drastic changes in religion"*[164]. This is because there are conflicts where particular beliefs about the world held by a religion have been refuted by science. In these places accommodation on the part of religion, sometimes an extensive one, is required. This, Yinger maintains, is not a destruction of religion. He hints, in an analogy with the change of government *"from an absolute monarchy through a limited monarchy to a democracy,"* that such accommodation is an amelioration of religion.[165] To sum up his position, Yinger maintains that use of the scientific method is justified, and science as a way of life is both best and an over-belief. It seems to us that Yinger is suggesting a kind of Kierkegaardian leap of faith from science to science as a way of life and the best religion. In our reply to Yinger, we shall try to show that this is both unnecessary and impossible. To recall Yinger's argument: science as a way of life is an over-belief because

(1) science fails to deal or eliminate the ultimate problems of life, and
(2) can contribute to human suffering as much as alleviate it.

We begin our reply by focusing on the first premise. In this part of our reply we hold that in order to rationally accept science as a way of life it is sufficient to establish that science is the best approach to these problems and that progress can be made.

Dewey, like Yinger, maintains that science is the only reliable way to arrive at knowledge. For him, *"we have no right to call anything knowledge except" that which is scientifically supported;*[166] *"science is the perfecting of knowing, its last stage."*[167] His argument is that we

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[162] As above, pg. 57.
[163] As above.
[164] As above, pg. 61.
[165] As above.
[166] Dewey, J., above at note 24, pg. 338.
[167] As above, pg. 219.

are invariably affected by nature, and therefore, control over matters of importance to us is dependent on our ability to control nature, which in turn, requires its understanding. Consequently, the benefits of science can be reliably expected only after a *"careful scrutiny of present conditions"*[168]. They are a result of its *"worm and intimate taking in of the full scope of a situation"*[169]. This squares nicely with Yinger's field theoretical approach. For Dewey, experimentalism is key to the scientific method. Through experimentalism, science operates within experience and so within reason defined pragmatically. Experimentalism means that everything is tested through acting upon it. A hypothesis is valid inasmuch as results agree with predictions, and valuable in the degree to which it furnishes control. Everything is liable to be checked by others. The methods of science have been carefully and slowly developed and selected so as to maximize effectiveness of reflection. Science is thus vindicated by its results. With a lesson from evolutionary theory, Dewey posits that *"the experimental method is new as a scientific resource – as a systematized means of making knowledge, though as old as life as a practical device"*[170].

Without science, success and progress depend on chance and are vulnerable to deception and quackery:

> *"Without initiation into the scientific spirit one is not in possession of the best tools which humanity has so far devised for effectively directed reflection. One in that case not merely conducts inquiry and learning without the use of the best instruments, but fails to understand the full meaning of knowledge. For he does not become acquainted with the traits that mark off opinion and assent from authorized conviction"*[171].

This conclusion is central to Dewey's pragmatism, as his definitions of several of his major concepts can illustrate.

Dewey defines something's *meaning* as its uses, its bearings, causes, and consequences of action upon it. Meaning can be reliably

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[168] As above, pg. 102-3.
[169] As above, pg. 236.
[170] As above, pg. 338-9.
[171] As above, pg. 189.

elucidated only by science. *Thought* or *reflection* is the accurate, explicit, and autonomous discernment of all relevant meaning. It is a prerequisite for *responsibility*. Having *mind* or *reason*, or being *intelligent, informed* or *free* is not innate, but proportional to the degree in which one's actions are informed and guided by thought. Similarly, an *experience* deserves its name, is valued, learned from and brings added control, inasmuch as it is infused with thought. *Aims*, *will* and *volition* are related to thought in the same manner. Lastly, *culture* is capacity for constant growth in thought. Thus with science, several indispensable benefits accrue. For Dewey, science gives meaning valuable both for the intellectual enrichment and satisfaction, and for the added control it supplies. It protects against natural dispositions of self-deception and misunderstanding and the infertility and evil that accompanies them. It gives knowledge and the responsibility that comes with it. It extensively widens the quality of human communication. More significant to our reply to Yinger, it is the primary engine of progress; it emancipates humanity from custom in both means and ends; and, it gives hope by showing that amelioration of the human condition is indeed possible.

It is our contention that Dewey does not base the social utility of reason on faith. Although he writes positively of the *"faith in the social utility of encouraging every individual to make his own choice intelligent,"* we believe that the main thrust of his position is to the opposite effect[172]. After all, he bases the possibility firmly on the ground:

> *"it goes without saying that we are for such a social state; in a literal and quantitative sense, we may never arrive at it. But in principle, the quality of social changes already accomplished lies in this direction. There are more ample resources for its achievement now than ever there have been before. No insuperable obstacles, given the intelligent will for its realization, stand in the way. Success or failure in its realization depends more upon the adoption of educational methods calculated to effect the change than upon anything else"*[173].

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[172] As above, pg. 121.

[173] As above, pg. 316.

He goes on to write that humanity now faces a

> *"future with a firm belief that intelligence properly used can do away with evils once thought inevitable... Science has familiarized men with the idea of development, taking effect practically in persistent gradual amelioration of the estate of our common humanity"*[174].

This, he adds in not a utopian idea.

Popper's philosophy shares Dewey's position that the future utility of science is not a utopian belief. As he writes: *"we are right to believe that we can and should contribute to the improvement of our world"*[175]. And again: *"A shaping of our social environment with the aim of peace and non-violence is not just a dream;"* it is *"entirely feasible."*[176] To understand how he reaches this conclusion we shall take a look at his evolutionary epistemology and world 3[177].

Life, Popper holds, is about problem-solving. All animate inhabitants of world 1, the world of physical things, and evolution by natural selection itself, are constantly involved in experimental problem solving. In this sense, a biological adaptation is seen as a preconscious form of tentative theory, the usefulness of which will influence the fate of the organism or species. The emergence of consciousness or perception, that is, the emergence of world 2, is the result of this natural process of experimental problem solving, which is also its most important biological function. Consciousness hastens problem solving, as well as adding security to the organism, by anticipating failure or success.

Adaptations, however, are selected in particular environments, a sufficient change in which may annul the advantages previously had by the adaptation. The environment in which the human mind has evolved is substantially different from the one we inhabit now, which is much more complex. Truth is hard to find and the best method to reach it is by trial and error. Moreover, our actions have

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[174] As above, pg. 225.

[175] Popper, K., above at note 142, pg. 28.

[176] As above, pg. 29.

[177] Popper, K., *Unended Quest: An Intellectual Autobiography* (London: Routledge, 1993)., Popper, *Lectures and Essays.*, O'Hear, A., Popper, K., The Arguments of the Philosophers (London: Routledge & Kegan Paul, 1982).

unforeseeable consequences, and errors can prove highly dangerous, even to humanity itself. Today, for these reasons, our mind can fail us miserably.

The solution to this problem is facilitated by the emergence of world 3. Broadly speaking, world 3 has as its inhabitants all the products of the human mind:

> *"We ourselves may be included, since we absorb and criticize the ideas of our predecessors, and try to form ourselves; and so may our children and pupils, our traditions and institutions, our ways of life, our purposes and our aims"*[178].

The nucleus of world 3, or its strict sense, includes problems, theories, and critical arguments, and is dominated by the value of objective truth and its growth. The existence of world 3 is the result of the prior emergence of consciousness and language, which allow for linguistic formulation, communication, and criticism.

The nucleus of world 3 is the best form of problem solving available to us. It allows for

> *"conscious choice, a conscious selection of theories in place of their natural selection ... a conscious and critical pursuit of our errors: we can consciously find and eradicate our errors, and we can consciously judge one theory as inferior to another"*[179].

Such a rational process of elimination is much better than that possible in world 1 and world 2 not just because it is faster, but also because of the safety it affords humans by detaching the experimenter from the tentative solution being put to the test. Indeed, *"in previous times the upholder of the theory was eliminated. Now we can let our theories die in our place"*[180].

To our interaction with world 3, we owe both our personality and the possibility of free thought. The nucleus of world 3 is the repository of critical discussion and tested solutions. In it, standards of criticism, after having been under critical selection pressure themselves, are at their most evolved state. Beliefs that failed, or have not been put

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[178] As above, pg. 195.

[179] Popper, K., above at note 142, pg. 21.

[180] As above, pg. 28.

to the test of these standards, did not pass criticism, and cannot therefore, be considered knowledge. Their choice cannot be considered conscious or free. A proper interaction with world 3, one that helps us transcend our ignorance, is a critical interaction with its nucleus. Through this interaction we gain self-criticism, personal growth, and the growth of world 3. It is this kind of interaction that allows us to freely pick the fruits of the human body of knowledge, to choose according to it, to transcend our more instinctive inclinations. It is to the emergence of, and possibility of a proper interaction with world 3, that we owe the possibility of social amelioration through science. Far from being an unjustified belief, Popper holds that unjustified belief is dangerous[181].

Thus far, our reply to Yinger was indirect. We did not try to show that his first premise is largely incorrect (as we could have). Our point is that his premise is unnecessary. It is enough that amelioration is possible, and that a method is the best one available for its use to be probabilistically justified. That is, if we seek knowledge and control, we are justified in looking for science before anything else. From this conclusion, we can criticize Paul's assertion that faith in reason is one of the traits of the mind essential to CT. What he calls faith in reason is *"confidence that, in the long run, one's own higher interests and those of humankind at large will be best served by giving the freest play to reason. [emphasis added]"*[182]. Worded thus, faith is indeed required. But the wording is loaded and superfluous. We may word it thus: We can be confident that, in the long run, one's own higher interests and those of humankind at large *will probably be* best served by giving the freest play to reason. This will be good enough.

We shall now move to another part of our reply directed at Yinger's second premise. Our contention will be that evil use of technology is incompatible with science, both because technology and science are distinct, and because science is or should be seen as thoroughly humanistic.

Science is not technology. As Smart and Dewey both hold, in science, method is prior. The doctrine of the priority of method in the definition of science is a common theme with many of the writers

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[181] As above.

[182] Talaska, R. A., above at note 10, pg. 154.

we visit in this work. Indeed, we hold that it enjoys a consensus in the field most apt at the study of science – its philosophy. This doctrine can be seen in Smart's definition of science as *"critical and imaginative experimental and theoretical procedures," or as "critical methodology"*[183]. For Dewey, as we have seen above, and for Popper, it is experimentalism. The identification of technology with science, although prevalent, is misleading in this respect. It is not uncommon for religious writers and leaders to accept such a conception of science. Numerous faiths define science as technology, or as pre-scientific revolution science, or as limited criticism or experimentalism, that is, limited to those areas that do not conflict with those faiths. In this way, any conflict which might exist between science and religion is hidden from view[184]. In another part of our reply to Yinger, we shall soon contend that such a conflict does in fact exist. First, though, we look at the humanistic goal of science.

Yinger takes inhumane use of technology, *"hydrogen bombs and the mass manipulation of people"* by propaganda for example, to taint science to the degree that a justification of its acceptance as a way of life is indemonstrable[185]. But returning to Dewey, we see that the goal of science, and science education especially, is thoroughly humanistic. Science is in the service of freedom. Knowledge is valued as *"positive* resources of civilization."[186] *"Egoistic specialists"* or inhumane use of the technological products of science are in conflict with science because they are not sufficiently imbued with the social component of meaning. They are not sufficiently thoughtful or deliberative in this respect, and so, they do not comply with the full meaning criterion of science[187].

A criterion of full meaning, Dewey holds, signifies that for an action to be intelligent, use of relevant past experience and meaning must be thorough. Both Dewey and Popper hold that all things social, including values and ethics, can and should be studied scientifically. They would concur with Talaska that the belief that morality cannot be investigated scientifically is an example of a vulgarized notion of

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[183] Smart, N., above at note 72, *pg.* 87.
[184] As above.
[185] Yinger, M. J., above at note 66, pg. 12.
[186] Dewey, J., above at note 24, pg. 37.
[187] As above, pg. 9.

science[188]. Thus, both misuse of technology and ethics are part of the subject matter of science. Ignorance with regard to them, especially if we consider hydrogen bombs and ubiquitous propaganda, is unscientific.

Immoral use of technology is only partially intelligent. It is a rational use of means not of ends. As Dewey maintains, scientific progress thus far is mostly a technical efficiency of achieving old goals with better means instead of a fully scientific and truly humane one of revising those goals. Siegel is in agreement with Dewey regarding the importance of being rational about ends. While noting that efficiency in achieving pre-given ends is a part of rationality, he holds that they cannot be identified. He writes:

> *"The means-ends conception of rationality seems inappropriate for the study of the connection between rationality and morality, for example, for it abolishes both the distinction between morality and prudence and the possibility of specifically moral reasons ... it overlooks moral constraints on rational choic ... as many philosophers have held, moral considerations are properly thought of as moral reasons, then, in ignoring those reasons I am not only immoral but irrational..."*[189]

To conclude our reply to Yinger we shall try to show that science as a way of life, far from being an over-belief, actually conflicts with it. To do this, we will have to contend with Yinger's following argument. Yinger brings what he considers to be three well-supported premises to back up his conclusion that science does not disprove religion. First, *"there has, in fact, been a long series of sharp conflicts between science and specific religious beliefs and practices.* [emphasis added]"[190]. These are conflicts where particular beliefs about the world held by a religion have been refuted by science. In these places accommodation on the part of religion, sometimes an extensive one, is required. Now, a religion's approach to science is ambivalent. Sometimes contributing to its growth, and sometimes opposing it by censorship and by *"exhorting the faithful to hold fast to the established*

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[188] Talaska, R. A., above at note 10.

[189] Siegel, H., above at note 9, pg. 129-30.

[190] Yinger, M. J., above at note 66, pg. 61.

beliefs"[191]. On the whole, however, and this is the second premise, *most of the accommodation in conflicts has been on the side of religion.* The third and last point is that "despite these drastic and continuous changes, *religion remains a vital part of the life of human societies.* [emphasis mine]"[192]. Even modern society, although not entirely supernaturalistic, is a religious society.

It clearly follows, Yinger holds, that science can disprove specific religious beliefs, "*but it does not disprove religion*"[193]. While agreeing that "*tension between religion and the life of the intellect may be persistent because of a fundamental clash of perspectives,*"[194] Yinger's conclusions that science does not disprove religion, and that science as a way of life is itself a religion, lead him to hold that "*there is no general conflict between science and religion defined in functional terms,*" and that science and religion are not "*wholly antithetical*"[195]. Yinger's conclusion, we hold, does not follow.

We take issue with Yinger's second premise; that accommodation on the part of religion has occurred is undeniable. We do however object to the extent of this accommodation. Yinger's conclusion, he maintains, follows because belief is still prevalent after religious accommodation has occurred. This means that he takes society as a judge on the matter. That is, if society is still religious after religion accommodated science, it is probable that science does not refute religion. Yinger's judges, however, failed to accommodate science at crucial points.

It matters not that even scientists believe in traditional religion. This has little to do with the problem of conflict between science and religion. For as we already hinted, scientists may lack an understanding of science. As Smart holds, the study of religion is distinct from the individual and personal beliefs of the scholars in it. Religious studies "*are defined in terms of the subject matter and of the appropriate methods of scholarship and research*"[196]. If our contentions are true, and method is prior in the definition of science;

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[191] As above, pg. 63-4.
[192] As above, pg. 61.
[193] As above.
[194] As above, pg. 62.
[195] As above, pg. 61, 64.
[196] Smart, N., above at note 73, pg. 64.

if science is the only reliable way to knowledge; if criticism may not be limited in the search for truth, and dogmatic thinking is not true reflection, then society is not a good judge on the matter. This is because society is mostly unaware of these and other relevant facts, and in some cases is shielded from them. Yinger relies on modern society as if it was a rational society, a position which many of our writers reject. As Paul writes:

> *"critical societies, societies in which fairminded critical thinking is a prominent social value. I take it as axiomatic that no such society has yet existed"*[197].

A much more competent judge on the matter is the philosophy of science to which we shall now turn.

We begin with Popper for whom science, including what we have considered as *'science as a way of life'*, is in critical conflict with over-beliefs. For him, the two guiding principles of science flow from the maxim of fallibilism. They are the *tentative* nature of scientific knowledge and the *critical* nature of its method. Since knowledge is not manifest, is hard to come by, and is not guaranteed, that is, knowledge is fallible, scientific knowledge is always tentative, conjectural, uncertain, and open to correction. Science should not dogmatically be seen to have an authority over knowledge. Such a position, Popper rejects as scientism, and is an unjustified belief in science. A belief, he maintains, should not even be extended by scientists to their own theory, so as to facilitate discharging the duty they have to the critical method of science without which there can be no knowledge. The search for truth, which is synonymous with science, demands that all effort be made to uncover and eliminate mistakes. Nothing is immune from criticism. This, in effect, is the method of rational criticism or critical thinking. Conjectural knowledge and critical method however, should not be misunderstood as concealing the qualitative difference between scientific or objective knowledge, and other forms of belief. In fact, it is because of public methods of free discussion and criticism, and a rejection of dogmatic belief, that scientific knowledge is the best kind we have. It is so, because if the tentative acceptance of a theory is to be justified, (a

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[197] Talaska, R. A., above at note 10, pg. 155.

theory itself can never be justified), it must be shown to have stood up to rational criticism, in a way unrivaled by competing theories.

Smart's argument is cautiously worded. Since *"many widely established religions are fairly traditional,"*[198] have conservative tendencies, and cannot sacrifice the essentials of their faith, *"there is or can be some tension between an open and scientific approach and traditional demands"*[199]. This tension is as between *"history as identity-giving myth and the critical realism demanded by modern scientific methods as used to establish what the facts were"*[200]. To the extent that religions are traditional, *"new ideas may be threatening"* to it[201]. We shall take advantage of his elucidation of *'compatibility systems'* in our argument. Compatibility systems are *"ways of establishing, on an intellectual basis, the compatibility between religion and modern science."*[202] Both theology and the modern study of religion are in the business of constructing compatibility systems. Clashes between religious knowledge and secular knowledge, undreamed of in earlier periods, put strain on compatibility systems. Compatibility systems that have been put forward have varied on the continuum between religion and science. They need not hold that there is any compatibility at all. In accordance to his 'position theory', which identifies common or possible reactions open to religions when they encounter different traditions, Smart identifies four compatibility system 'positions' with regard to the encounter with science[203].

1) Incompatibility. Modern knowledge is rejected in order to defend religion; fundamentalism as a modern reaction, for example. It can use pseudo-science, that is, it can accept the prestige of science but it makes it fit religion through the production of *"deviant scientific ideas."*[204]

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198 Smart, N., above at note 73, pg. 5.
199 As above, pg. 6.
200 Smart, N., above at note 72, pg. 54.
201 Smart, N., above at note 73, pg. 5.
202 As above, pg. 82-3.
203 As above.
204 As above, pg. 101-5.

2) Accept modern science into the religion and be optimistic about the possibility of creating a genuine compatibility system.
3) Religion and science are separate. This runs the risk of putting religion out of modern life.
4) Reject religion, and accept modern knowledge. The tension between the two may prove to be too great.

It is philosophy, Smart holds, which should criticize and evaluate compatibility systems. If a compatibility system is to be accepted from a philosophical point of view, it has to correctly handle the relationship between religion and science. As philosophy is an intellectual pursuit that must work on more or less the same principles as modern science, the first position is unacceptable[205]. It seems to us however, that religions can hold only the first position. That is, it seems that the second position has never been chosen, and that the third position entails acceptance of a pseudo-science. The second position has never been fully adhered to if we include, as we should include, the conclusions about dogmatic thinking in our definition of science. Furthermore, since religions inevitably say some things about this world which are in conflict with scientific conclusions, the third position can only be adhered to by hiding these conflicts. Like the first position, belief in both the second and third positions is of course very possible in practice, but it is unacceptable philosophically. To illustrate our point, it will be useful to look at Smart's argument to the effect that in worldview/ religious epistemology there is no certitude, and religious reaction to it.

Smart contrasts inner *certitude* with public *certainty* about the truth of existence claims. Certitude is entailed by faith and is a subjective sureness or private commitment. Certainty is public certainty, or sureness, or public provability. Where proof and certainty exist, it is because epistemology is 'hard', otherwise it is 'soft'. Now although proof of religious faith is possible within that faith, "it inevitably turns out that crosscultural or cross-traditional arguments on behalf of my hard epistemology over yours are soft," and so "the net result is that a worldview epistemology is soft. For soft arguments for the validity of a hard proof render the proof

[205] As above.

soft"[206]. His conclusion is that *"worldviews are, from the angle of criteria and proofs, opinion"*[207]. He goes on:

> *"This is not a conclusion that is congenial to many religious or similar worldview believers. Their phenomenological certainty of faith collides with the outer judgment of uncertainty... It will be replied that this is not how the situation is perceived in conservative seminaries and prestigious mosques, not in sacred temples or totalitarian academies... Those who resist the softness argument have to create more and more ingenious ways of keeping the situation concealed. [emphasis added]*[208]"

Similarly, but from the point of view of the child, he writes:

> *"though notoriously the interpretations of authoritative traditions come to vary, nevertheless the insider – formed already by the variant interpretation – sees the preferred interpretation as authoritative"*[209].

We hold that the primary method of concealing the conflicts we mentioned (that is, the priority of method, naturalistic explanation of religion, softness of worldview epistemology, and so on) is through misrepresentation of science. Acceptance of a pseudo-science that does not conflict with authority and is comfortable with a religion that accepts from it only that which does not conflict with its dogma, is the one followed by those religions that give any legitimacy to science. We shall not attempt to substantiate our last conclusion, as a survey of the world's religions cannot be covered by this work. Anecdotal *"evidence"* would be superfluous, as examples should be familiar. It is enough for our educational purposes for us to recognize that most of our religious-world's inhabitants are either unaware or hold misconceptions of science and the conflicts mentioned. In conclusion, we take it that science as a way of life is not a belief but the most justified working hypothesis. Furthermore, it conflicts with religion at crucial points.

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[206] Smart, N., above at note 72, pg. 123-4.
[207] As above, pg. 29.
[208] As above, pg. 124-5.
[209] As above, pg. 123.

8. Objection Three: Other Rights

A brief look at how our writers reply to several popular objections not touched upon thus far could prove informative. Since these objections are relatively well known, I hope the reader will forgive me for not taking the space to elucidate them properly. We begin with *paternalism* and Dewey, who states that:

> *"if a person cannot foresee the consequences of his act, and is not capable of understanding what he is told about its outcome by those with more experience, it is impossible for him to guide his act intelligently"*[210].

For Dewey, this person cannot be said to be responsible, and interference with his actions with the purpose of freeing him intellectually is permissible. Gewirth reaches a similar conclusion. He takes liberty to be reserved for those who have been properly educated. Where there is lack of knowledge or an irrational state of mind, it is possible to assume 'dispositional consent' to interference, if the person would have consented when in a calm state of mind and with the relevant information. It is also required to communicate any relevant information to the person who is affected by it, if at all possible, for such interference to be legitimate. The demands of his first principle of morality (the PGC[211]), like proper RE in our case, do not conflict with our sense of autonomy since it is *"based on rational grounds whose rightness he [the agent] is proximately capable of understanding"*[212]. Gewirth holds that all have a duty to be educated; and while agents that are empirically rational know that they, like all others, may act irrationally (and so accept institutions that take care of such weaknesses), children and the uneducated may not possess nor understand this fact[213]. Dispositional consent is therefore safe to assume where education in concerned.

On the subject of *parental rights*, Gewirth, far from being an advocate for parents' educational rights, talks of their duties.

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[210] Dewey, J., above at note 24, pg. 27.

[211] For more on the PGC, Gewirth's moral philosophy and its relationship with education and democracy see Goldberg, I., above at note 1.

[212] As above, pg. 138.

[213] Empirically rational, in the sense that they know the relevant empirical information and do not contradict it.

Parental guidance is justified insofar as it is conducive to his thoroughly critical education. In practice, then, it is rarely justified. History, Gutmann maintains, has shown that parents cannot be trusted to instill rational deliberation in their children. To the assertion that it is a part of one's right to freedom to be able to choose one's children's education, she replies that the

> *"same principle that requires a state to grant adults personal and political freedom also commits it to assuring children an education that makes those freedoms both possible and meaningful in the future"*[214].

Gewirth adds, in accordance with his scientific approach, that harm to freedom and well-being is to be identified by public methods *"available to every intellectually normal person"*[215]. It should be scientifically substantiated that the harm will universally accrue to every similarly-situated person, and that the harm will not be a result of idiosyncratic or other local beliefs that are not themselves substantiated in like manner. Thus, the claim that one's well-being has been reduced by not being able to inculcate an offspring in a manner that conflicts with the PGC is not justifiable under his system.

Another point Gutmann objects to is the belief that pluralism seems to be served by parental educational rights because they perpetuate ways of life. She takes a Millian view on toleration and the value of pluralism in that pluralism is valued because of its ability to enrich our lives by increasing our understanding of different ways of life. Unchecked parental rights are likely to decrease this understanding, and so foster nothing more then superficial pluralism. What is truly necessitated by pluralism as a value is her democratic deliberative education. Toleration should be qualified[216]. We will not expand here on her reply to parental rights in the form of ownership over offspring. We will note, however, that in agreement with Kant, the concept of ownership is not applicable in this context. Another related issue Gutmann helpfully brings to

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[214] Gutman, A., above at note 30, pg. 30-1.

[215] Gewirth, A., above at note 17, pg. 233-4.

[216] Langerak, E., "Theism and Toleration," in. Quinn, and Taliaferro, above at note 7.

the fore is that her educational theory (and so our ideal) does not wholly determine education and permits families and subcommunities to help shape it.

Coming back to *toleration*, Gewirth agrees with Gutmann that toleration has its limits. Gewirth is tolerant of whatever *"falls within the limits set by the PGC's duties"*[217]. Smart also puts limits on religious liberty[218]. We take Lock's *'inward persuasion'* argument, that is, that one cannot force someone to be a true believer whereas authentic belief is exactly what is needed for religion, to be problematic in our educational context. Indeed, it is very possible to uncritically inculcate belief in a worldview at a young age; and we take such an inculcation to be an unjustifiable act of force in the degree to which it is uncritical[219]. Lock's pragmatic argument that what we know about history and human nature shows that toleration is necessary for civil peace, is more pertinent to our context. For Smart, only minimization of violence could justify the spread of views by force. Such a case where it is justifiable to inculcate irrationally will be outlined below, when we come to discuss Siegel's reply to the indoctrination objection. We will reach a conclusion familiar to us from our reply to paternalism above – that such a case is justifiable (tolerable) only when teaching for CT.

Coming back to Gewirth, and on the issue of *group rights*, we can see that religious inculcation, as a morally optional activity justified by *'optional consent'*, does not comply with its requirement of free choice. For as we have seen, children are made religious before they can apply their rationality, and can usually not fully develop their rationality in respect to their inculcated worldview. Smart similarly holds that authority can be established only voluntarily. However, a voluntary decision should not be confused with majority or consensus. These should not be authoritative on the matter. Thinking that it is best to teach a religion where there is consensus for it imports the wrong judges. Clergy or adherents are not educationalists. The clergy *"are in fact nearer to being the living data than the teachers about those data"*[220]. What the majority thinks is good education *"is by*

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[217] Gewirth, A., above at note 17, pg. 242.
[218] Smart, N., above at note 72, pg. 30.
[219] Langerak, E., in Quinn, and Taliaferro, above at note 7.
[220] Smart, N., above at note 72, pg. 33.

itself no argument. The majority can tyrannize," as well as be wrong[221]. Related to group rights, is the assertion that our point of departure is Western and thus, foreign to other cultures. As we have already dealt with this form of relativism above, it will suffice to say that science, our foothold, is not in essence, Western. Another related point is *religious rights*, where Smart's philosophy is again most pertinent. He writes:

> *"there is neither a God-given nor a humanity-bestowed right to teach a debatable worldview as though it is not debatable"*[222].

Since worldview epistemology is soft *"dogmatism is wrong in education,"* and a proper study of religion should be plural[223].

Another objection comes from the problem of *neutrality*. Can our ideal comply with the old demand for separation of church and state?[224] More specifically, can the political and religious ramifications of our ideal allow us to treat it as neutral. Can it be taught in a neutral fashion? Smart talks of a "spillover" from the modern study of religion that changes beliefs, or of the 'reflexive effect' - the influence of the study of religion upon religion[225]. He writes:

> *"The fact that we do not just practice religion or ideology, but study it means a new phase of human awareness. It involves a revolution in thinking and feeling... Pure belief is no longer possible"*[226].

Siegel replies to the objection that an education that has political or religious consequences cannot be neutral by making a

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[221] As above, pg. 26.

[222] As above, pg., 20.

[223] As above, pg., 13.

[224] As a version of the right to freedom of and from religion, our discussion on the distinction between religion and science as a way of life is also relevant to this question.

[225] Smart, N., above at note 73, pg. 27-8

[226] Smart, N., above at note 72, pg. 22-3. As with Popper, for Smart science implies a political and moral philosophy. See also Nielsen, K., "Naturalistic Explanations of Theistic Belief," in Quinn and Taliaferro above at note 7, pg. 403. Nielsen talks of the ramifications of the study of naturalistic explanations of religion.

distinction between political or religious neutrality and intellectual neutrality[227]. Only educational ideals that are not intellectually neutral are ideologically biased. Their acceptance and justification are a function of prior political commitment. For both Siegel and Smart, CT and the modern study of religion are intellectually neutral. Siegel writes on CT that *"it alone sanctions the critical evaluation of all ideologies – including ... itself"*[228]. For this reason, CT is the most justified intellectual approach. It is not an ideology in the pejorative sense. Similarly, Smart makes a distinction between worldviews and his worldview-theme, which is higher or second-order compared to worldviews. The pluralistic openness of this worldview-theme necessitates its acceptance, despite the facts that it has lower-order consequences and that it too has a soft epistemology[229].

The second objection to neutrality is the assertion that teaching in a neutral manner is impossible or at least practically impossible[230]. Students are severely limited in the evidence they can explore and are left with what is given and selected for them; vocabulary and description of facts are value laden and so on[231]. Of the solutions offered, several make a connection between neutral teaching and teaching which does not indoctrinate[232]. We will use Siegel to illustrate such an approach. Siegel tries to solve the following paradox: It is a fact of child development that children *"hold beliefs in advance of their being able to justify them rationally"*[233]. However, it is necessary, he writes,

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[227] Siegel, H., above at note 9, pg., 70.

[228] As above, pg. 75.

[229] Smart, N., above at note 72, pg. 31, 121. In the original dissertation the writer referred to intellectual neutrality as objectivity.

[230] We take these objections to be epistemological and teaching complications or difficulties that can be surpassed to a sufficiently justifiable degree. The objection that neutrality is impossible even in theory has already been dealt with while discussing the priority of reason and the possibility of escaping the limitations of one's own worldview.

[231] Norman, in Brown, above at note 16; Trigg on Warnock, in Quinn and Taliaferro, above at note 7.

[232] Trigg, in Quinn and Taliaferro, above at note 7; Norman, in Brown, above at note 16; Montefiore, in Brown, above at note 16.

[233] Siegel, H., above at note 9, pg. 82.

> *"for the enhancement of the child's rationality that we get the child to embrace non-rationally a belief in the power and value of reasons"*[234].

Since he sees indoctrination as anti-critical,[235] he asks whether rationality can be inculcated without indoctrination. An affirmative answer is reached after distinguishing between two cases: *"that in which the lack of justifying reasons is permanent; and that in which it is temporary,"* keeping the pejorative sense of indoctrination for the former, and naming the latter as *"non-indoctrinative belief-inculcation"*[236]. Why non-indoctrinative? Because in the latter case the teachings "can become criticizable"[237]. Initially, rational justification of beliefs taught is missing. But such teaching is permissible only in those cases where beliefs are necessary for developing CT and are later given rational grounding. This reminds us of Dewey's position that propaganda and indoctrination are as good as they increase ability to learn. It is also consonant with Norman's assertion that the conception of imposing CT is self-contradictory[238]. Since critical thinkers are best situated to rid themselves of earlier unwarranted influences as well as justify warranted ones, education that creates critical thinkers is minimally problematic with respect to indoctrination and neutrality.

Conclusion

Our two aims for this work were to justify our acceptance of standards set by the UN and UNESCO for the universal right to education, and to articulate and defend a form of RE that is compatible with this right. After defining CT and presenting several arguments in its support as an educational ideal, we extracted thirteen criteria which we held that our ideal for RE will have to comply with if it is to comply with the standards set for the right to education. Throughout we emphasized that education demands a critical ability and disposition towards one's worldview, and that

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[234] As above, pg. 86.

[235] For more on the definition of indoctrination see Goldberg I., above at note 1.

[236] Siegel, H., above at note 9, pg. 82-3.

[237] As above, pg. 86-7.

[238] Norman, in Brown, above at note 16.

RE is in a good position not only to comply with this demand but also to facilitate it. We took Smart's RE as one that complies with the thirteen criteria and so, with the right to education. Next, we moved to defend our educational ideal from attacks directed both at rationality and at science on which it depends. We concluded that the acceptance of the descriptive assertion that one's thinking or conception of rationality is determined by one's worldview does not conflict with the possible existence of a higher-level or true rationality that is capable of justifiably criticizing any and every worldview. We held that although difficult, the achievement of such rationality depends on critical thought. We then showed that what Yinger defines as science as a way of life not only is not a religion under his functional definition, but actually conflicts with it. In conclusion, we saw that our ideal may be justified even when in conflict with other rights.

BIBLIOGRAPHY

Brown, S. C., ed. *Philosophers Discuss Education*. London: Unwin bros., 1975.

Brownie, Ian., ed. *Basic Documents on Human Rights*. New York: Oxford University Press, 1992.

Byres, F. Joseph., *The Psychology of Religion*. London: Collier Macmillian Publishers, 1984.

Carr, Wilfred., and Anthony, Hartnett., *Education and the Struggle for a Democracy: The Politics of Educational Ideas*. Buckingham: Open University Press, 1997.

Dewey, John., *Democracy and Education: An Introduction to the Philosophy of Education*. New York: Macmillan Publishing, 1966.

Gewirth, Alan., *Reason and Morality*. Chicago: University of Chicago Press, 1978.

Goldberg, Ilan., "A Form of Religious Education Compatible with the Right to Education." M.A. diss., University of Malta, 2002.

Gutmann, Amy., *Democratic Education*. Princeton NJ: Princeton University Press, 1987.

Hood, Ralph, W. Jr., Bernard, Spilka., Bruce, Hunsberger., and Gorsuch, Richard., *The Psychology of Religion: An Empirical Approach*, 2d ed. New York: Guilford Press, 1996.

Johnson, L. Ronald., *Religion in Society: A Sociology of Religion*, 3d ed. London: Prentice-Hall International, 1988.

Kelly, A. V. *Education and Democracy: Principles and Practices*. London: Paul Chapman Publishing, 1995.

Macedo, Stephen., *Diversity and Distrust: Civic Education in a Multicultural Democracy*. London: Harvard University Press, 2000.

Noddings, Nel., *Philosophy of Education*. Dimensions of Philosophy. Oxford: Westview Press, 1998.

O'Hear, Anthony., *Karl Popper*. The Arguments of the Philosophers. London: Routledge & Kegan Paul, 1982.

Ozmon, Howard, A., and Samuel, M. Carver., *Philosophical Foundations of Education*. Ohio: Prentice Hall, 1995.

Paul, W. Richard., "Teaching Critical Thinking in the 'Strong' Sense: A Focus on Self-Deception, World Views, and a Dialectical Mode of Analysis." *Informal Logic* 4, no. 2, pg.2-7.

——, Background Logic, Critical Thinking and Irrational Language Games. *Informal Logic* 7.1, pg. 9-18.

——, *Critical Thinking: What Every Person Needs to Survive In a Rapidly Changing World*, 3rd ed. Edited by Jane, Willsen., and A.J.A. Binker.

Popper, Karl., *In Search of a Better World: Lectures and Essays from Thirty Years*. London: Routledge, 1992.

——, *Unended Quest: An Intellectual Autobiography*. London: Routledge, 1993.

Quinn, Philip, L., and Charles, Taliaferro., eds. *A Companion to Philosophy of Religion*. Massachusetts: Blackwell Publishers, 1997.

Sadovink, Alan R., Peter W. Cookson, Jr., and Susan, F. Semel., *Exploring Education: An Introduction to the Foundations of Education*. Boston: Allyn and Bacon, 1994.

Siegel, Harvey., *Educating Reason: Rationality, Critical Thinking, and Education*. London: Routledge, 1988.

Smart, Ninian. *Religion and the Western Mind*. London: Macmillan Press, 1987.

——, *The Science of Religion and the Sociology of Knowledge: Some Methodological Questions*. New Jersey: Princeton University Press, 1973.

Symonides, Janusz., and Vladimir, Volodin., eds. *UNESCO and Human Rights: Standard-Setting Instruments, Major Meetings, Publications*. Paris: UNESCO, 1999.

Talaska, Richard, A., ed. *Critical Reasoning in Contemporary Culture*. Albany NY: State University of New York Press, 1992.

United Nations General Assembly. *Convention on the International Right of Correction*. 1952.

United Nations General Assembly. *Declaration on Social Progress and Development*. 1969.

United Nations Educational, Scientific and Cultural Organisation. *Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*. 1974.

United Nations General Assembly. *Declaration on the use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind*. 1975.

Warnock, G. J., ed. *The Philosophy of Education*. London: Oxford University Press, 1975.

Yinger, Milton J., *The scientific study of religion*. New York: Macmillan Publishing, 1970.

AN OVERVIEW OF THE SUPERVISORY MACHINERY UNDER THE ECHR AND ITS IMPACT ON THE DOMESTIC LEGAL SYSTEM

YIANNA HADJIHANNA

CHAPTER 1

The European Convention on Human Rights: Origins, Development, Scope, Institutional arrangements and Functioning in practice

1. Introduction

The protection of human rights plays a vital role in the 21st century owing both to the growing regard for the safeguarding of fundamental rights and freedoms and because of the worst human rights violations on record which have occurred. Social, political, civil, economic and cultural developments cannot be effected without the respect and promotion of human rights. Therefore, the protection of these rights and freedoms are of immense importance both for the individuals affected and for the development of society as a whole. Human Rights require safeguarding. Only when nations realize this, can transparency, democracy, peace and security be strengthened and guaranteed. The creation of international instruments for the protection of human rights is a pre-condition for making fundamental rules effective. Such development of binding systems for the respect of the rule of law, democracy, cultural tolerance and human rights has only happened relatively recently[1].

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[1] Leonard, S., 'The European Convention on Human Rights: A New Era for Human Rights Protection in Europe', in *'Human Rights - An Agenda for the 21st century'*, Hegarty, A., & Leonard, S., (eds), Cavendish Publishing Ltd: UK, 1999, pg. 35

International, regional and domestic systems have been set up for the promotion of the rights and freedoms that must be respected in a democratic society. There are five systems of human rights protection operative within Europe, namely the frameworks created by the United Nations, the Organization for Security and Co-operation in Europe, the European Union, European national systems, and the Council of Europe.

The Council of Europe was formed in 1949 and its first step was to draft the *'most effective and influential international human rights instrument in the world'*[2]: the European Convention of Human Rights and Fundamental Freedoms (hereinafter 'ECHR')[3].

2. The European Convention on Human Rights (ECHR)

The ECHR, inspired by the Universal Declaration of Human Rights[4], was adopted on 4 November 1950 and came into force on 3 September 1953. The Council of Europe had the horrors of the Second World War and the Holocaust firmly in mind and was aware of the threat of dictatorship in Western Europe and the fear of the spread of communism by the Soviet Union. These fears led the Council to safeguard the essential rights and freedoms, which were accepted by the democratic regimes at the time. It did so by setting principles for the respect of democracy and created machinery for their observance. The Convention created an international protection machinery which has been described as *'the first effective regional enforcement mechanism for human rights'*[5].

3. System of protection

Forty-four State members of the Council of Europe have ratified

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[2] Blackburn, R., & Polakiewicz, J., (eds) *'Fundamental Rights in Europe'*, Oxford University Press, Oxford, 2001, Preface

[3] Rome, 4.XI.1950

[4] Adopted by the UN General Assembly on 10 December 1948

[5] Salcedo, C.J.A., 'The place of the European Convention in International law', in *'The European System for the Protection of Human Rights'*, Macdonald, R.St.J., & Matscher, F., & Petzold, H., (eds), Martinus Nijhoff Publishers, The Netherlands, 1993, pg. 16-17

the ECHR,[6] accession to which is a precondition for becoming a member of the Council. The contracting States must incorporate the Convention into national law and must offer protection to all persons within a State's jurisdiction, irrespective of nationality, legal status or length of stay.

States of the Council of Europe have an obligation to '*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention*'. Consequently the State has a double responsibility: to ensure that the municipal law is in line with the Convention and to offer just satisfaction to the victim in case of violation of the Convention[7]. The Court has often stressed that the primary responsibility for the protection of human rights falls on national authorities. Therefore States must respect and guarantee the effective enjoyment of the rights and freedoms set forth in the Convention. States are free to choose their own way of meeting their obligations under the ECHR.

The ECHR provides for civil and political rights which are acceptable in all democratic societies, such as the right to life, the right to a fair trial, freedom of thought, conscience and religion, and the right to marry[8]. Additional rights were added by the successive Protocols subsequent to the Convention. These are essential since *'both expand the protection and improve the efficiency of the enforcement system'*[9]. Additionally, they prove that the ECHR is a 'living instrument' capable of adapting depending on the needs of the society.

Accompanying these rights are the mechanisms by which these provisions can be invoked and enforced. Originally, the Convention provided for two institutions: the European Commission of Human Rights and the European Court of Human Rights[10], as the main organs in dealing with the supervision of the Convention. Additionally

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[6] As at 03/03/03

[7] Drzemczewski, A., 'Fact-finding as part of effective implementation: The Strasbourg experience', in *'The UN Human Rights Treaty system in the 21st century'*, Bayefsky, F.A., (Editor), Kluwer Law International, UK, pg. 115-136

[8] Economic, social and cultural rights are not mentioned in the text of the ECHR but are included in the European Social Charter

[9] Leonard, S., above at note 1. pg. 39

[10] See ECHR, Article 19, pre-amendment

the Committee of Ministers had a residual judicial power to deal with cases that were not brought before the Court[11]. The complaint was brought before the Commission provided that the contracting State concerned recognized its competence. The right of individual petition was optional and subject to a declaration of State acceptance. As a result, the right of an individual to lodge an application depended on the willingness of the State to accept and recognize the competence of the Commission. However with the entry into force of Protocol No.11 in 1998, the whole system of supervision of the Convention changed. A single full-time Court able to perform all the functions of the two original organs carries out the supervision of the ECHR. This major change in the monitoring system of the Convention was designed to make the enforcement system more effective and despite the various criticisms leveled against it[12], Protocol No.11 brought about significant improvements to the existing regime.

The Convention's enforcement machinery offers two levels of protection:

> *'firstly against bad-faith abuse of governmental power and secondly against good-faith limitations on liberty which nevertheless go beyond what is necessary in a democratic society'*[13].

The right to individual application became mandatory with Protocol No.11 and therefore stands in equal status with the power of the State to bring a complaint. Consequently, there are two types of applications that can be brought under the Convention: inter-State and individual.

4. Bringing a complaint under the ECHR

4.1 Individual and inter-State applications

Articles 33 and 34 cover the inter-State and individual complaint mechanisms respectively. According to Article 33 any contracting

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[11] See ECHR, Article 32(1), pre-amendment

[12] For more detail see: Schermers, H., *' The 11th Protocol to the ECHR'*, (1994) 19 E.L.Rev. 367

[13] Mahoney, P., *'Speculating on the future of the reformed European Court of Human Rights'*, (1999) 20 HRLJ I, pg. 2

party can invoke the Convention against any other contracting State. It can do so either on its own behalf or on behalf of any of its nationals. There is no need for the complaining State to prove that it *'has a special interest in, or any relationship to, the victim'*[14]. The inter-State complaint mechanism has been used only in a few occasions. Some cases have been raised because of political hostilities between the contracting States. For example the case of Greece v UK[15], Austria v Italy[16], Ireland v UK[17]and Cyprus v Turkey[18]. Other cases were brought solely on humanitarian grounds such as the Greek case[19], one of the Court's most important cases.

Furthermore, any person, non-governmental organization or group of individuals, which feel that any of his rights have been violated by the State, can lodge a complaint before the Court. According to judgments, 'indirect victims,' that is, a class of individuals who are not themselves victims of the violation, may bring a complaint to the Court. Article 34 offers individuals a powerful weapon to make States comply with their obligations under the Convention.

4.2 Requirements for admissibility

Article 35 of the ECHR sets out the criteria for admissibility. There are seven grounds upon which an application may be declared inadmissible, two of which apply both to inter-State and individual applications: the Court can deal with the complaint only after all domestic remedies have been exhausted and the complaint must be brought within six months of the date of the final decision of the national court. An applicant is not required to exhaust domestic remedies if they are not genuine or effective or if they have been unreasonably delayed. Moreover, for an application to be declared

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[14] Davidson, S., *'Human Rights'*, Open University Press, UK, 1993, pg. 104

[15] Greece v UK (1st Cyprus case), Application 176/56, 14 December 1959, (1958-9) 2 Yearbook 174

[16] Austria v Italy, Application 788/60, 11 January 1961, (1961) 4 Yearbook 116

[17] Judgment of 18 January 1978, Publications of the European Court of Human Rights, Series A, No.25

[18] Cyprus v Turkey (Joined applications 6780/74&6950/75), 26 May 1975, (1975) 18 Yearbook 82 (1982) 4 EHRR 482

[19] Yearbook of the European Convention on Human Rights Vol.11 (1968), p.690-780 (admissibility) and Yearbook of the European Convention on Human Rights, Vol.12 (1969) (merits)

admissible the requirements of Article 35(2) must be fulfilled: that is the application must not be anonymous[20] and the application must not be substantially the same as a matter already examined by the Court or examined by another international investigation and contains no new facts[21]. Furthermore applications that are incompatible with the provisions of the Convention or manifestly ill-founded, or which constitute an abuse of the right of petition will be struck down. The grounds of Article 35(2)(a)(b) apply only to individual cases. Since the entry into force of Protocol No.11, it is the task of the Court to declare whether the application is compatible or incompatible with the Convention.

5. Processing the application

5.1 The structure of the European Court of Human Rights

Section II of the Convention deals extensively with the Court. The Court as amended is composed of a number of judges equal to that of the contracting States. The Plenary Court elects its President, two Vice-Presidents and two Presidents of Section for a period of 3 years[22]. Under the Rules of the Court, the Court is divided into 4 Sections. Committees of three judges are set up within each Section and Chambers of seven members are constituted within each Section on the basis of rotation. The Grand Chamber is composed of seventeen judges. Where the Chamber has relinquished jurisdiction under Article 30 of the Convention, the Grand Chamber includes the members of the Chamber, which relinquished jurisdiction, whereas in cases referred to it by Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber (except as prescribed by Article 27).

5.2 Registration and procedure for admissibility

Once the application reaches Strasbourg it will be registered at the Court's Registry. The application will be assigned to a Section,

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[20] ECHR, Article 35(2)(a)
[21] ECHR, Article 35(2)(b)
[22] ECHR, Article 26

whose President appoints a *rapporteur* for drawing up reports and requesting information from the parties concerned. After a preliminary examination of the application the case is forwarded to a Committee of three judges or to a Chamber. The Committee can declare the application inadmissible by a unanimous vote[23] and the decision is final without the right to appeal. When the Committee is not unanimous in its vote or the application is referred directly to the Chamber, the Chamber has to decide on the admissibility and merits of the application[24]. The decision on admissibility is taken by majority vote. The Chamber can declare the case inadmissible at any stage of the proceedings and must give reasons for the decision. The substance of the case is later examined by a separate judgment but there can be instances were both issues are dealt with together.

5.3 Judgment

Once the Chamber declares the application admissible, it proceeds on the merits of the case[25]. The Court can ask for additional information both oral and written. The Chamber must *'place itself at the disposal of the parties with a view to securing a friendly settlement'*[26] of the alleged violation. If the dispute is resolved by a means of a settlement, then the case is struck out of the list of cases by means of a decision[27]. Where no friendly settlement is reached the Court will issue a judgment. This takes place after a public hearing where both parties explain their written Statements. During the proceedings a Chamber may relinquish jurisdiction in favour of the Grand Chamber[28] where a case raises serious question of interpretation of the ECHR or where there is a risk of departing from existing case law[29]. The parties can object to such a relinquishment within one month of notification of the intention to relinquish.

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[23] ECHR, Article 28
[24] ECHR, Article 29
[25] ECHR, Article 38(1)(a)
[26] ECHR, Article 38(1)(b)
[27] ECHR, Article 39
[28] ECHR, Article 43
[29] ECHR, Article 30

Chambers deliver their judgment by majority vote. Within three months of delivery of the Chamber's judgment, any party may request that a case be referred to the Grand Chamber if it raises a serious question of interpretation or application or a serious issue of general importance[30]. A Grand Chamber panel of five judges examines this request. A Chamber's judgment becomes final only when the parties declare that they will not request the case to be referred to the Grand Chamber or after three months have passed since the date of the judgment if reference has not been made to the Grand Chamber and finally when a panel of the Grand Chamber rejects the request for a reference[31]. Once the judgment becomes final it is then published. According to Article 46, all contracting parties must *'undertake to abide by the final judgment of the Court in any case to which they are parties'* and must take all the appropriate measures to abide to the Court's judgment.

5.4 Just satisfaction

The Court has the power to *'afford just satisfaction to the injured party'*[32]. This can take the form of compensation and/or costs may be ordered in favour of the victim. An order for compensation is only made when the injured party makes a request to the Court. The task of the Court ends at the stage of the judgment.

6. Enforcement

Once the judgment is delivered, it is transmitted to the Committee of Ministers, which is responsible for supervising its execution[33]. The Committee has the responsibility of monitoring enforcement and compliance by States found to be in breach of the Convention. According to Article 8 of the Statute of the Council of Europe, the Committee may suspend or expel any contracting State which has seriously violated article 3 of the Statute. This is the ultimate sanction; however, expulsion has never occurred.

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[30] ECHR, Article 43
[31] ECHR, Article 44
[32] ECHR, Article 41

CHAPTER 2
The General Position of the Convention in the domestic legal system of the contracting States

1. Incorporation of Treaties in International Law

The Convention was created with the objective of achieving *'an effective and uniform standard of protection within Europe'*[34]. The form and method of implementation of the ECHR at national level are not specified. Consequently, the method of application and incorporation of the treaties into domestic law is determined by national law, particularly, constitutional law. Indeed, *'the national implementation methods and mechanisms depend on the history, customs, political and social system of a given society'*[35].

The implementation and application of the Convention at domestic level is important for effective national protection of the rights and freedoms recognized under the Convention. States have an obligation under international law to bring their municipal law in line with their international commitments.

2. Legal systems within the Council of Europe

The relationship which exists between domestic and international law is based on two well-known concepts, namely, monism and dualism. Both deal with the issue of whether international and domestic law are two separate legal systems or part of the same system.

Followers of the dualist theory such as Triepel[36] maintain that international law and domestic law are two independent legal systems and consequently the internally competent organs must transform international legal obligations in order to be applicable domestically. Followers of the monist theory, such as Scelle[37] and

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[33] ECHR, Article 46

[34] Wieruszewski, R., 'National implementation of Human Rights', in Rosas, A., & Helgesen, J., in collaboration of Gomien, D., (eds), *'Human Rights in a changing East-West Perspective'*, Pinter Pls, London & New York,1990, pg. 264

[35] Wieruszewski, above at note 34. pg. 287

[36] Triepel, H., *'Volkevrecht und Landesrecht'* (1989)

[37] Schelle, G., *'General principles of law of peace'*, in Collection of lectures of the Hague Academy of International law, volume 46 (1993), pg. 383

Kelsen[38] regard law – whether international or domestic – as a single unity composed of binding legal rules, whether those rules are obligatory to States, individuals or other entities, other than States.

In States with monist tradition, such as Belgium, France and Switzerland, the rights and freedoms of the Convention can be applied directly by the courts after ratification of the Treaty. This is refereed to as an *'automatic incorporation'*[39] since the obligations imposed by the international agreement are applicable domestically and require no formal reception. The adoption of the international legal norms is automatic and direct.

The dualist tradition keeps a strict separation between the norms of international law and the internal legislation. This method of *'legislative incorporation'*[40] requires the legislature to transform or to incorporate the substantive norms of the treaty in order to become applicable in municipal law. States such as Germany, the UK, Italy, States of the Central and Eastern Europe favour a dualist approach.

The method by which a treaty becomes part of domestic law usually is determined by the Constitution of the State and not a matter prescribed by international law. States are free to choose between the various methods of incorporation and *'either is satisfactory assuming that the norms of treaties effectively become part of national law'*[41].

3. Obligations imposed upon State parties to the ECHR

The purpose of the ECHR is primarily to produce municipal effects in order to protect individuals against arbitrary interference by a contracting party. Therefore one may pose the question whether the Convention requires States to give direct effect in national law to the rights and freedoms stated in the Convention.

Originally, it had been suggested that Articles 1 to 12 demarcate the scope of the Convention and that these articles attest the binding

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[38] Kelsen, H., *'General theory of law and the State'* (1945)

[39] Steiner, H., & Alston, P., *'International human rights in context'*, Law, politics and morals, 2nd ed., Oxford university press, 2000, pg. 1000

[40] As above, pg. 1000

[41] As above

character of the Convention. As a result the contracting States were argued to be under a legal obligation to apply the provisions of the Convention in their domestic law[42]. This view was mainly influenced by the treaties of the European Union which create binding obligations upon the Member States.

It was not until the Swedish Engine case[43], that a clear statement on the point was made:

> *'neither Article 13 of the Convention, nor the Convention in general lays down for the contracting States any given manner for ensuring within their internal law effective implementation of any of the provisions of the Convention'.*

Similarly, in another case[44] the Court held that,

> *'the Convention does not formally require contracting States to incorporate it in their domestic legal systems or to give it a certain position in the domestic hierarchy of sources of law. States are in principle free to choose the means which suits them best for ensuring the effective enjoyment of the rights and freedoms set forth in the Convention'.*

Strasbourg interpreted Article 1 of the Convention by substituting the words 'shall secure' for the words 'undertake to secure' that 'a particular faithful reflection' of abiding by the Convention is achieved in those countries that incorporate the Convention in their municipal law. The Court has stated that Article 13 does not lay down any specific way in which a country must comply with its obligations under international law[45]. It only requires that where a person has an arguable claim to be the victim of a violation guaranteed under the Convention, he must have a remedy before a national authority. If however, no remedy exists under the domestic law then it is possible to say that a State, which has not incorporated the

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[42] Buergenthal, T., *'The effect of the European Convention on Human Rights on internal law of Member States'*, ICLQ, Supplementary publication No.11 (1965) 79, pg. 80-83

[43] Swedish Engine Drivers' Union v Sweden, 6.2.76, Series A, No, 20, 1 ECHRR 617, paragraph 50

[44] Republic of Ireland v United Kingdom, 18.1.1978, No.25, 2 ECHRR 25

[45] Silver v UK, Judgment 30.8.91, No 215, 14 ECHRR 248, paragraph 347

Convention, will be in breach of Article 13. Drzemczewski[46] states that Article 13 indirectly requires incorporation if no adequate domestic remedy exists.

The obligation of the State is to guarantee certain human rights to individuals and to ensure that the domestic legislation does not conflict with the substantive terms of the Convention. As held by Beddard[47], it was not the intention of the parties to create for themselves a duty to integrate the ECHR into their domestic systems but merely to take such steps as were required in order not to be in violation of an international treaty. Indeed, as Strasbourg organs confirmed, there appears to exist no legal obligation on the contracting States to incorporate the Convention into domestic law. States are free to choose any method, which suits them best in order to ensure the effective enjoyment of the Convention[48].

4. Application of the ECHR in domestic law

As previously mentioned, the method by which the ECHR becomes part of national law is left to be determined by the Constitutional Law of the contracting state. The obligation for ensuring observance of the ECHR in municipal law lies both with the legislature and the judiciary[49]. The legislature has to ensure that domestic law is in line with the Convention and the judiciary has to ensure that the interpretation of the statutory law is not in contradiction with it.

Some years ago, States were reluctant to give direct application to the Convention[50]. Today however, national courts consider and apply the judgments of Strasbourg in their national cases and adopt rulings consistent with it. They make regular reference to the

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[46] Drzemczewski, A., The Danish Centre of Human Rights, *'The implementation in national law of the European Convention on Human Rights'*, Proceedings of the 4th Copenhagen Conference on Human Rights, 28-29 October 1988, pg. 26

[47] Beddard, R., *'The status of the ECHR in domestic law'*, 16 ICLQ (1967), pg 207-17

[48] Polakiewicz, J., *'The application of the ECHR in domestic law'*, (1996) 17 HRLJ 405, pg. 405

[49] Polakiewicz, J., 'The status of the Convention in national law' in Blackburn, R., & Polakiewicz, J., above at note 2.

[50] See, for example, R v Chief immigration Officer, ex parte Salamic Bibi, (1976) 3 ALL ER 843, pg. 847

Convention and try to ensure that no conflicts exist between it and national law.

However, there are complex circumstances were the domestic application of the ECHR cannot always be effected. A State found in violation of the ECHR has to conform its legislation to the requirements of the Convention. The legislature enjoys a 'margin of appreciation' which means that the State is free to amend and comply with its obligations in a sufficient but not in an absolute manner. Additionally the Strasbourg case law is not a superior source of law, unlike European Union treaties, and does not require uniformity between the contracting States.

The practice of some States which have become recently parties to the Convention, shows that a 'compatibility exercise' can be an advantage before ratification of the ECHR[51]. Hungary, Finland and Estonia for instance, analysed and assessed their municipal law in the light of the Convention at the inter-ministerial Committees or working groups, which were set up for this reason. Furthermore, effective application of the ECHR in domestic law can be ensured by the actions of some States to check and examine their draft legislation, prior to enforcement, with the requirements of the Convention[52]. This is important in connection with Article 52, whereby the

> *'...contracting party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention'.*

There are various difficulties in meeting the requirements of the Convention in municipal law. Adaptation and changes of national law is not always easy given to cultural, historic, religious variations that exist between the States. Furthermore, adaptation takes time to be effected. Despite the various problems which a State may encounter, contracting parties to the ECHR are not relieved of their obligation to bring domestic law in line with the Convention.

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[51] Drzemczewski, A., *'Ensuring compatibility of domestic law with the ECHR prior to ratification: The Hungarian Model'*, 16 HRLJ 241 (1995)

[52] Drzemczewski, A., & Nowicki, M., *'The impact of the ECHR in Poland: A stock-taking after three years'*, (1996) European Human Rights Law Review, Issue 3, 261, pg. 277-279

Insofar as the status the Convention occupies within the domestic legal system, this varies dramatically from State to State. Therefore there is a wide variation as to the position of the Convention within national law[53]. However, irrespective of the status of the Convention in domestic law, the State has an obligation to comply with the conventional rights because

> *'the efficacy of human rights treaties depends essentially on the incorporation of the provisions in national law'*[54]

5. The importance of incorporation of the ECHR

The incorporation of the Convention within the domestic legal system of the contracting States is of immense importance since the control mechanisms of Strasbourg cannot by themselves ensure the application and effectiveness of the conventional rights.

The rights and freedoms stated in the ECHR should be the same in all the contracting states of the Council of Europe. A specific provision should be inserted in the ECHR stipulating the status which should be given to the Convention. As the 4th Copenhagen Conference[55] suggested, uniformity could be achieved and furthered by preliminary rulings of the Strasbourg organs. This is similar to the situation pertaining under the Treaty of the European Union where member states of the European Union can apply to the Luxembourg Court for preliminary rulings on specific issues. This contributes to the uniformity, interpretation and application of the treaties. In this way, the rights and freedoms of the ECHR may achieve more complete and comprehensive incorporation.

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[53] Ress, G., 'The effects of judgments and decisions in domestic law', in R.St.J. Macdonald, F., Matscher, H., Petzold (ed), above at note 5. pg. 801-853; and see: Polakiewicz, J., & Jacob-Foltzer, V., *'The ECHR in domestic law: The impact of Strasbourg case law in States where direct effect is given to the Convention'*, (1991) 12 HRLJ 65

[54] Steiner, H., & Alston, P., above at note 39. pg. 999

[55] Above at note 46.

CHAPTER 3
The supervisory/control machinery of the ECHR

1. Historical background and development of the supervisory machinery

The ECHR provides for the rights and freedoms that must be protected by States and for their enforcement. Before the entry into force of Protocol No.11, three institutions were responsible for the enforcement of the ECHR: the European Court of Human Rights, the European Commission of Human Rights and the Committee of Ministers. As mentioned above, individuals could only lodge complaints against contracting States when the State had accepted the right to individual petition. Once they had done so any individual, group of individuals or non-governmental organization could lodge a complaint, which was first examined by the Commission. The issue of admissibility was determined and if it was declared admissible and no friendly settlement was reached, the Commission produced a report which was transmitted to the Committee of Ministers. If a friendly settlement was reached, that was the end of the case.

The Court could only deal with the case where the respondent State had accepted the compulsory jurisdiction of the Court. The Commission or the contracting State concerned could apply to the Court within three months following the report of the Committee of Ministers. Individuals had no authority to bring the case before the Court. The judgment of the Court was final. If the case was not referred to the Court, the Committee of Ministers was to determine whether a violation had occurred and could award 'just satisfaction' to the victim. The Committee of Ministers was also responsible, as now, for the supervision of the Court's judgments.

Protocol No.11 restructured the entire enforcement machinery. The accession of new member States in the 1990's and the increase of the number of cases before the European institutions lengthened the proceedings to unacceptable limits. There was *'an increasing dissatisfaction with the way in which the Strasbourg system was operating'*[56].

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[56] O'Boyle, M., *'Establishing the new European Court of Human rights: Progress to date'*, 3 Human Rights law Review, Vol.4 (3), 1999, pg.1

The solution was the creation of a single full-time court in order to simplify the structure with the aim of shortening the duration of the proceedings and contemporaneously, strengthen the judicial character of the system by making it fully compulsory and abolishing the adjudicative role of the Committee of Ministers.

The restructuring of the supervisory machinery was designed to improve the control system which may be described as the cornerstone of the Convention regime as it decides on violations and ensures that States comply with their obligations under the Convention.

2. The supervisory machinery of the ECHR

As discussed earlier, there is no obligation to incorporate the Convention into domestic law but only to bring domestic law in line with the ECHR. When a State undertakes to apply the Convention in its domestic legal sphere, it also subjects itself to the international control mechanism of Strasbourg. Today membership of any State in the Council of Europe is regarded as inseparable from the undertaking to accept all obligations under the ECHR.

The European Court of Human Rights, the Committee of Ministers and to a lesser extent, the Secretary-General and the Parliamentary Assembly form the control machinery of the Convention. For the purpose of this study, only the two main bodies, the European Court of Human Rights and the Committee of Ministers, will be examined.

3. The European Court of Human Rights

3.1 The task of the European Court of Human Rights

The European Court of Human Rights has its seat in Strasbourg. After the changes brought by Protocol No.11, the Court took on all the previous tasks of the Commission. It is a full-time body and is composed of judges from all the States parties to the ECHR. Its jurisdiction is prescribed by the Convention, which jurisdiction is now compulsory to all contracting States. Section II of the ECHR deals extensively with all the powers of the Court.

The Court's power includes the resolution of individual allegations

of violations of the Convention stemming out from measures affecting the applicant. The Court

> *'not only looks at individual measures of implementation of national legislation but also has to deal directly with the compatibility of legislative acts as such with the standards of the ECHR'*[57].

The Court interprets the Convention in the light of present-day conditions and in the light of their object and purpose in conformity of the general rule of interpretation in Article 31 of the 1969 Vienna Convention on the Law of the Treaties. Additionally the Court developed principles of interpretation such as the doctrine of margin of appreciation[58].

The ECHR does not confer any power on the Court to promote approximation or uniformity of laws in the existing contracting States. It has been stated that

> *'...such unification or harmonisation might come about as an indirect result of the Court's decisions but it should not be the objective'*[59].

The Court has the power to offer 'just satisfaction' to the applicant, and this usually takes the form of financial compensation. The State must pay the awarded sum to the applicant, which usually includes default interest from the time between the judgment and the execution of the payment.

The Court delivers judgments, which are essentially declaratory. It leaves to the State the choice of the means to be utilized in its domestic legal system for the performance of its obligations under Article 46. The Court can declare that a particular legislation or part thereof, is not in conformity with the Convention but it cannot itself annul or repeal provisions of national law, which are not in

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[57] Colsong, H., 'The European Court of Human Rights and the national law-maker: some general reflections', in *'Protecting human rights: The European Dimension'*, Matscher, F., & Petzold, H., (eds), Studies in honour of Gerand J. Wiarda, Carl Heymanns Verlag KG, Koln, Berlin, Bonn, Munchen, 1988, pg.239

[58] Prebensen, S., 'Evolutive interpretation of the ECHR', in *'Protecting Human Rights: The European Perspective'*, Mahoney, P., (ed), Carl Heymanns Verlag KG, Koln, 2000 pg. 1123-1124

[59] Colsong, H., above at note 57. pg. 244

conformity with the ECHR[60]. The task is to remedy the wrong suffered as a result of the State's non-compliance with the Convention.

Two kind of judgments can be issued by Strasbourg: declaratory and just-satisfaction judgments. The first one declares whether a State is in violation of the Convention and the second type of judgment usually offers the applicant a compensation for material and moral damages. In some cases, the re-imbursement of the costs and expenses incurred before the European institutions can be ordered.

At any rate,

> *'...a judgment in which a Court finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'*[61].

The Court tries to set common legal standards which influence and shape domestic law and practice areas of the contracting States. With the accession of new member States in the Council of Europe, the Court will have a crucial role to play for preserving its standards and promoting democracy and the rule of law.

4. Obligations and effects produced by the Court's judgments

The obligation to comply and remedy the applicant is placed on all the national authorities of the respondent State. This obligation *'is one of the most important pre-conditions for the success of the high objectives of the ECHR'*[62]. According to Article 46 of the Convention, *'the high contracting parties undertake to abide by the final judgment*

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[60] Klass & others, Judgment of 6.9.78, paragraph 58. See also: Polakiewicz, J., 'The execution of judgments of the European Court of Human Rights', in Blackburn, R., & Polakiewicz, J., (eds), above at note 2.

[61] Papamichalopoulos & others v Greece, judgment of 31.10.95, Series A, No.330-13, paragraph 34

[62] Eckart Klein, 'Should the binding effect of the judgments of the European Court of Human Rights be extended?' in Mahoney, P., (ed), *'Protecting human rights: The European Perspective'*, Carl Heymanns Verlag KG, Koln, 2000, pg.705

of the court...'. This obligation is vital for the protection of human rights within Europe.

The judgment of the Court is final and there is no possibility of appeal, in accordance with the provisions of Article 44(2). The judgment is binding on the parties concerned. The binding effect of the judgment is limited to the principles of *ratione personae*, *ratione materiae* and *ratione temporis*.

However, the Strasbourg judgments have effects extending beyond the confines of a particular case: not only do they influence reforms in the legislative norms and administrative practices of the contracting States, but it can also make them more sensitive to human rights considerations and influence the manner in which legislation is drafted. As mentioned, the judgment is binding on the State concerned. However other State parties are not hindered from abiding the judgment or use it as guidance on the compatibility of their own law and practice with the Convention. In many instances, States amend their legislation and national courts continuously rely on the Strasbourg case law for deciding a case within the domestic arena[63]. For instance the Netherlands had to consider its law on detention following the Brogan case[64] and the Cyprus courts often refer to the Strasbourg case law in interpreting the national Constitution.

Strasbourg does not alter municipal law nor does it have a duty to instruct the State on how to change the domestic law. It is up to the State concerned to take measures to ensure that domestic law is consistent with the ECHR. This limitation from the part of the Court can be criticized. The Court can only issue judgments and in some cases it can offer 'just satisfaction' to the applicant. This is only a financial remedy, which does not change or improve the domestic legal system of the State. There is also doubt as to whether the measures taken by the authorities concerned are sufficient to comply with the Court's judgment[65] since States are free to choose any

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[63] Ryssdal, R., 'The expanding role of the European Court of Human Rights', in *'The future of Human Rights protection in a changing world'*, Eide, A., & Helgesen, J., (eds) with the collaboration of Swinehart, T., Norwegian university Press, Oslo, 1991, pg.117

[64] Brogan v UK, judgment of 29 November 1988, Series A, No.145

[65] Van Dijk, *'The Benthem case and its aftermath in the Netherlands'*, 34 Netherlands international law Review 5 (1987), pg.9-24

measures that suits the government best to comply with the judgment and not what is best to guarantee the provisions of the Convention.

5. The challenges of the Court in the 21st century

The European Court plays a significant role in the development of the European human rights jurisprudence. No new rights were added to the Convention but the Court has had a significant impact in adapting the existing rights

> *'to evolutions in standards in the convention and thereby raised the protection afforded by the ECHR to a higher level than intended or expected in 1950'*[66].

The Court of Human Rights has brought a welcome reform and is a worthy successor to the old system[67]. The Grand Chamber plays a significant role in developing the European human rights system. It is the Grand Chamber's role to examine the most leading cases that are lodged before the Court. It has to decide cases which raise 'serious questions affecting the interpretation or application of the ECHR or 'serious issues of general importance'[68]. It is the Panel that will distinguish the most leading cases that need to be decided; it will act as a 'filter' in accepting the most important applications.

The task of the Court in interpreting the Convention as a 'living instrument' can be threatened by the readiness of the States to accept the standards of the Court. States are not always ready to adapt their internal laws to social developments. For instance, transsexual, homosexual and AIDS cases cause particular difficulties not only to the Court in determining those principles but to the contracting States as well[69]. The diversity of law and morals in the domestic

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[66] Prebensen, C.S., above at note 58, pg.1136

[67] Drzemczewski, A., *'The European Human Rights Convention: Protocol No.11- Entry into force and first year of application'*, (2000), 21 HRLJ 1, pg. 9

[68] ECHR, Article 43

[69] Modinos case, Judgment of 22 April 1993, Series A No. 259. The Court ruled that the government failed to *'show the existence of a serious reason creating a pressing social need to maintain in force in Cyprus the prohibition by criminal law of homosexual activities between male adults'*. The Cyprus government had a strong opposition in changing and adapting the legislation with the judgment.

legal system of the contracting States can cause practical difficulties in implementing the decisions of the Court.

Another challenge of the Court rests in the relationship between the Strasbourg machinery and the European Union. The EU has recently drafted the Charter of Fundamental Rights, which contains civil and political, economic, social and cultural rights. If the Charter becomes binding for the EU, then EU member States have to subject themselves to the Luxembourg Court. Problems may arise as to which Court will have jurisdiction with regard to the 15 EU States. Also there is a risk of a duplication of standards by the Strasbourg and Luxembourg Courts. If the fifteen States ratify the Charter of Fundamental Rights then a different protection regime will exist between those fifteen States and the rest of the contracting States of Central and Eastern Europe[70].

The accession of new States in the Council of Europe may challenge the new jurisprudence of the Court. Additionally, the increased awareness and popularity of Strasbourg leads to a high number of applications registered before the Court. Therefore the

> *'major challenge for the Court today is not only to maintain and develop the Convention standards but also to ensure that the Europe of human rights remains a single entity with common values'*[71].

6. The Committee of Ministers

6.1 The role of the Committee of Ministers

The Committee of Ministers consists of representatives of governments from all the contracting states of the Council of Europe. It is the executive body of the Organization and the decision-making organ through which agreements and common action by States are adopted[72]. The Committee decides what action should be taken on

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[70] O'Boyle, above at note 56.

[71] Evaluation Group, *'Report of the Evaluation group to the Committee of ministers on the European Court of Human Rights'*, EG Court (2001) 1, 27.9.2001, http:// cm.coe.int pg.4

[72] Council of Europe, *'The Committee of Ministers'*, www.humanrights.coe.int

recommendations adopted by the Parliamentary Assembly and on proposals made by various committees working for the Council[73].

The monitoring that will be examined in the following pages is that carried out by the Committee of Ministers in the context of Article 46 of the ECHR. The Committee acts to prevent human rights violations and supervises the measures taken to prevent future violations. A contracting state, the Secretary General or the Parliamentary Assembly can refer a request for monitoring to the Committee. The decisions taken by the Committee take the form of recommendations to governments or the form of Conventions and agreements binding to all contracting States that accede them.

6.2 The function of the Committee

Prior to entry into force of Protocol No.11, the Committee had quasi-judicial functions assigned to it by former Article 32 of the Convention whose function was severely criticized[74] as it was causing delays to the whole system and also, being a political body of the Council, it could not act as a judicial organ to a particular case[75]. The Committee is no longer exercising its judicial function.

Today it monitors States' compliance with Article 46(1) of the Convention by supervising the execution of the final judgments of the Court. This supervision takes the form of monitoring legislative or administrative reforms effected by the contracting States in response to a finding of a violation by the Court[76]. Under Article 46(2), the Committee is responsible for ensuring that the payment

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[73] For the record 2000, *'The European Human Rights System'*, Human Rights Internet (HRI) & the Netherlands Institute of Human Rights (SIM), 2001, pg.289

[74] Jacobs, F., & White R., *'The European Convention on Human Rights'*, 2nd edition, Oxford University Press, New York, 1996, pg. 399; Bartsch, H-J., 'The supervisory functions of the Committee of Ministers under Article 54 - a postscript to Luedicke-Belkacem-Koc, in *'Protecting Human Rights: The European Dimension'*, Studies in honour of Gerard Wiarda, Matscher, F., & Petzold, H., (eds), Carl Heymanns Verlag KG, Koln, 1988, pg.54

[75] Van Dijk, P., & Van Hoof, G., *'Theory and Practice of the European Convention on Human Rights'*, Kluwer Law International, 3rd edition, pg. 277

[76] Tomkins, A., *'The Committee of Ministers: Its Roles under the European Convention on Human Rights'*, European Human Rights Law Review, 1 (1995) 49-62

of 'just satisfaction' is made to the applicant. It can monitor measures for ensuring the reopening of proceedings at the origin of the violation, reversal of a judicial verdict or discontinuation of expulsion proceedings, or measures to prevent the repetition of the violation such as reforming legislation or introducing training[77].

The Committee adopts its own rules of procedure and develops its own practice. In 1976, it adopted rules[78] for supervising the execution of the Court's judgments and in 2001 adopted new rules for the application of Article 46(2)[79]. All the judgments delivered by the Court and the measures taken by the respondent State in order to abide by the judgment are automatically inserted in the Annotated Agenda of the Committee. They are then examined in the regular Committee's human rights meetings[80]. The Committee not only examines cases where the Court found a violation of the Convention but also supervises those cases where the parties have agreed to a friendly settlement.

The rules of the Committee describe the procedure taken for ensuring compliance with commitments accepted by member States. Under these rules, the Committee invites the State to inform of the measures, which it has taken to comply with the judgment. States submit information as to what steps they have taken to remedy the violation. They submit any legislative, regulatory and administrative amendments they had undertaken or going to undertake to comply with Article 46(1). These measures are regularly published in an appendix to the Committee of Ministers resolution declaring that the function under Article 46 has been exercised. If a State fails to take any measures to remedial the violation the Committee by

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[77] Council of Europe, 'The Committee of Ministers', in *'Human Rights Information Bulletin'*, No.54, July-October 2001, H/Info (2002) 1 issued by the Council of Europe

[78] Rules adopted by the Committee of Ministers for the application of Article 54 of the ECHR, approved in the 254th meeting of the Ministers' Deputies, http://cm.coe.int

[79] Rules for the application of Article 46(2) of the ECHR, adopted by the Committee of ministers on 10 January 2001, at the 736th meeting of the Ministers' Deputies, http://cm.coe.int

[80] Polakiewicz, J., 'The execution of Judgments of the European Court of Human Rights', Blackburn, R., & Polakiewicz, J., (eds), above at note 2, pg.63

> *'2/3 majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee'*[81]

can take any measures that deems necessary. Under the Statute of the Council of Europe the Committee of Ministers has the power to suspend or expel from the Council any member state guilty of serious human rights violations.

Since there is no European human rights police force or penal system, it is the task of the Committee of Ministers to ensure that justice is done according to the judgment of the Court, thus maintaining the coherence and the credibility of the system[82]. The Committee has to satisfy itself that the State took the appropriate measures to rectify the situation. If it does so, then the Committee will issue a resolution that the State has complied.

7. Supervision under Article 46

8. Execution of judgments

The ECHR is silent as to how the judgments are to be executed. It is also silent as to the nature and scope of State's obligation to execute. The Convention however States in Article 46 that

> *'high contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties'.*

Therefore, once a State is found to be in violation, it has to execute the judgments of the Court. As it was stated in a Greek case[83]

> *'...a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation*

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[81] Zwaak, L., 'The effects of final decisions of the supervisory organs under the European Convention on Human Rights', in Bayefsky (ed), *'The UN Human Rights System in the 21st century'*, Kluwer Law International, UK, 2000, pg.263

[82] Harman, J., *'Complementarity's of mechanisms within the Council of Europe/ Perspectives of the Committee of Ministers'*, (2000), 21 HRLJ 296, pg.296

[83] Papamichalopoulos v Greece, Judgment of 31.10.95, Series A, Vol.330-B, paragraph 34

for its consequences in such a way as to restore as far as possible the situation existing before the breach'.

The duty to execute a decision rests on the contracting State. It can choose the method of redressing the wrong[84]. No supervisory machinery of Strasbourg can order the State how to perform any course of action. In particular, the Court is not empowered to give instructions or directions in relation to the operation of its judgment.[85] In the Marckx case[86] it was held that

'judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligations under Article 53 (now 46)'.

However, States have no right to suspend their obligation under Article 46(1) while awaiting for such a reform to be completed[87].

It is not only the State party to the case which has the obligation to abide by the decision. All State parties have a general obligation under Article 1 of the ECHR to ensure that their law and practice is in line with the jurisprudence of Strasbourg. In this way, the judgments of the Court should not only have a reparative effect but also a preventive effect. In various States statutory and administrative reforms have been effected after a judgment has been issued concerning other parties.

The execution of judgments is crucial for the effectiveness and development of the ECHR. In the last few years some States have not abided by the judgments of the Court. There are cases that are still not executed for various reasons, thus reducing and undermining the credibility of Strasbourg Court and also undermining the power of the Committee of Ministers. It is therefore vital that measures are taken in this respect to improve this area.

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[84] Bocker, R., & Von Hebel, H., 'The enforcement of Strasbourg and Geneva decisions' in *'The execution of Strasbourg and Geneva Human Rights decisions in the national legal order'*, Barkhuysen, T., Van Emmerik, M., Van Kempen, P., (eds), Martinus Nijhoff Pls, The Hague, Boston, London, 1999, pg.238

[85] Soering v UK, Judgment of 7 July 1989, Series A, Vol.161. paragraph 127

[86] Marckx v Belgium, judgment of 13 June 1979, Series A, Vol.31, paragraph 58

[87] Vermeire v Belgium, judgment of 29 November 1991 Series A, Vol.214-6, paragraph 26

8.1 Difficulties in executing a judgment

The issue of enforcement of judgments is vital for the effective functioning of the protection system[88]. Having said this, the execution of some judgments may cause practical and other difficulties. This can be due to the fact that either the Court's judgment is not clear or that the Committee fails to exert enough pressure on the State concerned when supervising the execution of a judgment[89]. The ECHR does not provide for any sanctions for failure to execute.

Usually States comply in good faith with the Court's judgments. However there are instances where States comply with their obligations but the reforms taken fail considerably in preventing further violations. This means that States comply but not in an effective manner. In other instances, the contracting States comply with their obligations under Article 46(1) but this compliance is effected after the passage of some years[90].

There have been cases where a considerable amount of time elapsed in order to take remedial measures to comply with the judgment. For instance, the Belgian authorities took ten years to reform the legislation regarding parentage and patrimonial rights in order to abide with the Marckx judgment.[91] The UK took several years to comply with the Gaskin judgment;[92] from 1989 until 2000 there were no signs of execution[93]. It may be justifiable in certain cases to wait some years before the judgment is executed but it is not justifiable in cases where States deliberately fail to abide by

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[88] Bartsch, H-J., 'The supervisory functions of the Committee of Ministers under Article 54- a postscript to Luedicke-Belkacem-Koc', in Matscher, F., & Petzold, H., (eds), above at note 74. pg.47

[89] Parliamentary Assembly of the Council of Europe, *'Execution of judgments of the European Court of Human Rights'*, Resolution 1226 (2000), (2000) 21HRLJ 273, pg.273

[90] Jurgens, E., *'Report on the execution of judgments of the European Court of Human Rights'*, (2000) 21 HRLJ 275, pg.276

[91] Marckx v Belgium, above at note 86.

[92] Gaskin v United Kingdom, Judgment of 7 July 1989, Series A, No.160

[93] Parliamentary Assembly of the Council of Europe, Jurgens, E., *'Report on the execution of judgments of the European Court of Human Rights'*, (2000) 21 HRLJ 275, pg.276

the decision. The Loizidou case[94] is a clear example of this situation. The Turkish authorities deliberately fail to execute the judgments delivered in 1998 and 2001 respectively. This shows the defects and weakness in the supervision of the Committee of Ministers.

Legislative and other difficulties may occur when complying with the judgment. In some cases, for example, execution can demand the applicant's rehabilitation. This might involve the reopening of judicial proceedings at domestic level or canceling a sentence, i.e. criminal conviction. This was the difficulty in the Hakkar case[95], which concerned the condemnation of the applicant to life imprisonment following criminal proceedings that were not in conformity with the Convention. In complying with the judgment, the French authorities faced difficulties since French law did not allow for re-opening of the criminal proceedings. From 1995 till 1999 the French authorities did not include in the draft law any provisions for amending the legislation. It took them five years, until 2000, to introduce a draft law that makes revision possible in the future[96].

The weakness of the Committee of Ministers to supervise the judgments can be seen in the cases against Italy concerning the excessive duration of the judicial proceedings[97]. The Court repeatedly ruled that recurring delay is a practice incompatible with the Convention[98]. However since the end of 1980's a very high number of violations of Article 6(1) have been found that are due to the excessive length of the proceeding before the civil courts in Italy[99]. The Italian government took some measures in the 1990's but the

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[94] Loizidou v Turkey, Judgments of 23 March 1995 (preliminary objections), 18 December 1996 (merits) and July 1998 (just satisfaction), full text of the case 19 HRLJ 260 (1998)

[95] Hakkar v France, EurCommHR report of 27 June 1995

[96] Jurgens, E., above at note 90. pg.279

[97] The Committee of Ministers has to supervise approximately 136 cases concerning the excessive length of the proceedings, Information in the 'Annotated Agenda of April 2002, www.coe.int

[98] Di Mavro v Italy, Judgment of 28 July 1999

[99] Since 25th June 1987 until July 1999 the Court delivered 65 judgments in which Italy found to be in violation of Article 6: Ferrari v Italy, Judgment of July 1999, paragraph 21

number of violations has not yet been decreased and reforms are still needed in this respect[100].

It has to be recognized that the implementation of a judgment in national law causes practical difficulties. In the case of Italy, the execution requires a large number of legislative, regulatory and administrative measures in order to improve the whole judicial procedure that has been working in this manner for years now. The practical difficulties that Italy is faced with have not deterred the Court in finding violations of the Convention. Therefore, the obligation of a State under Article 46(1) is not suspended because of any difficulties that a State is faced with. It is also true that due to the inability of the Committee to ensure that effective measures have been taken in this respect, Strasbourg has been flooded with applications concerning the same subject matter. It is unacceptable that a State requires more that 20 years[101] in taking effective measures to reform the process of the judicial proceedings.

Similarly the Committee is failing to ensure the execution of judgments in cases relating to torture in Turkey. Since the 1980's there is a crucial problem of torture in Turkey. A substantial number of applications[102] reached the Court which found Turkey to be in violation of the Convention. Turkey undertook some legislative reforms in the 1980's and 1990's, which proved to be ineffective to stop the violations. The Committee does not seem to exercise its functions with due care in ensuring that effective measures are taken to stop the violations of the Convention. For instance, in its Resolutions[103] the Committee stated that the Turkish government took appropriate measures and no further violations would take place. After those Resolutions more cases reached the Court concerning torture.

The Committee of Ministers should make a greater effort to ensure

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[100] Committee of Ministers of the Council of Europe, *'Excessive length of proceedings before the civil Courts in Italy: supplementary measures of general character'*, (1999) 20 HRLJ 501, pg.501

[101] Since the 1980s a very high number of violations by Italy concerning Article 6 have been found.

[102] For instance, Yagiz v Turkey, judgment of 7 August 1996, reports 1996-III, 966 Sur v Turkey, Judgment of 30 October 1996, Reports 1997-VI, 2034

[103] Resolution DH (93) 59 on the Sargin case [(1996) 16 HRLJ 286] and Resolution DH (96) 17 on the Erdagoz case.

effective supervision of the Court's judgments and ensure that the measures taken are effective to prevent future violations.

CHAPTER 4 Discussion

1. The effectiveness of the supervisory machinery

2. The role of the contracting States

> *'The success of the Convention system will ultimately depend on whether or not there is some co-operation between domestic courts and the Strasbourg'*[104].

Only then will the Convention principles be guaranteed, enforced and promoted.

Today, the lack of effective enforcement of the Convention is attributable to the fact that it lacks direct applicability within the domestic legal system. Incorporation of the Convention into national law can reduce the need to lodge complaints to Strasbourg thereby reducing the workload of the Court.

The ECHR should not only have direct effect within domestic law but also should be afforded a legal superiority over domestic law. This form of enforcement is identical to the European Union system. All EU treaties and decisions of the European Court of Justice take superiority over any form of national law. As a result, uniformity exists between the member states. However, one must realize that it is not easy to adopt such a proposal for the Council of Europe regime since the consent of the entire members of the Council is required. Also, while the Council of Europe is expanding coherence between all the contracting States becomes harder.

National judges, administrators, legislators and government officials should ensure that national law is in line with the ECHR and that the national legal system provides for effective remedies. The contracting States must keep an eye on the Strasbourg jurisprudence and adapt domestic standards accordingly. The possibility for re-opening domestic

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[104] Ryssdal, R., 'The expanding role of the European Court of Human Rights', above at note 63. pg.118

proceedings after the finding of a violation by the Court should be considered seriously by the contracting States. National courts should use the Strasbourg judgments more widely and, national legislation should correspond to the European jurisprudence. The contracting States must ensure that the Strasbourg case law is available in the national language of the State. In this way, the contracting States are the key element for the protection, promotion, development and effectiveness of the ECHR.

3. The role of the European Court of Human Rights

The Court has proved to be the major supervisory machinery for the protection of human rights in Europe by interpreting and applying the Convention. The Court has produced an extensive body of case-law giving meaning to the Convention's rights and freedoms so as to guarantee and develop human rights principles.

There are of course some shortcomings relating to the internal structure of the Court such as the composition of the Court and the operation of the Chamber system.[105] Furthermore, Article 41 authorizes the Court to afford 'just satisfaction' to the victim. This includes monetary compensation for pecuniary damages and reimbursement of costs and expenses[106]. However, the Strasbourg Court cannot recommend or order the State to take any form of action in order to cure the wrong. This is a limitation placed on the power of the Court in order to avoid interference with the domestic affairs of a country. The Court does not always award moral damages to the victim. Often, in the case of torture, for example, a judgment of the Court to offer just satisfaction

> *'does not really provide a relief to the victim and even the just satisfaction guaranteed in Article 50 normally cannot compensate for the suffering of the victim'*[107].

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[105] Blackburn, R., 'Current developments, Assessment and Prospects', in Blackburn, R., & Polakiewicz, J., above at note 2. pg.82.

[106] Tomuschat, C., 'Just satisfaction under Article 50 of the European Convention on Human Rights', in Mahoney, P., & Matscher, F., & Petzold, H., (eds.), 'Protecting Human Rights: The European Perspective', 2000, pg.1413

[107] Nowak, M., 'The European Convention on Human Rights and its control system', (1989) 1 NQHR 98, pg.101

Further, the remedy of 'just satisfaction' does not have a preventive character. Strasbourg should review its position in this regard and consider awarding moral damages more often as this can have such effect. Additionally as Nowak[108] suggests efforts should be directed towards the root that causes the violation than just redress for the symptoms.

A reform worth considering would be the insertion of a provision similar to that which exists in the Convention for the Prevention of Torture. Regular visits to places of detentions, to prisons and police stations can help in preventing some violations. Additionally it would be more effective if the Court could make recommendations as to what measures should be taken in order to remedy the situation. A similar provision is included in Article 63(1) of the American Convention on Human Rights of 1969[109] where it confers power to the Court to indicate what measures the respondent State should take. Such a power can be given to Strasbourg in order to be able to make recommendations as to how the violations can be remedied. Admittedly it is not an easy task and a heavy burden would be placed on the Court. However one can suggest that the Court can do so where it is clear and easy to predict the measures that should be taken.

The fact that some States have not yet executed the judgments of the Court, whether completely or partially, is another debilitating factor and an issue to which consideration should be given. States use the pretext that the judgment does not warrant general measures and therefore refrain from acting upon it[110]. Therefore, in order to avoid such situations the Court should indicate the precise violation by drafting a clear judgment; it should also provide sufficient reasons as to what measures are needed to redress the violation. Strasbourg should also take into account the adverse effects which non-compliance may have on its own reputation. A possible measure can be the insertion of a provision in the Convention for contempt of Court when there is no compliance by States. If a State is found to

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[108] As above.

[109] See Appendix II

[110] Steering Committee for Human Rights (CDDH), Reflection Group on the Reinforcement of the Human Rights Protection Mechanism/ Activity Report, (2001) 22 HRLJ 331, pg.333

be in contempt of Court then further measures should be taken such as fines or restrictions in appearing in meetings of the Council and refrain from voting in particular topics.

Today, the Court faces challenges. It needs to ensure its effectiveness, high standard of justice, credibility and authority. The most important challenge is the increased number of applications and to a lesser extent, the duration of the proceedings[111]. It will test its efficacy and ability to ensure that the Convention's standards are implemented in the contracting States.

The Court interprets the provisions of the ECHR in such a way as to strike a balance between the rights guaranteed to the individual and the right of the State to derogate from it for its own needs. Thus, with the development of the doctrine of the margin of appreciation, the Court seeks to balance the two interests. However the fact that member States can derogate from the Convention in prescribed circumstances[112] can limit the effectiveness of the Convention. As the Court does not aim in ensuring homogeneity and uniformity between the contracting States, the fact that States can limit the applicability of the Convention makes it even more difficult to attain minimum standards. It is not surprising therefore that this leads to unequal standards between the different contracting States and as a result the differentiation in the protection of the individual.

Furthermore, the Court has to adapt existing provisions of the Convention with the evolution of standards in societies. If the number of applications continue to increase then measures need to be taken such as an increase of Court's personnel or creating a new Court of First instance[113].

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[111] Parliamentary Assembly of the Council of Europe, 'Structures, procedures and means of the European Court of Human Rights', Recommendation 1535(2001) adopted in 26.9.01, (2001) 22 HRLJ 302, pg.302

[112] ECHR, Article 15

[113] Luzius Wildhaber, President of the European Court of Human Rights in Alibali. A., 'On the European Court of Human Rights', www.alb-net.com, date accessed 13/5/02

4. The Committee of Ministers

4.1 The effects and execution of judgments

The judgments of the Court should be made binding not only on the parties to the case but also to all contracting States. This can improve the execution of the judgments in general and also can attach a wider recognition to the Convention. Again, an identical situation exists in the EU regime where the Luxembourg judgments are binding on all the member States of the EU. Similarly, an identical situation exists in the American Convention on Human Rights. Article 68(2)[114] provides that a judgment can confer an immediate legal effect upon the judgments of the Court in domestic law. A similar provision can be inserted in the ECHR in order for a judgment to have a direct effect on the domestic law and should not depend on the domestic law for its execution.

Neither the Convention nor the Court has set a specific time limit wherein a State must comply. The Court has held[115] that a period of usually three months is reasonable for the State to comply with its obligations and pay the applicant the specified sum. However this time limit is not taken into account. Significant delays take place which threaten to bring the enforcement system into disrepute[116]. Active measures need to be taken to prevent this.

It is unacceptable that some States do not perform the obligations they agreed upon by ratifying the Convention. In such cases, the order of just satisfaction does not really provide a remedy for the victim. Compliance with the Court's judgments can help to avoid new violations and render supervision more transparent. Therefore, a large responsibility lies on the contracting states in meeting their obligations under the ECHR.

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[114] See Appendix II

[115] Moreira De Azevedo v Portugal, judgment of 28 August 1991, Series A, Vol.208-C, pg.30; Dombo Beheer v The Netherlands, Judgment of 28 October 1993, Series A, Vol. 274, pg.41

[116] Zwaak, L., 'The implementation of the decisions of the supervisory organs under the ECHR', in Barkhuysen, T., & Van Emmerik, M., & Van Kempen, D., 'The execution of Strasbourg and Geneva Human Rights decisions in the national legal order', Martinus Nijhoff Pls., The Hague/Boston/London, 1999, pg.82

4.2 Supervision by the Committee of Ministers

The Committee has no power to intervene directly in the supervision and execution of judgment taken by the State concerned. Judgments take some years to be enforced and others are executed but not in an effective manner. In other cases, a number of years lapse before a State complies with the judgment. It seems therefore that

> *'the Council of Europe lacks a mechanism under which the member States can be kept under constant surveillance to ensure their compliance with the commitments accepted with the Council of Europe'*[117].

The Committee can only issue declarations, adopt resolutions and exercise political pressure on the contracting States. However, this is not enough to strengthen the supervisory mechanism. There is a gap in the exercise of the Committee's powers[118].

Having said this, various initiatives have been directed at improving the efficacy of the Committee in this regard. In order to improve the supervisory mechanism of the Convention various meetings, at ministerial level, took place. The Ministerial Conference held in Rome in November 2000 to commemorate the 50th anniversary of the ECHR addressed the importance of promoting the execution of Court's judgments. Additionally an Evaluation Group[119] was set up in January 2001 to examine the means of guaranteeing the effectiveness of the Court and recognized the importance of the execution of judgments. Furthermore in the Declaration on the Protection of Human Rights[120], the Committee instructed the Deputies to consider the recommendation of the Evaluation group on the execution of judgments. Also, recent measures taken by the

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[117] Zwaak L., above at note 81. pg. 271

[118] Steering Committee for the Human Rights (CDDH), 'Reflection Group on the Reinforcement of the Human Rights Protection Mechanism/ Activity Report, (2001) 22 HRLJ 331, pg.331

[119] Evaluation Group, EG Court (2001) 1, September 2001, produced a report to the Committee of Ministers about the European Court on Human Rights

[120] Declaration on the Protection of Human Rights and fundamental freedoms in Europe-guaranteeing the long-term effectiveness of the European Court of Human Rights', adopted at 109th session, Strasbourg, November 2001

Committee are encouraging in promoting effectiveness of the supervisory system: the introduction of a new rule in transparency, the increased use of interim resolutions to inform and the publication of the information regarding the execution of different cases can help improving the working methods of the Committee and ensure its efficiency[121].

The Committee must therefore ensure that the measures taken constitute effective means in preventing future violations. As the Parliamentary Assembly[122] suggested, the Committee of Ministers must be stricter on the States that fail to execute judgments. The measures provided in Article 8 of the Statute should be used where States continuously refuse to abide by the judgments. Additionally, a system of fines should be introduced.

Also, direct contacts at different levels with the national authorities concerning the particular case should become more consistent. This can encourage and promote the execution of judgments and share political commitment for respecting the Convention. Information should be given by the national authorities as to the exact measures taken and the reasons as to how the measures can prevent future violations. The publication of the Committee of Minister's work in the area of execution is now made public. The annotated agenda for its human rights meetings, which contains information on the State progress of the execution of the cases, is available on the net.

Apart from the above developments, the Committee should be stricter in exercising its duties under Article 46(2). As the Steering Committee for Human Rights (CDDH) concluded[123] if judgments are not executed or are executed too slowly or in an unsatisfactory manner the credibility of the system for the protection of human rights provided by the Convention is at risk.

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[121] Deputies reply to Parliamentary Assembly recommendation 1477 (2000), Decision of 9 January 2002, 779th meeting, http://coe.int/cm/

[122] Parliamentary Assembly, Resolution 1226, (2000), September 2000

[123] CDDH, Opinion concerning recommendation 1477(2000) of the Parliamentary Assembly on the execution of judgments of the European Court of Human Rights, adopted by the 52th meeting, 6-9 November 2001, CDDH (2001) 35

CONCLUSION

The Council of Europe is expanding and new members are joining. The Convention has to date been ratified by 44 States; millions of individuals can lodge a complaint to Strasbourg. With the accession of new member States the efficiency of the supervisory machinery is threatened. Protocol No.11 itself does not guarantee nor improve the effectiveness of the European human rights system. The Committee of Ministers cannot enforce all the judgments and its supervisory role is not fully effective. Today, the European system has to cope with the increased workload due to the huge number of applications. Additionally cases take some years to be decided causing inconvenience and delays to the applicants.

Both the Court and the Committee of Ministers have a major role to play in meeting the future challenges and improving the monitoring system. However most importantly, the national authorities have a large responsibility regarding the incorporation of the Convention into national legal system, the application of Strasbourg jurisprudence in national case law and the execution the Court's judgments. The system is based on a system of co-operation between contracting States and Strasbourg authorities.

Despite the fact that the machinery has been reformed several times there are still some deficiencies that require further amendments. However, despite this, the ECHR remains one of the most important, if not the most important, human rights mechanisms. It has been a model for other international human rights systems, has developed a rich jurisprudence in Europe and proved to be a safeguard for many individuals whose rights are violated by their own State. The European system for the protection of human rights promises much for the future.

BIBLIOGRAPHY

Anghie, A., & Sturgess, G. *'Legal visions of the 21st century'*; Essays in Honour of judge Christofer Weeramantry, Kluwer Law International, The Hague/ London/Boston, 1998.

Assembly recommendation 1477 (2000), *Decision of 9 January 2002, 779th meeting*, http://cm.coe.int.

Barkhuysen, T., & Van Emmerick, M. & Van Kempen P.H (Editors), *'The execution of Strasbourg and Geneva Human Rights Decisions in the*

National Legal Order' Martinus Nijhoff Publishers, The Hague, The Netherlands, 1999.

Bartsch, H.J., 'The supervisory functions of the Committee of Ministers under Article 54- a postscript to Luedicke-Belkacem-Koc', in *'Protecting Human Rights: The European Dimension'*, Studies in honour of Gerard Wiarda, Matscher, F., & Petzold, H., (eds), Carl Heymanns Verlag KG, Koln, 1988.

Bayefsky, F.A., *'The United Nations Human Rights Treaty System in the 21st century'*, Kluwer Law International, The Hague/London/Boston, 2000.

Beddard, R., *'Human Rights and Europe'*, (London: Sweet and Maxwell, 2nd edition, 1980).

Beddard, R., *'The status of the ECHR in domestic law'*, 16 ICLQ (1967).

Berenstein, A., *'Economic and social rights: their inclusion in the European convention on Human Rights - problems of formulation and interpretation'*, HRLJ, II, 1981, p.257.

Bernhardt, R., *'Domestic jurisdiction of States and International Human Rights organs'*, (1986) 7 HRLJ 205.

Bernhardt, R., *'Reform of the control machinery under the European convention on Human Rights: Protocol No.11'*, American Journal of International Law, Vol. 89 (1995) 145.

Blackburn, R., & Polakiewicz J, (editors) *'Fundamental Rights in Europe: The ECHR and its member States 1950-2000'*, Oxford University Press, 2001.

Blackburn, R., 'Current developments, Assessment and Prospects', in Blackburn, R., & Polakiewicz, J., *'Fundamental rights in Europe'*, Oxford University Press, 2000.

Bloed, A., (Editor) *'Monitoring Human Rights in Europe'*, Kluwer Academic Publishers, The Netherlands 1993.

Bocker, R., & Von Hebel, H., 'The enforcement of Strasbourg and Geneva decisions' in *'The execution of Strasbourg and Geneva Human Rights decisions in the national legal order'*, Barkhuysen, T., Van Emmerik, M., Van Kempen, P., (eds), Martinus Nijhoff Pls, The Hague, Boston, London, 1999.

Brownlie, I., *'Basic documents on Human Rights'*, 3rd edition, Oxford 1992.

Buergenthal, T., *'The effect of the European Convention of Human Rights on the internal law of Member States'*, I.C.L.Q., Supplementary Publication No.11 (1965), 79 (80-83).

Bulter (Editor) *'Human Rights Protection: Methods and effectiveness'*, Kluwer Law International, London/The Hague/New York, 2002.

Bureau of the Parliamentary Assembly of the Council of Europe, *'The geographical enlargement of the Council of Europe-Policy, Options and Consequences'*, (1992) 13 HRLJ 230.

Castermans-Holleman, M., & Van Hoof, F. & Smith, J., *'The Role of the*

Nation-State in the 21st country' Human Rights, International Organizations and Foreign Policy: Essays in Honour of Peter Baher, Kluwer Law International, The Hague/London/Boston, 1998.

Churchill & Young, '*Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The experience of the United Kingdom, 1975-1987*', 62 British yearbook of International law 283 (1991).

Colsong, H., '*Das Rechtsschutzsystem der Europaischen Menschenrechtskonvention*' (1958).

'*On the reform of the supervisory system of the ECHR*', (1992) 13 HRLJ.

'The European Court of human rights and the national law-maker: some general reflections', in '*Protecting human rights: The European Dimension*', Matscher, F., & Petzold, H., (eds), Studies in honour of Gerand J. Wiarda, Carl Heymanns Verlag KG, Koln, Berlin, Bonn, Munchen, 1988.

Committee of Ministers of the Council of Europe, '*Excessive length of proceedings before the civil courts in Italy: supplementary measures of general character*', (1999) 20 HRLJ 501.

Committee of Ministers of the Council of Europe, '*Non-execution of the judgment in the case of Loizidou v Turkey*', 3rd Interim Resolution, (2001) 22 HRLJ 146.

Committee of Ministers of the Council of Europe, *Strasbourg* '*Re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights*', Recommendation No. R (2000) 2 adopted on 19 January 2000 at 694th meeting of the Ministers' Deputies 21 HRLJ 272.

'*Compliance with member States commitments: The Committee of Ministers*', Monitoring procedures, Monitor/Info (2002), Strasbourg, 5 April 2002, http://cm.coe.int.

Coomans, F., & Flinterman, C., & Grunfeld, F., & Westendorp, I., & Willems, J., (editors), ' *Human Rights from exclusion to inclusion; Principles and Practise*', An Anthology from the work of TheoVan Boren, Kluwer Law International, The Hague/London/Boston, 2000.

Council of Europe, '*About the Committee of Ministers*', www.coe.int.

'*Human Rights information sheet*', No.42, Strasbourg, 1998.

'*Reform of the control system of the European Convention of human Rights*' 14 HRLJ 31-48 (1993).

'The Committee of Ministers' actions under the European Convention on Human Rights', in '*Human Rights Information Bulletin*', No.54, July-October 2001, H/Info (2002) 1 issued by the Council of Europe.

'*The Committee of Ministers*', www.humanrights.coe.int.

Directorate General II - Human Rights, '*Human Rights information bulletin*' No.54 July-October 2001.

Dankwa, E., *'Conference on regional protection systems of human rights protection in Africa, the Americas and Europe'*, (1992) 13 HRLJ 314.

Davidson, S., *'Human Rights'*, Open University Press, 1st edition, 1993, Great Britain.

Deidy, A., & Hampson, F., & Boyle K., *'Gross violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey'* (1997) 15(2) NQHR 161.

Delmas-Marty, M., & Chodkiewicz, C., (Editors) 'The European Convention for the Protection of Human Rights: International protection versus National Restrictions', Martinus Nijhoff Publishers, Dordrecht/Boston/ London, 1992.

Deputies meetings: 760th meeting (July 2001), 764th meeting (October 2001), 783rd meeting (February 2002), Information as provided in 792nd (DH) Meeting of April 2002, *'Annotated agenda and business'* www.coe.int.

Drzemczewski, A., *'The European Court of Human Rights'* 2 Yearbook of European Law 327 (1993).

'Protocole No. 11 a la CEDH: Préparation a l'entrée en vigneur' 8 European Journal of IL 59 (1997. Drzemczewski, A., *' A major overhaul of the European Human Rights Convention Control mechanism: Protocol No. 11'* Collected courses of the academy of European Law, Volume VI, Book 2, p.121-244 (1997).

'The European Human rights Convention: Protocol No.11- Entry into force and first year of application', (2000), 21 HRLJ 1.

'Ensuring compatibility of domestic law with the European Convention on Human Rights prior to ratification: The Hungarian Model', 16 HRLJ 241 (1995).

'European Human Rights Convention in domestic law', Oxford university Press, 1983, reprinted 1997.

'Fact-finding as part of effective implementation: The Strasbourg experience', *in 'The UN Human Rights Treaty system in the 21st century'*, Bayefsky, F.A., (Editor), Kluwer Law International, UK.

'The Council of Europe's Cooperation and Assistance programs with Central and Eastern European countries in the human rights field', 14 HRLJ (1993) 229.

'The European Human Rights convention: A new Court of Human Rights in Strasbourg', Lee Law Review 697 (1998).

'The need of radical overhaul' (1993) 143 NLJ 126.

Drzemczewski, A., & Meyer-Ladewig, J., *'Principal characteristics of the new ECHR control mechanism, as established by Protocol No.11 signed in 11 May 1994'*, (1994) 15(3) HRLJ 81.

Drzemczewski, A., & Nowicki, M., *'The impact of the ECHR in Poland: A stock-taking after three years'*, (1996) European Human Rights Law Review, Issue 3, 261.

Eckart, K., 'Should the binding effect of the judgments of the European Court of Human Rights be extended?' in Mahoney, P., (ed), *'Protecting Human Rights: the European Perspective'*, Carl Heymanns Verlag KG, Koln, 2000.

Eide, A., & Helgesen, J., (editors) in collaboration of Swihehart, T., *'The future of Human Rights- Protection in a changing world'*. Essays in Honour of Torkel Opsahl, Norwegian University Press, Oslo, 1991.

European Committee on legal cooperation of the Council of Europe, *'Submissions of the CDCJ on the effectiveness of the European Court of Human Rights for the attention of the Evaluation Group'*, (2001) 22 HRLJ 334.

European Convention on Human Rights & Additional Protocols: Chart of Signatures and Ratification as of 28 July 1994 15 HRLJ 114.

Evaluation Group, *'Report of the Evaluation group to the Committee of ministers on the European Court of Human Rights'*, EG Court (2001) 1, 27.9.2001, http://cm.coe.int.

'For the record 2000: The European Human Rights System', Volume 1: Thematic Mechanisms and Approaches, Human Rights Internet (HRI) and the Netherlands Institute of Human Rights (SIM), 2001 ISBN: 1-894253-51-5.

Frowein, A.J., 'Reservations to the European Court on Human Rights', in Matscher, F., & Petzold, H., (eds), *'Protecting Human Rights: The European Dimension'*, Studies in Honour of Gerard J. Wiarda, Koln 1988.

Ganshof van der Meerscll, *'European Court on Human Rights'*, 8 Encyclopaedia of Public International law 192, (1985).

Gearty, C.A., *'The ECHR and the protection of civil liberties: an overview'* (1993) CLJ 91.

Ghandi, R. P., *'International Human Rights Documents'*, 2nd edition, Blackstone Press Ltd, 2000, Great Britain.

'The Human Rights Committee and the right of individual communication', British Year Book of International Law, LVII, 1986, p. 201.

Golsong, H., *'On the reform of the supervisory system of the European Convention of Human Rights'*, 13 HRLJ 265-269 (1992).

Gomien, D., & Harris, D., & Zwaak, L., *'Law and Practise of the European Convention on Human Rights and the European Social Charter'*, Council of Europe Publishing, Strasbourg, 1996.

Hanski, R., & Suski, M., (Editors), *'An introduction to the International Protection of Human Rights'* A textbook 2nd edition, Institute for Human Rights Abo Akademi University Turku/Abo, 1999.

Harman, J., *'Complementarity of mechanisms within the Council of Europe/ Perspectives of the Committee of Ministers'*, (2000), 21 HRLJ 296.

Harris, D.J., O'Boyle, M., & Warbrick, C., *'Law of the ECHR'*, London: Butterworths, 1995.

Hegarty, A., & Leonard, S. (Editors) Human Rights *'An agenda for the 21st century'* Cavendish Publishing Ltd London, 1999.

Helfer L.R., *'Consensus coherence and the European Convention on Human Rights'* 26 Cornell International Law journal 133-4 (1993).

Humphrey, *'The revolution in the IL of Human Rights'* 4 HRLJ 205, 208-9 (1974-5).

Information as per 792nd (DH) Meeting 16, 17 and 19 April 2002, 'Annotated agenda and business', Public information version, www.coe.int.

Information Document issued by the registrar, *'The European Court of Human Rights', Historical background, organization procedure'*, www.echr.coe.int/Eng/edocs/infodocrevised2.htm.

J. Polakiewicz & V., Jacob-Foltzer *'The European Human Rights Convention in Domestic Law: The Impact of Strasbourg case law in States where Direct Effect is given to the Convention'* 12 HRLJ 65, (1991).

Jacobs, F., & White R., *'The European Convention on Human Rights'*, 2nd edition, Oxford University Press, New York, 1996.

Jacobs, G. F., *'The extension of the European Convention of Human Rights to include economic, social and cultural rights'* Human Rights Quarterly III, 1978 p.166.

Janis, M.W., Kay, R.S., Bradley, A.W., *'European Human Rights Law'*, Text and Materials, 2nd ed., Oxford: Clarendon Press, 2000.

Jurgens, E., *'Report on the execution of judgments of the European Court of Human Rights'*, (2000) 21 HRLJ 275.

Kamminga, M., 'Is the European Convention on Human Rights sufficiently equipped to cope with gross and systematic violations?' (1994) 2 NQHR 153.

Kay, *'The European Human Rights System as a System of Law'* 6 Columbia Journal of European Law 55 (2000).

Kelsen, H., *'General theory of law and the State'* (1945).

Krafft, M., *'Situation and role of the Committee of Ministers in a system with a single judicial organ'*, (1987) 8 HRLJ 41.

Kruger, H-C., *'Revised Rules of procedure of the European Commission of Human Rights'*, 12 HRLJ 43, (1991).

Lawson, R., & Deblois, M., (editors), *'The Dynamics of the Protection of Human Rights in Europe'* Essays in Honour of Henry G. Schermers, Martinus Nijhoff Publishers, The Netherlands, 1994.

Leonard, S., 'The European Convention on Human Rights: a new era for Human Rights protection in Europe', *in 'Human Rights - An Agenda for the 21st century'*, Hegarty, A., & Leonard, S., (eds), Cavendish Publishing Ltd: UK, 1999.

Leuprecht P., *'Innovations in the European System of Human Rights Protection: Is enlargement compatible with Reinforcement?'* 8 Transnational Law and Contemporary Problems 313 (1998).

Leuprecht, P., 'The execution of judgments and decisions' in *'The European System for the protection of Human Right'*, R.St.J. Macdonald, Matscher F., Petzold, H., (eds), Dordrecht, Nijhoff, 1993.

Lord Lester of Herne Hill QC, 'The European Convention in the new architecture of Europe' (1996) P.L.5.

MacDonald, R.St.J., & Matscher, F & Petzold H., (eds) *'The European System for the protection of Human Rights'* Martinus Nijhoff publishers, Dordrecht/Boston/London, 1993.

Mahoney, P., *'Speculating on the future of the reformed European Court of Human Rights'* 20 HRLJ (1999) 1.

Mahoney *'Developments in the Procedure of the European Court of Human Rights: The revised rules of Court'*, (1983) 3 Yearbook of European Law 127.

Mahoney, P., *'Judicial activism and judicial self-restraint in the ECHR: 2 sides of the same coin'*, (1990) 11(2) HRLJ 80.

Mahoney, P., *'Universality versus subsidiarity in free speech cases'*, (1997) European Human Rights law Review 364.

Martens, K. S., *'Incorporating the European Convention: The Role of the Judiciary'*, European Human Rights Law Review, 1 (1998) 5-14.

Martonyi, Hungarian Minister of Foreign Affairs, Parliamentary Assembly of the Council of Europe, *'April 1999 session/Reply to questions concerning the execution of certain cases pending before the Committee of Ministers: Loizidou v Turkey, Socialist Party v Turkey and Hakkar v France'*.

Matscher, F., & Petzold, H., (Editors) *'Protecting Human Rights: The European dimension'*, Studies in honour of Gerard J. Wiarda, Carl Heymanns Verlug K.G., Berlin, 1988.

McDougal, M., *'The impact of International law upon national law: A policy-oriented perspective'*, 4.5 Dak. L.Rev 25 (1959).

Menendez, J. A., *'Chartering Europe: The Charter of Fundamental Rights of the European Union'*, http://www.arena.uio.no/publications/wp01_13.htm, pg. 1.

Merrills, G. J., *'The Development of International law by the European Court of Human Rights'*, 2nd edition, Melland Schill Monographs in IL, Manchester, 1993.

Merrills, J., 'The Council of Europe (I): The European Convention on Human rights' in *'An introduction to the International Protection of Human Rights'*, Hanski, R., & Suski, M., (eds), Institute for Human Rights, Abo Akademi University, 1999.

Ministers' Deputies, 789th meeting, doc. CM/Del/Dec (2002) 789, Item 2.5 of 20 March 2002, http://cm.coe.int.

Ministers' Deputies, 754th meeting, doc, CM/Del/Dec (2001) 754, item 2.7 of 6, 7-8 June 2001, Http://cm/coe.int

Morrison, C.C., *'The dynamics of Development in the European Human Rights Convention System'* (Leyden: Sijthoff, 1981).

Mowbrag, A.R., *'The reform of the Control system of the ECHR'* (1993) PL 419.

Mowbray, A., *'A new European Court of Human Rights'* (1994) PL 540.

'Procedural developments and the European Convention on Human Rights' [1991] 19 PL 353.

'The European Court of Human Rights: Approach to just satisfaction' [1997] PL 647.

Nowak, Rossenmayr & Schwaighofer *'6th International colloquy about the European Court on Human Rights'* 7 HRLJ 117 (1986).

Nowak, M., *' The European Convention on Human Rights and its control system'*, (1989) 1 NQHR 98.

'The attitude of socialist States towards the implementation of UN Human Rights Conventions', SIM Newsletter 1/1998, 85.

O'Boyle, M., *'Establishing the new European Court of Human rights: Progress to date'*, 3 Human Rights Law Review, Vol.4 (3), 1999.

Parliamentary Assembly of the Council of Europe, *'Execution of judgments of the European Court of Human Rights'*, Resolution 1226 (2000), (2000) 21HRLJ 273.

'Structures, procedures and means of the European Court of Human Rights', Recommendation 1535(2001) adopted in 26.9.01, (2001) 22 HRLJ 302.

Parliamentary Assembly of the Council of Europe, Jurgens, E., *'Report on the execution of judgments of the European Court of Human Rights'*, (2000) 21HRLJ 275.

Parliamentary Assembly of the Council of Europe, Strasbourg, *'Execution of judgments of the European Court on Human Rights'*, Resolution 1226 (2000) adopted on 28 September 2000, 21 HRLJ (2000) 273.

'Recommendation on the execution of the European Court of Human Rights', Recommendation No.1477 (2000) adopted on 28th September 2000, 21 HRLJ (2000) 274.

'Report on the execution of judgments of the European Court of Human Rights', Rapporteur: Erik Jurgens, Doc. 8808, adopted on 28th September 2000, 21 HRLJ (2000) 276.

Polakiewicz, J., & Jacob-Foltzer, V., *'The European Human Rights Convention in domestic law: The impact of Strasbourg case law in States where direct effect is given to the Convention'*, (1991) 12 HRLJ 65.

Polakiewicz, J., & Kruger H-C., 'Proposals for a coherent Human Rights protection system in Europe' (2001) 22 HRLJ 1.

Polakiewicz, J., *'The application of the European Convention of Human Rights in domestic law'* (1997) 18 HRLJ 405.

'The execution of judgments of the European Court of human rights', in

'Fundamental rights in Europe', Blackburn, R., & Polakiewicz, J., (eds), Oxford University Press, 2001.

Polakiewicz, J., (eds), 'The status of the Convention in national law', in Blackburn, R., & Polakiewicz, J., *'Fundamental Rights in Europe'* Oxford University press, 2001, pg. 34.

Poznan Statement, Statement adopted by the Participants at the conference on 'All-European' System of Human Rights Protection, NQHR 4/1990.

Prebensen, S., 'Evolutive interpretation of the ECHR', *in 'Protecting human rights: The European Perspective'*, Mahoney, P., (ed), Carl Heymanns Verlag KG, Koln, 2000.

'Inter-State complaints under Treaty provisions- The experience under the European Convention on Human Rights', (1999) 20 HRLJ 446.

Recommendation 1477 (2000), *'Execution of judgments of the European Court of Human Rights'*, 779th meeting, 9 January 2002, http://cm.coe.int.

Ress, G., 'The effects of judgments and decisions in domestic law', in R.St.J. Macdonald, F., Matscher, H., Petzold (ed), *'The European system for the Protection of human rights'*, Martinus Nijhoff publishers, 1993.

Robert, J., *'Constitutional and International protection of Human Rights: Competing or complementary systems?'* General Report to the IXth Conference of European Constitutional Courts' 15 HRLJ 1-23 (1994).

Robertson, A. H., *'The European Convention for the Protection of Human Rights'*, British Year Book of IL Vol. 27 (1950) 145.

Robertson, A. H., *'The council of Europe'*, 2nd edition, Manchester: Manchester University Press, 1961.

Robertson, A. H., & Merrill, J.G., *'Human Rights in Europe: A study of the ECHR'*-3rd edition, Manchester: Manchester University Press, 1993.

Robertson, A.H., & Merrill, J.G., *'Human Rights in the world'*, 3rd edition, 1996, Manchester: Manchester & New York.

Rosas, A., & Helgesen, J., (Editors) with the collaboration of Gomien, D., *'Human Rights in a changing East-West Perspective'*, Pinter Publishers, London/New York, 1990.

Rowe, N., & Schlette, V., *'The protection of Human Rights in Europe after Protocol No. 11 to the ECHR'* (1998) 23 EL Review; Checklist No1 HR/3, HR/8.

Rules adopted by the Committee of Ministers for the application of Article 54 of the ECHR, approved in the 254th meeting of the Ministers' Deputies, http://cm.coe.int.

Rules for the application of Article 46(2) of the ECHR, adopted by the Committee of Ministers on 10 January 2001, at the 736th meeting of the Ministers' Deputies.

Ryassdal, R., *'The enforcement system set up under the European Convention on Human Rights'* in compliance with judgments of International Courts 49, (Bulterman & Kuijer edition 1996).

'The coming Age of the European convention on Human Rights' (1996) European Human Rights law Review 18-29.

'The expanding role of the European Court of human rights', in *'The future of human rights protection in a changing world'*, Eide, A., & Helgesen, J., (eds) with the collaboration of Swinehart, T., Norwegian university Press, Oslo, 1991.

Salcedo, C.J.A., 'The place of the European Convention in International law', in *'The European System for the Protection of Human Rights'*, Macdonald, R.St.J., & Matscher, F., & Petzold, H., (eds), Martinus Nijhoff Publishers, The Netherlands, 1993.

Schelle, G., *'General principles of law of peace'*, in Collection of lectures of the Hague Academy of International law, volume 46 (1993).

Schermers, G. H., *'The European Court of Human Rights after the Merger'* (1993) 18 E.L. Review 493-495.

Schermers, H., *'Has the European Commission of Human Rights got bagged down?'* (1988) 9(2) HRLJ, 175.

'The 11th Protocol to the European Convention on Human Rights' (1994) 19 EL Review 369.

Shelton, D., *'Remedies in International Human Rights Law'*, Oxford University Press, New York, 1999.

Steering Committee for Human Rights (CDDH), *'Reflection group on the reinforcement of the Human Rights protection mechanism'*, 3rd meeting, Strasbourg, 5-8 June 2001 Report [CDDH-GDR (2001) 9].

Stein, E., *' International law in internal law: Toward internationalisation of Central-Eastern European Constitutions?'* (1994) 8 A.J.I.L 427.

Steiner, H., & Alston, P., *'International human rights in context'*, Law, politics and morals, 2nd ed., Oxford university press, 2000.

The Annoted agenda of the Committee of Ministers: http://coe.int/cm/h.

The Danish Centre of Human Rights, *'The implementation in national law of the European Convention on Human Rights'*, Proceedings of the 4th Copenhagen Conference on human rights, 28 & 29 October 1988.

The European Convention of Human Rights: *'Institution of review proceedings at the national level to facilitate compliance with Strasbourg decisions'* 13 HRLJ 71-78 (1992).

'The Council of European and Human Rights', Human Rights information centre, Public relations division in association with the Directorate General of Human Rights, www.humanrights.coe.int.

The Steering Committee for Human Rights (CDDH), Opinion concerning recommendation 1477(2000) of the Parliamentary Assembly on the execution of judgments of the European Court of Human Rights, adopted by the CDDH during the 52th meeting, 6-9 November 2001, CDDH (2001) 35.

Tomkins, A., *'The Committee of Ministers: Its role under the European Convention on Human Rights'*, European Human Rights Law Review, 1 (1995) 49-62.

Tomuschat, C., *'Just satisfaction under Article 50 of the ECHR', in 'Protecting Human Rights: the European Perspective'*, Mahoney, P., & Matscher, F., & Petzold, H., & Willhaber, L., (eds), 2000.

'Quo vadis, Argento ratum? The success story of the European Convention of Human Rights and a few dark stains' 13 HRLJ 401-406 (1992).

Trechsel S., *'Towards the Merger of the Supervisory organs: Seeking a way out of the Deadlock'* 8 HRLJ 11.

Trindade A., *'The application of the rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of individual rights'* 15 (1983).

Van Dijk, *'The Benthem case and its aftermath in the Netherlands'*, 34 Netherlands International law Review 5 (1987).

Van Dijk, P., & Van Hoof, G.J.H., *'Theory and Practice of the European Convention on Human Rights'*, Kluwer International/SIM (1998).

Van Hoof, F., *'The future of the European Convention on Human Rights'* NQHR Vol. 7, No. 4 (1989).

Verdross, A., *'Status of the European Convention in the hierarchy of rules of law'*, Report drawn up in the proceedings of the 2nd International Conference on the ECHR held in Vienna, 18-20 October, 1965, as cited in Robertson H.A., *'Human Rights in national and international law'*, (1965).

Villiger, E.M., *'The new Court and its domestic and International context'* (1987) 8 HRLJ 84.

Waldock, H., *'The effectiveness of the System set up by the ECDU Human Rights'*, 1 HRLJ 1 (1980).

Warbrick, C., *'Rights, the European Convention on Human Rights and English Law'* (1994) 19 EL Review 34.

Weinstein, B., *'Recent Decisions from the European Court of Human Rights'*, www.asil.org.

White, C.A.R., *'State of ratification of Human Rights instruments'*, (1998) 23 E L Review 89, Checklist No.1 HR.

Wolfgang, S., 'Relevance of the European Convention on Human Rights outside the jurisdiction of the contracting States', in *'Essays in honour of Wang Tieya'*, R.St.J., Macdonald (ed), Kluwer Academic Pls, Great Britain, 1993.

Zwaak, L., 'The effects of final decisions of the supervisory organs under the European Convention on Human Rights', in Bayefsky (ed), *'The UN Human Rights System in the 21st century'*, Kluwer Law International, UK, 2000.

'The European Convention for the Protection of Human Rights and Fundamental Freedoms', unpublished.

'The implementation of the decisions of the supervisory organs under the ECHR', in Barkhuysen, T., & Van Emmerik, M., & Van Kempen, D.,

'The execution of Strasbourg and Geneva Human Rights decisions in the national legal order', Martinus Nijhoff Pls, The Hague/Boston/London, 1999.
'The Protection of Human Rights and fundamental freedoms within the Council of Europe', SIM Newsletter 2/1998, 43.

CASE LAW

1. *Austria v Italy*, Application 788/60, 11 January 1961, (1961) 4 Yearbook 116
2. *Brogan v UK*, judgment of 29 November 1988, Series A, No.145
3. *Cyprus v Turkey* (Joined applications 6780/74&6950/75), 26 May 1975, (1975) 18 Yearbook 82 (1982) 4 EHRR 482 Yearbook of the European Convention on Human Rights Vol.11 (1968), p.690-780 (admissibility) and Yearbook of the European Convention on Human Rights, Vol.12 (1969) (merits)
4. *Cyprus v Turkey*, Judgment of 10/05/01-Grand Chamber
5. *Di Mavro v Italy*, Judgment of 28 July 1999
6. *Dombo Beheer v The Netherlands*, Judgment of 28 October 1993, Series A, Vol. 274
7. *Gaskin v United Kingdom*, Judgment of 7 July 1989, Series A, No.160
8. *Greece v UK* (1st Cyprus case), Application 176/56, 14 December 1959, (1958-9) 2 Yearbook 174
9. *Hakkar v France*, EurCommHR report of 27 June 1995
10. *Ireland v UK*, Judgment of 18.1.78, Series A, No.25
11. *Klass & others*, Judgment of 6.9.78, paragraph 58
12. *Loizidou v Turkey* (preliminary objections), Judgment of 23 March 1995, Series A, No 310 paragraph 75, 16 HRLJ 24 (1995)
13. *Loizidou v Turkey*, Judgments of 23 March 1995 (preliminary objections), 18 December 1996 (merits) and July 1998 (just satisfaction), full text of the case 19 HRLJ 260 (1998)
14. *Marckx v Belgium*, judgment of 13 June 1979, Series A, Vol.31
15. *Mathews v UK*, Judgment of 18 February 1999, Application 24833/94
16. *Modinos and Marangos v Cyprus*, Judgment of 22 April 1993, Series A, No.259
17. *Moreira De Azevedo v Portugal*, judgment of 28 August 1991, Series A, Vol. 208-C
18. *Papamichalopoulos & others v Greece*, judgment of 31.10.95, Series A, No.330-13, paragraph 34
19. *R v Chief immigration Officer*, ex parte Salamic Bibi, (1976) 3 ALL ER 843
20. *R v Secretary* of State for Home Affairs, ex parte Bhajan Singh (CA), (1975) 2 ALL ER 1081

21. *Republic of Ireland v United Kingdom*, 18.1.1978, No.25, 2 ECHRR 25
22. *Scozzari & others*, Judgment of 13/07/00, Grand Chamber
23. *Selmouni v France*, Judgment of 28 July 1999, 20 HRLJ 228, (1999)
24. *Silver v UK*, Judgment 30.8.91, No 215, 14 ECHRR 248
25. *Soering v UK*, Judgment of 7 July 1989, Series A, Vol.161
26. *Stran Greek Refineries and Stratis Andreadis case v Greece*, Judgment of 9 December 1994, 15 HRLJ 432 (1994)
27. *Sur v Turkey*, Judgment of 30 October 1996, Reports 1997-VI, 2034
28. *Swedish Engine Drivers' Union v Sweden*, 6.2.76, Series A, No., 20, 1 ECHRR 17
29. *The Sunday Times case*, Judgment of 26.4.1979
30. *Vermeire v Belgium*, judgment of 29 November 1991 Series A, Vol.214-6
31. *X and Y v The Netherlands* (1985)
32. *Yagiz v Turkey*, judgment of 7 August 1996, reports 1996-III, 966

THE PROTECTION OF CIVIL AND POLITICAL RIGHTS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS THROUGH ACCESSION OF TURKEY TO THE EUROPEAN UNION

HATICE SENEM OZYAVUZ

CHAPTER 1

1. Introduction

Since the signing of the Ankara treaty[1] in 1963, one of the most problematic issues facing Turkey regarding joining of the European Union has been the issue of Human Rights. Through this thesis I hope to present an understanding of the fact that in order for the problems to be solved there is a certain mentality, which needs to be adopted. The human rights which are most frequently violated in Turkey are being studied by the European Union. This is due to Turkey's application to become a member of the European Union; hence, all criteria must be met and sustained. The application of the Copenhagen criteria is the starting point for several reforms on human rights in Turkey. The guidelines for the reforms are based on the judgments of the European Commission of Human Rights (hereinafter referred to as the Commission) and the European Court of Human Rights (hereinafter referred to as the Court). This thesis shall attempt to objectively analyse how Turkey must develop in order to fulfil the Copenhagen Criteria in order to join the European Union.

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[1] Also referred to as the *Gumruk Birligi* Treaty.

Mediterranean Journal of Human Rights, Vol. 7, No. 2, pp.195-231

2. History

The concept of human rights appeared after the Second World War. "Atrocities of National Socialism" brought about a strong focus on the role of human rights. Statesmen realized that security in one's territory required international security as well. In that respect, human rights had to be adequately protected at the national level to provide not only peace in each country but also in the world. It was clear that the internal and external dimensions of human rights were not to be thought of separately. The United Nations gave expression to this concept by the *Universal Declaration of Human Rights*, adopted on 10 December 1948.

3. The Council of Europe

At the European level it was thought that external policies necessitated a consideration of the internal policies as well because of the fact that the development and implementation of an effective external policy could only be undertaken in the context of appropriate internal institutional arrangements so as to ensure reciprocity and consistency. The International Committee of the Movements for the European Unity organized a "Congress of Europe" at The Hague, which could be considered as a step towards the establishment of the Council of Europe in August 1949.

Although the primary aim of the Council of Europe was the facilitation of economic and social progress with the aim of greater unity at the first session of the Consultative Assembly of the Council of Europe, it instructed the Committee on Legal and Administrative Questions to consider the details of the collective guarantee of human rights. Shortly after this period, in November 1950, seeking "*to take the first step for the collective enforcement of certain rights stated in Universal Declaration*", the European Convention for the Protection of human rights and Fundamental Freedoms was signed and this entered into force on 3rd September 1953[2]. During the negotiations

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[2] 213 United Nations Treaty Series, No.2889, p.221; Council of Europe, European Treaty Series, no.5, 4 November 1950;Council of Europe, Collected Texts, Strasbourg, 1994,pp.13-36. Originally signed by 12 member States, this Convention has attracted a wide adherence. It has since been supplemented by various Protocols.

on the Convention, the idea of establishing a Commission and also a Court was expressed by the delegates. The Court and the Commission were eventually set up in order to ensure the observance of the engagements undertaken by the high contracting parties under the ensuing Convention.

4. The European Union

The process of European integration was launched on 9th May 1950 when France officially proposed to create *"the first concrete foundation of a European federation"*. Six countries – Belgium, Germany, France, Italy, Luxembourg and the Netherlands – joined from the very beginning[3]. This step has been considered as the first in establishing the European Union. Although human rights have become a cornerstone of the European Union, from 1953 to 1987, there was no mention of human rights in the European Council and European Federation[4]. During that period Europe was busy with extending economic relations. When in 1957 the Treaty of Rome created the European Economic Community, the need for the Single Market emerged. Economic co-operation in the form of the elimination of customs and quota restrictions without external tariffs raised the question of human rights in some fields such as drug trafficking, free movement of workers, discrimination and immigration. The protection of human rights came to be accepted as part of the European Identity[5].

Another evolution of the European Community was the European Court of Justice. Its main task is that of ensuring that Community law is reflected in the treaties. However in 1969, in the case of *Stauder,*[6] reference was made to human rights as it was stated that

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[3] See http://europa.eu.int/abc-en.htm, date accessed 30/05/03

[4] Except the Joint Declaration in 1977 which was issued by stating the prime importance of the protection of fundamental rights and it was also ensuring that in the exercise of State powers they would continue to respect these rights.

[5] See Neuwahl, N. A., and Rosas, A., (ed), *The Treaty on European Union: A Step Forward in The Protection of Human Rights?, The European Union and Human Rights*, Martinus Nijhoff, 1995.

[6] Case 29/69, *Stauder v. Ulm*, 1969, European Court Reports

"fundamental rights are enshrined in the general principles of Community law and protected by the Court".

In 1992, the Maastricht Treaty[7], constituted a further step in the human rights field. According to the positivist view this gave rise to a strict legal obligation to observe the European Convention on Human Rights.

5. Foreign Policy

When Europe was moving from a community with economic aims to a political community, human rights started to play an important role in internal policies as well as external policies. Since the 1970s the European Community applied human rights in the framework of *"European Political Cooperation"* and in its relations to the third States[8].

After the Maastricht treaty the European Union was established with three pillars: the European Community, Common Foreign and Security Policy and Co-operation in the Area of Justice and Home Affairs.

Under the First Pillar, the E.C. developed an external human rights policy by *inter alia*, insisting on placing specific human rights clauses in all agreements concluded with third world countries. In the ambit of the Second Pillar, Common Foreign and Security Policy established five objectives, one of which was the development of respect for human rights and Fundamental Freedoms. On the other hand, the Third Pillar contained references to other human rights standards.

These three pillars demonstrate that human rights are regarded as one of the basic and fundamental principles of the European Union, having achieved great importance in the Union's external and internal policy. So much so, respect for human rights has been established as an explicit pre-condition for EU membership in the Amsterdam Treaty[9].

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[7] Entered into force on 1st November 1993.

[8] Zwamborn, M., *'Human Rights Promotion and Protection Through The External Relations of the European Community and The Twelve'* (1789) NQHR 11

[9] Signed in October 1997, it entered into force on 1 May 1999.

In June 1993, at its meeting in Copenhagen, the European Council decided on a number of political and economic criteria that candidate countries in Central and Eastern Europe must meet. The Political Criteria, termed *"The Copenhagen Political Criteria for Accession to the European Union"*, include stability of institutions, guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

6. Turkey's Journey to the European Union

As an associated member of the Council of Europe, Turkey was one of the countries to become a party to the European Convention on Human Rights[10]. Turkey's first application for membership of the European Union was made in April 1987 by the Government of Ozal. However, the Commission did not open the negotiations until the confirmation of Turkey's eligibility and approval of the European Accession Strategy in December 1997, and this, owing to the economic and political objections of member countries. In December 1997, the Union recognized the full applicant status of Turkey but also pointed out that respect for the Copenhagen Political Criteria would constitute a prior requirement for the opening of accession negotiations. In June 1998, the EU strategy was set in motion, which includes co-operation between the Commission and the Turkish authorities to bring Turkish legislation in line with the *acquis communitaire*.

Although the Commission Report of 1997 announced the formal candidacy of Turkey for E.U. membership, in December 1999 the Helsinki European Council stated that there was still much ground to be covered on the road to membership owing to the serious shortcomings in terms of human rights, and especially regarding the protection of minorities[11]. The E.U. Accession Partnership Document adopted in late 2000 has been described as a *"road-map*

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[10] The European Convention on Human Rights was signed in November 1950 and ratified by the law no. 6366 of March 1954. Protocol 1 was signed and ratified at the same time. However until 1987, Turkey did not recognize the right to individual petition and the competence of the Commission. It was only in 1990, that it accepted the jurisdiction of the Court.

[11] European Commission Report on Turkey, October 1999

for reform". In March 2001, to show that the government will monitor progress in the field of human rights, democracy and the rule of law, a Turkish National Plan was adopted. This was a type of response to the E.U. Accession Partnership Document and an attempt to negotiate on the E.U. human rights demands[12].

Although Turkey wishes to fulfil the obligation of becoming *"a democratic State of law, guaranteeing human rights and the rule of law"* under the national program, the rules are falling very far short of the targets that are to be reached in the short and the long term according to the E.C. Accession Agreement.

Under the National Program, the Turkish Government plans to make changes in following subjects:

a. Right to life
b. Prohibition of torture
c. Freedom of thought and expression
d. Cultural rights and individual freedoms[13]

CHAPTER 2
The Right to Life

1. Under the European Convention on Human Rights

Of all the norms of international law, the right to life must surely rank as the most basic and fundamental right, which informs all other rights. Most of the international human rights instruments begin their list of individual rights with the right to life because of its essential importance in the light of the fact that without the right to life no other right can exist. To indicate the most popular few one can refer to Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights, Article 4 of the American Convention on Human Rights and Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms Protocol Number 11.

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[12] Report On Turkey, Human Rights Watch Report, September 2000.

[13] Due to the fact that this dissertation is presented in abstract form, the analysis which follows is based on the right to life and the prohibition of torture. The student's full dissertation also discussed the freedom of expression and minority rights.

Initially protection of the right to life was recognized in the European Convention on human rights in the following terms:

> *"Every State party ... shall guarantee to all persons within its territory the following rights: a. Security of life and limb..."*

However, following discussions with the Committee of Experts and the Committee of Ministers, it was decided that a definition of each right was to be stated in the Convention. This lead to the present Article 2 which reads:

> *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary;*
> *a. in defence of any person from unlawful violence;*
> *b. in order to effect a lawful arrestor to prevent the escape of a person lawfully detained;*
> *c. in action lawfully taken for the purpose of quelling a riot or insurrection."*

Although the aim of the drafters was to offer a definition of each right, this does not mean that the ambits of application of such protection are clear and unambiguous. A concise study of the application of the right to life under the Convention is required in this study as it will set the basis for a comparison with the position of Turkish laws and practice.

Although Article 2 protects the right to life of *"everyone"*, issues immediately arise as to the parameters of application of such protection, especially when discussing abortion. Does *"everyone"* include the fetus? The question remained unanswered by the Commission until the report given in *X v. United Kingdom*[14], where it held that the use of the term *"everyone"* and the context in which the term has been used in Article 2 indicates that it is not meant to include the unborn child. The commission then considered whether

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[14] Application 8416/78, D & R 19(1980)

the term "life" includes an unborn life and concluded that this term might also have different meanings according to the contexts in which it is used[15].

However in later decisions[16] the Commission accepted that in certain circumstances the fetus may enjoy a certain protection under Article 2, even if it bypassed a direct decision on this particular question by finding that the State had not infringed the wide discretion allowed to it under the European Convention on Human Rights. An example of this is the application of *H. v. Norway*[17] wherein the Commission accepted that the legislation of Norway did not exceed the discretion allowed to States in this matter[18], thereby leaving the question unanswered. Contrary to this however, the Inter-American Convention is clearer and states that life starts at the moment of conception[19].

Another ambiguity in the protection of this right is whether it includes the right to die. Various definitions of euthanasia exist; for our purposes we may cite the following:

> *"Euthanasia is the intentional killing of a patient, by act or omission, as a part of his or her medical care."*[20]

From the outset one should consider whether allowing the performance of euthanasia by a person who is not the patient, such as the doctor or a relative, could be regarded as *"intentionally depriving somebody of his life."* The term *"deprivation"* seems to imply that the act is involuntary from the point of view of the person being so deprived. With respect to euthanasia the patient is deprived of his life by a doctor or relative upon the patient's instructions.

Consequently, this seems to suggest that the wording of Article 2 does not exclude euthanasia. In this context it is worth mentioning

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[15] As above, pp.250-251

[16] Shelton, D., *'International Law on the Protection of the Fetus in Abortion and Protection of the Human Fetus'*, edited by Frankowski S. and Cole G., Martinus Nijhoff Publishers, 1987, pp.1-14

[17] Application 17004/90, d & R 73(1992), p. 155 (167)

[18] The national legislation allowed self-determined abortion with the first twelve weeks of pregnancy; between the twelfth and eighteenth week abortion should be decided upon by the Board of Doctors and after the eighteenth week it is only allowed where the mother's life is in danger.

[19] Article 4 Inter-American Convention

[20] Keown, J., (ed.), *'Euthanasia Examined'*, Cambridge University Press, 1996

that there are close links between euthanasia and the prohibition of torture and other forms of ill treatment. It is arguable that prolonging one's life when the person is severely ill constitutes at lest degrading treatment within the meaning of Article 3 of the European Convention on Human Rights[21]. The case of *Diana Pretty v. United Kingdom*[22] gives an excellent and actual illustration of this. The applicant submitted that the right to life gave her the right to die; she alleged that denying her right to assisted suicide was, by prolonging her life, making her endure inhuman or degrading treatment. The Court rejected this argument and emphasized that State parties have a positive obligation to protect life:

> *"Article 2 could not, without distortion of language be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."*

As to whether denying her claim would amount to inhuman and degrading treatment the Court held that:

> *"the positive obligation on the part of the State which had been invoked would require that the State sanctions actions to terminate life, an obligation that could not be derived from Article 3."*

Moving on, the responsibility to protect the right to life has been placed upon the legislator[23] by stating that everyone's right to life shall be protected by law. However, it is difficult to define to what extent a State may be in default. For instance, Fawcett[24] when dealing with the protection of law has considered whether the State is in default when motorists are not subjected to speed limits. He concludes that the right to life does not afford a guarantee against all threats to life but only against intentional deprivation and careless

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[21] See Theodore, O.,et al (ed.), *'The right to Life / The Right to Die, in The Jurisprudence of Human Rights: A Comparative Interpretive Approach'*, Abo Akademi University, Turku/Abo, 2000, p.97

[22] Application no. 2346/02

[23] Application 6839/74, X v. Ireland, d & R 7(1997)

[24] Fawcett, J.E.C., *'The Application of the European Convention on Human Rights'*, 2nd edition, Oxford, 1987

endangering of life[25], saving the cases mentioned in the second paragraph of Article 2. On the other hand, protection by law requires that laws for the protection of the right to life should be in existence and should be adequate, and similarly for the remedies offered in respect of violations. The expression *"by law"* refers not only to the texts of laws in the constitution or ordinary laws but also to the entire system and machinery of law, including the legislative and executive branches[26].

Under the provisions of the Convention, Article 2 has a positive and negative component. Positively, the State must adopt measures that are conducive to allowing one to live. Negatively, the right relates to the prohibition from arbitrary or unlawful deprivation of life by the State or its agents; this therefore, amounts to a right not to be killed by the State. The State is consequently also responsible to investigate State killings and is duty bound to punish offenders for such State killings. As pronounced by the Court, State parties should take measures not only to prevent arbitrary deprivation of life and to punish such acts, but also to prevent arbitrary killing by their own security forces, since the typical example of a violation of the right to life is the arrest or abduction and subsequent arbitrary or summary execution of political opponents by members of the army or police forces and through enforced disappearance.

The protection accorded by Article 2 is however not absolute and exceptions are recognized in the second paragraph. One such exception is the taking of life in execution of a sentence of a Court following a conviction of a crime for which the death penalty is provided by law. Although the death penalty is justified under Article 2, it has been limited by the same Article and other provisions of the Convention, such as Article 6. These limitations include the following:

a. the judicial decision in question must have been taken after a fair and public hearing in accordance with Article 6;
b. the punishment must be proportionate to the crime committed;
c. the conditions for the execution must not constitute inhuman and degrading treatment in the sense of Article 3. For instance,

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[25] As above, p. 37

[26] Ramcharan, B.G., *'The Concept and Dimensions of the Right to Life, The Right to Life in International Law'*, Martinus Nijhoff Publishers, 1985

a prolonged execution system such as the death row phenomenon, may constitute inhuman and degrading treatment;

d. the decision ordering the death penalty should not have retrospective effect in terms of Article 7;
e. the imposition and execution of the death penalty should respect the prohibition of discrimination under Article 14;

Case law shows that the death penalty has become a difficult dilemma to solve. In the *Soering* case[27] the Court dealt with imminent extradition and death row, and held that extradition of a person to a country where the death penalty still exists cannot be considered as an issue under Article 2 or Article 3 of the Convention. The Court stated that the existence of the death penalty is not a violation of Article 3 because it falls within the exceptions recognized in Article 2; however, the same could not be said for the death row phenomenon.

Although Article 2 does not consider judicial capital punishment as a violation of the right to life, an additional protocol focusing on this issue was adopted in 1985[28]. Article 1 of the Protocol reads as follows:

> *"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."*

According to Article 1, the death penalty should be abolished in times of peace and State parties are allowed to introduce or to keep it in force only in times of war or at times of an imminent threat of war, as provided for in Article 2. Obviously, State parties are free to abolish the death penalty even during times of war or at a time of an imminent threat of war.

The discussion on the death penalty issue was finalized in Europe in February 2002, when the Council of Europe adopted Protocol 13, thereby banning the death penalty under all circumstances, including during times of war and imminent threat of war. Furthermore, no derogation or reservation is allowed. The adoption of this ban is a strong political signal, declaring that the death penalty is unacceptable in all circumstances. It is worth

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[27] Judgment 7th July 1989 pp.40 - 41

[28] Signed April 1983, it entered into force March 1985

mentioning that Protocol 13 was adopted after the events of the 11th September 2001.

On the other hand, the second paragraph of Article 2 provides for four exceptions wherein the deprivation of life is justified on the grounds that it results from the use of force for a given purpose[29]. These four exceptions are:

a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest;
c) to prevent the escape of a person lawfully detained;
d) in action lawfully taken for the purpose of quelling a riot or insurrection.

One is not to say that these exceptions have no restrictions whatsoever, since the use of the phrase *"no more than absolutely necessary"* amounts to the principle of proportionality. Therefore, should the use of force not be in conformity with the principle of proportionality, that deprivation would amount to a violation of Article 2(1). There must be proportionality between the measure of force used and the purpose pursued which is the *sine qua non* requirement stated in the second paragraph of Article 2 in order for that deprivation to be justified. In *X v. Belgium*[30], the applicant alleged that the deprivation of her husband's life violated Article 2 since the police killed him intentionally. The Commission rejected this allegation on the grounds that even were one to assume that the police killed the applicant's husband, one could not say that the deprivation of life was intentional.

In the *Stewart*[31] case the Commission held that the use of force must be absolutely necessary for one of the purposes in Article 2(2) for a consequent deprivation of life to be justified[32].

The *McCann*[33] case on the other hand, concerned the shooting of three suspects by soldiers of the British and Gibraltar authorities.

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[29] Dijk van, P., and Hoof van, G.J.H., *'Theory and Practice of the European Convention on Human Rights'*, Third Edition, Kluwer Law International, 1998, the Hague, p. 305

[30] Application 2758/66, Yearbook XII (1969), p. 174 (192)

[31] Application 10044/82, D & R 39(1985), p. 162 (169 – 171)

[32] The Commission here considered whether the death of the boy was a consequence of the use of the force contrary to Article 2.

[33] Judgment 27th September 1995, A. 324, p. 59

The authorities suspected that the Irish Republican Army was planning a terrorist attack on Gibraltar by means of a remote-controlled car bomb. It was decided that three suspects should be arrested and during their arrest they were shot by soldiers at close range. Upon investigation no weapons or remote controls were found. The Court held that the use of force by agents of the State in pursuance of one of the aims mentioned in Article 2(2) may be justified under Article 2 where it is based on an honest belief which is perceived, for good reason, to be valid at the time, but which subsequently turns out to be mistaken. Having regard to the dilemma confronting the authorities in the circumstances of the case, the Court found that the reactions of the soldiers did not, in themselves, give rise to a violation of Article 2. However, the Court also observed that this showed a failure by the authorities in handling the arrest operation, noting that all soldiers shot to kill the suspects. On the basis of these circumstances, the Court held that the authorities had failed to respect the right to life of the suspects by failing to exercise the greatest care in evaluating the information at their disposal prior to transmitting it to the soldiers, who shot to kill[34].

The type of derogation allowed from this right must also be considered. Under Article 15 of the European Convention on Human Rights no derogation from Article 2 is allowed except in respect of deaths resulting from lawful acts of war. This derogation must however be according to the criteria set out in Article 15(1), and there must be a public emergency which is actual and imminent, affecting the whole nation and threatening the continuance of the organized life of the community[35].

2. Protection of the Right to Life under Turkish Legislation

2.1 The Constitution of the Republic

Article 17 of the Constitution guarantees the right to life and *"physical integrity"* recognizing as justified interference only cases of medical necessity and when prescribed by law. Article 17 runs as follows:

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[34] Van Dijk, P., and Van Hoof, G.J.H., above at note 29, p.308

[35] See The Greek case, Commission Report 5th November 1969, para. 153 yearbook 12 p.72; Ireland v. United Kingdom Judgment 18th January 1978, A.25

> *"Everyone has a right to life and the right to protect and develop his material and spiritual entity. The physical integrity of the individual shall not be violated except for medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his or her consent. No one shall be subjected to torture ... Cases such as the execution of death penalties under Court sentences, the act of killing in self-defence, occurrence of death as a result of the use of a weapon permitted by law as a necessary measure during apprehension, the execution of warrants of arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, carrying out the orders of authorized bodies during the martial law or State of emergency, are outside of the scope of the provision of paragraph 1."*

The death penalty is also mentioned in Article 38 of the Constitution[36], which limits the use of the death penalty to cases of terrorist crimes, times of war or imminent threats of war. Although this seems to be in conformity with Article 2 of the European Convention on Human Rights, the exception made in respect of terrorist crimes is not in conformity with Protocol 6, which recognizes as exceptional only cases of war and imminent threats of war.

Although Turkey, *de facto*, has not executed the death penalty since 1984[37], in practice, death sentences have continued to be imposed in terms of the Anti-Terrorist Law. In 2000, seventeen persons were sentenced to death, as were ten others between January and August 2001.[38] In the case of the PKK leader Abdullah Ocalan, the Turkish Government[39] has agreed to postpone the execution of the sentence till the case is finalized before the Courts.

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[36] As amended on 17th October 2001

[37] According to the Turkish Constitution, only the Turkish Grand National Assembly is authorized to confirm the execution of the death penalty passed down by the Courts (Article 87). The Assembly has not decided on any execution since 1984.

[38] 2001 regular report on Turkey's Progress towards Accession, prepared by the Commission of the European Communities, Brussels.

[39] A dilemma arises at this point, because according to Turkish law the Government has no authority to postpone the execution of the death penalty. It is the Assembly that decides these issues.

In view of its intention to join the European Union, Turkey must seek to align itself with the Copenhagen Political Criteria and to abolish the death penalty, signing and ratifying Protocol 6 to the European Convention on Human Rights.

2.2 Turkey before the European Court of Human Rights

A number of cases have been brought to the Court regarding violations of the right to life. The majority of the complaints concern extra-judicial killings, disappearances or destruction of property,[40] and the decisions given by the Court show that serious violations occur.

2.3 Extra-Judicial Killings

The term *"extra-judicial killings"* refers to *"the taking of a person's life by governmental authorities without the minimal guarantees provided by the due process of law."*[41] There are four types of extra-judicial killings which have been exemplified in the proceedings brought before the Court:

a. Deaths occurring while the person is in the custody of the police or the military forces, and for which the authorities do not take responsibility. In these cases responsibility is avoided by claims that the detainee died of natural causes[42], or that the persons was killed for a just cause[43], or was later killed by unknown assailants[44]. In some cases the authorities deny that the individuals were detained at all and claim that the alleged detainees were probably killed in a settling of accounts by a common criminal[45] or when participating with the PKK in an armed clash with security forces who acted self-defence[46].

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[40] See Akkoc v. Turkey, Application No: 22947/93, Application No: 22948/93, Akkum v. Turkey, Demir v. Turkey, Tanrikulu v. Turkey, Mentes & Ors v. Turkey

[41] Kaufmann, E., Fagen, P.W., *'Extra-Judicial Executions: An insight into the Global Dimensions of a Human Rights Violation'* (1981) 3(4) Human Rights Quarterly, pp.81-100

[42] Tanli v. Turkey, Judgement 10th April 2002; Sanli v. Turkey, Judgment 22nd May 2002

[43] Bilgin v. Turkey, Judgment 17th July 2002

[44] Aydin v. Turkey, Judgment 25th September 1997

[45] Celikbilek v. Turkey, Judgment 22nd June 1999

[46] Ikincisoy v. Turkey, Akkum v. urkey, Application No: 26144/95

b. Deaths that occur during security operations. In these circumstances, authorities deny responsibility and even though they initiate investigations, these investigations are either never concluded, or alternatively, they are concluded by a finding that the individual has been killed for a good purpose[47] or killed by the PKK[48].
c. Deaths for which the authorities hold officials accountable and proceed with an investigation, however the applications concern the inordinate delay in the investigation and/or the failure to prosecute[49].
d. Killings carried out by different branches of the military forces, police forces, unidentified civilians or private agencies with access to police support, and for which the government does not hold itself accountable. These deaths may occur as a result of an armed attack[50], or by abduction which often includes torture.

2.4 Disappearances

The European Convention on Human Rights does not contain a definition of forced disappearances, however reference may be made to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances which states that:

> *"Enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to*

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[47] Aytekin v. Tureky, Judgment 18th September 1997 – the victim was killed when he was driving to a security checkpoint

[48] Ergi v. Turkey, Judgment 28th July 1998; Kaya v. Turkey, Judgment 20th February 1998

[49] Avsar v. Turkey, Judgment 10th July 2001

[50] Kilic v. Tureky, Judgment 28th January 2000; Tanrikulu v. Turkey, Judgment 8th July 1999

acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.[51]"

In the judgment of *Velasquez Rodriguez v. Honduras*[52], the Inter-American Court stated that the practice of disappearances often involves the secret execution without trial of the individual and the concealment of his body. It also held that prolonged isolation amounts in itself to cruel and inhuman treatment, harmful to the psychological and moral integrity of the victim. This judgment has also been referred to by the European Court in the case of *Kurt v. Turkey*[53] were the Court affirmed that

"the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion. This complex of rights includes the right to life and the right not to be subjected to ill treatment."

Violation of the right to life in these circumstances arises on two grounds: first, when the person disappears that person is deprived of his life in circumstances for which the State is responsible. A presumption that the individual has died as a result of forced disappearance is sufficient to raise State responsibility. Secondly, the State's failure to observe its obligation to protect life by positive law in accordance with Article 2, includes its failure to conduct an effective official investigation into allegations of a disappearance at the hands of State agents[54].

Cases of forced disappearances normally involve persons who are last seen in the custody of the police or military authorities and who are not acknowledged as having been detained[55]. In this regard, the Commission has held that the State has a continuing obligation to account for the fate of missing persons[56].

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[51] Preamble to the United Nations Declaration of Protection of All Persons from Enforced Disappearances

[52] Velasquez Rodrigez v. Honduras, judgment 29th July 1988

[53] Kurt v. Turkey, Judgment 25th May 1998; Application No: 24276/94

[54] Cakici v. Turkey, Judgment 8th July 1999

[55] Kurt v. Turkey, Judgment 28th January 1998; Cicek v. Turkey, Judgment 27th February 2002

[56] Loizidou v. Turkey (1998) 25 European Convention on Human Rights CD.9

2.5 Destruction of Property

The majority of cases brought before the Court concerning the right to life also include the destruction of property. Damage to homes or other properties by agents of the State may raise issues under three articles of the European Convention on Human Rights, that is, Articles 2 and 3 of the Convention and Article 1 of Protocol 1. Violations of Article 2 arise from the deaths of persons caused during the course of these destructions[57], however, the destruction of the property in itself has not been found to be a violation of the right to life.

2.6 Changes under the National Programme

2.7 Abolition of the Death Penalty

According to the Constitution of the Republic of Turkey, only the Turkish Grand National Assembly is authorized to give effect to a final sentence of capital punishment. The Turkish Government, sustained by the Turkish Grand National Assembly has since 1984, adopted a practice whereby it does not infringe upon the essence of the right to life. The National Plan only states that:

> *"The abolition of the death penalty in Turkish criminal law, its form and its scope, will be considered by the Turkish Grand National Assembly in the medium term."*

2.8 New Changes

The Turkish Grand National Assembly has adopted reform laws in respect of the death penalty[58]. The amendment abolishes the death penalty in the Turkish legal system except for times of war and imminent threat of war, in line with Protocol No. 6 to the Convention. These changes fully meet the criteria established in the Accession Partnership.

According to Article 120 of the Turkish Constitution, the Turkish Government is entitled to declare a state of emergency, whereby emergency measures are introduced in order to combat extraordinary

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[57] Sahin v. Turkey, Judgment 25th September 2001

[58] Act No. 4771, Third EU Reform Package, Approval date 3rd August 2002

political and military situations. The emergency rule was first introduced in 1984 and is still in force in the southeast part of Turkey.

An additional form of emergency rule known as *"State of Emergency Regional Governance"* was established by the Council of Ministers on 10th July 1987. Emergency governance was then declared in eight southeastern provinces of Turkey in order to eliminate the separatist movements in that region. The governor of the region is empowered to establish all necessary organisations and to requisition all necessary public personnel, equipment, vehicles or buildings from public institutions and to issue orders to all private or public security forces, including the gendarmerie.

Turks face difficulties with violations of the right to life particularly in the south-eastern region of the country, as is evidenced by a number of judgments delivered by the European Court. Although the military no longer directly carries out operations in that region, the gendarmerie still do under the operational control of the military. Civilian and military authorities remain publicly committed to the rule of law and respect for human rights however members of security forces, soldiers and gendarmerie – including the special police teams, anti-terror squads and village guards – have committed serious human rights violations. The changes that have been carried out under the national programme plan are not sufficient to prevent these violations, since they do not ensure the protection of rights of people who live in that region. Other than that, mentality change is needed in the region, as well as in the administration of government. Further laws have also to be enacted making possible the punishment of security and military forces acting in that region as an organ of the State.

CHAPTER 3
Prohibition of Torture

1. Under the European Convention on Human Rights

> *"Torture is a particularly barbaric violation of the right to physical and mental integrity, and represents a direct attack on the core of the human personality"*[59].

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[59] Janusz, S., (ed.), *'Human Rights: Concept and Standards'*, Dartmouth Publishing Company Limited and UNESCO Publishing, 2000

The prohibition of torture is systematically found to be formulated in the general international instruments on human rights immediately after the right to life and it is given special and particular attention in human rights jurisprudence in much the same way as the right to life. The right not to be subjected to torture has been stated by the International Court of Justice to have created *"erga omnes"* obligations upon the members of the international community[60].

Similarly, the U.S. Supreme Court in *Wilkerson v. Utah*[61] stated that torture was one of the crimes against humanity. The Swiss Federal Supreme Court, in its decision of 22nd March 1983, held that the prohibition of torture is not only a part of international customary law but also a part of *jus cogens*[62]. In the *Siderman de Blake v. Republic of Argentina,* the Court concluded that official acts of torture attributed to Argentina constituted a violation of a *jus cogens* norm of the highest status within international law. The *jus cogens* nature of the crime of torture provides a justification for States exercising universal jurisdiction against torture wherever the act may be committed. International law provides that such crimes may be punished by any State because the offenders are *"common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution ...*[63]

All international human rights-related legal instruments have accepted and offer protection for the prohibition of torture. To mention a few, one can refer to Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[64], Article 5 of the American Convention on Human Rights, the Inter-American

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[60] In the *Barcelona Traction Case*, the International Court of Justice stated "... *such obligations derived, for example, in international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person.*" I.C. J. Reports 4, at 32, (1970)

[61] Wilkerson v. Utah, 99 U.S. 130, 136 (1879)

[62] Swiss Federal Court, Judgment 22nd March 1983

[63] Steiner H. and Alston P., *'International Human Rights in Context, Law, Politics and Morals'*, Second Edition, Oxford University Press, 2000 p. 1203

[64] Signed on 10th December 1984 and entered into force on 26th December 1987

Convention to Prevent and Punish Torture[65], Article 3 of the European Convention on Human Rights, Protocol No. 11, and the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment[66].

At the European level, the Statute of the Council of Europe[67] proclaims that

> *"every member of the Council must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realization of the aim of the Council."*[68]

On the basis of this statement, in 1969, Greece was found guilty of torturing and ill-treating detainees, opponents of military junta and was suspended from its right of representation and requested to withdraw. Protection against torture was also given importance in the European Convention on Human Rights in Article 3 providing that:

> *"No one shall be subjected to torture ôr to inhuman or degrading treatment or punishment."*

Although the Universal Declaration of Human Rights includes the term *"cruel"*, this was not included in Article 3. This omission was not explained in the debates of the drafting committee, but experts have agreed that the difference in wording between the Declaration and the Convention does not express any difference in substance. Proposals were also made to include the prohibition of physical mutilation, as well as medical or scientific experimentation against one's will, but this was not adopted[69]. Article 3 protects against torture, inhuman or degrading treatment or punishment. It

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[65] Signed on 9th December 1985 and entered into force on 28th February 1987.

[66] Signed on 26th November 1987 and entered into force on 1st February 1989

[67] Adopted on 5th May 1949

[68] The Statute of the Council of Europe, Article 3

[69] Kelberg, L., *'Torture: International Rules and Procedures, in An End to Torture: Strategies for its Eradication'*, edited by Bertil Duner, Lond 1998, pp. 3- 38. However the jurisprudence of the Court incorporates the term *"cruel"* into the European Convention on Human Rights such as in the case of *Ireland v. UK.*

does not define these terms, but the European Convention organs have amply established principles defining these concepts. In relation to the concept of torture, the Commission stated that torture

> *"is often used to describe inhuman or degrading treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment."*[70]

In the same case, the Commission understood *"inhuman treatment"* to refer to at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. On the basis of principles established by the Commission and the Court, torture is said to contain two elements, namely: severe inhuman treatment and a specific purpose.

In *Ireland v. United Kingdom*[71] the Court, basing itself on a distinction between torture and inhuman treatment, held that:

> *"it was the intention that the Convention, with its distinction between torture and inhuman treatment, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."*

However, it is not clear from this judgment whether it is sufficient merely to show this level of suffering or whether a particular purpose must also be shown. In a recent case, *Aksoy v. Turkey*[72], the Court considered the treatment complained of in the following terms:

> *"This treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining omissions or information from the applicant. In addition to the severe pain, which it must have caused at the time, the medical evidence shows that it led to paralysis of both arms, which*

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[70] The Greek Case, 12 Yearbook of the European Convention on Human Rights, p. 186

[71] Ireland v. United Kingdom, Judgment 18th January 1978, a. 25. pp. 66- 67; see also Aksoy v. Turkey, Judgment 18th December 1996, Vol. 26, para. 63

[72] Reports 1996 – VI, Vol. 26, Para 63

lasted for some time ... the Court considers that this treatment was of such a serious and cruel nature and it can only be described as torture.[73]"

The case-law indicates that torture may be non-physical. In the *Greek Case*[74], the Commission held that:

"the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault could also constitute torture."

A decisive element of the treatment prohibited by Article 3, is not solely the intention or motive of the actor that causes physical or mental suffering, but also the nature of the act and its effect on the person undergoing the treatment. Furthermore, the absence of the consent of the victim constitutes a relevant factor[75], even if its absence does not in all cases give an inhuman character to a treatment affecting human integrity.

A less distinct difference is made between inhuman treatment or punishment and degrading treatment or punishment. In the case of *Tyrer*[76] the Court stated that:

"the suffering occasioned must attain a particular level before a punishment can be classified as 'inhuman' within the meaning of Article 3."

In examining whether a given punishment is to be considered degrading, the Court considered the degree of humiliation occasioned in all the circumstances of the particular case, giving particular attention to the nature and context of the punishment and the method of execution. In its report of the 5th November 1969, the Commission held that a treatment or punishment that grossly humiliates the person before others or forces him to act against his will or conscience can be considered as degrading treatment or punishment.[77] Thus, all treatment violating Article 3 need not necessarily be defined as

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[73] Judgment 18th December 1996, Reports 1996-VI, Vol. 26, Para. 64; se also Yagiz v. Turkey, Reports 1996 – III, Vol. 13, para 554 -55

[74] Report 5th November 1969, Yearbook XII(1969), p. 461

[75] For more details, see Van Dijk P. and Van Hoof G.J.H., above at note 29, p. 317

[76] Judgment 25th April 1978, A. 26, p. 14

[77] See Guzzardi case, B.35 (1983), p. 33

atrocious or gross but it must "*reach a certain minimum level of severity ...*"[78]

In assessing this standard of severity, which in the nature of things, is a relative concept, it considers all the circumstances of the case. Since a complaint is considered on the basis of its particular circumstances, this could lead to a situation where the same act could in one case give rise to a violation, while in other circumstances could fall short of a violation. In *Zeidler v. Germany* no breach of Article 3 was found where the applicant, as a prisoner, was put in a strait jacket and subjected to solitary confinement; however, in the case of *X v. Germany,* these actions were held to amount to a violation because they were inflicted on a prisoner with poor health.

Article 3 does not permit of any limitations, and unlike other human rights articles in the European Convention on Human Rights, it does not contain any limitation criteria. Nor may it be derogated from, even in the event of public emergency[79]. On this basis, the obligation imposed upon States not to torture and to prevent torture is valid in every circumstance, as this obligation is absolute.

Several applications regarding violations of Article 3 have been made by detained persons. When considering imprisonment conditions, reference must be made to the United Nations Standard Minimum Rules which set out rules on various issues such as the separation of categories of prisoners, their accommodation, personal hygiene, food, medical services, clothing and bedding, religion, discipline and punishment and contact with the outside world. These rules have become a point of reference for the European Court of Human Rights. The *Greek Case* constituted the first systematic application of these standards.

It is possible to derive, from the jurisprudence of the Commission and the Court, that isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and lack of physical exercise, may constitute

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[78] Ireland v. United Kingdom, Report 25th January 1976, B. 23 – I, (1980), p. 388, Judgments of 18th January 1978, A. 25, p. 65

[79] Ireland v. United Kingdom, Judgment 18th January 1978; Ahmed v. Austria, Judgment 17th December 1996, Reports 1996 – VI, Vol. 26, Para. 40

a violation of Article 3 if there is no balance between the requirements of security and the basic individual rights[80].

A few cases also concerned physical force exercised by police or prison officers against a person arrested or detainee. In *Ribitsch v. Austria*[81] the Court stated that:

> *"In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and ... an infringement of the right set forth in Article 3."*

Furthermore,

> *"where an individual is taken to the police custody in good health and is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article3"*[82] .

When considering the prohibition of torture from a European perspective one cannot refrain from mentioning the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment[83]. Unlike the traditional conventions, its purpose is to prevent torture before it occurs. In order to realize this purpose, Article 1 establishes a Committee, which is empowered to visit any place in which individuals are deprived of their liberty by public authorities within the jurisdiction of the State parties, without requiring the permission of the State.

The Committee arranges periodic and *ad hoc* visits to countries and controls the consequences of its *ad hoc* previous visits through its following visits. Although in principle, the report of the Committee on these visits is of a confidential nature, these may be made public if the States themselves ask for its publication wherein it includes its own comments[84]. Furthermore, if the Committee considers that

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[80] Krocher and Moller v. Switzerland, Judgment 16th December 1982, D & R 34 (1983) p. 24 – 52

[81] Judgment 4th December 1995, A. 336, p. 26

[82] See Aksoy case, Judgment 18th December 1996, Reports 1996 – VI, Vol. 26

[83] Opened for signature in November 1987.

[84] Article 11

a State Party has failed to co-operate or to improve the situation in the light of the Committee's recommendations, then the Committee has the discretion to issue a public statement.[85] So far, the Committee has used this sanction three times, twice in respect of Turkey[86], and once in respect of Russia.

2. Prohibition from Torture under Turkish Legislation

Several grievances related to torture have been brought before the European Court against Turkey, and on occasions, the Court has found a violation, particularly when the complaint was based on interrogation techniques. Article 17 of the Turkish Constitution prohibits torture stating that:

> *"No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity ...".*

Moreover, the Criminal Code recognizes acts of torture and ill treatment as criminal offences in Article 243 and Article 245 respectively. Despite these legal provisions which aim to prevent torture and punish the torturer, in practice they are not effective since the governmental authorities directly or indirectly support law enforcement personnel who are the perpetrators of the crime of torture[87].

This permissive attitude towards the crime of torture and ill treatment also emerges from the practice and case law of the Turkish Courts. For example, the Constitutional Court, in its decision based on the 1961 Constitution, delivered three decisions directly related to the prohibition of torture and other ill treatment incompatible with human dignity. When considering a situation of a detainee restrained by leg irons, the Court found such practice unconstitutional. However, the 'no food punishment' regulated in the Military Penal Code was declared constitutional by the Court on the 27th December 1965[88].

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[85] Article 10(2)

[86] In 1992 and 1996

[87] Semih, G. M., *'The Institution Process of the Turkish Type of Democracy'*, Amac Publishers 1989, Istanbul p. 55

[88] Case No: 1965/65

The judgment of the Turkish Court of Appeal also showed up another difficulty since until 1987 the Court was unable to define and clearly distinguish between torture, inhuman treatment and cruel treatment. The decision given in 1987 was an effort to try to define these concepts but, it is argued, it was unable to reach an acceptable conclusion since it found that being beaten in a way that causes the victim to stay away from work for a week cannot be considered as torture but only as inhuman treatment.

Although the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was opened for signature in November 1987, Turkey only signed it in January 1988, even if it was the first State to deposit an instrument of ratification. It also signed the First and Second Protocols to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Since 1999, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the CPT) has visited Turkey eight times more than any other State party. Unlike other State parties that have been visited more than once, Turkey has authorized the publication of any of the materials related to these visits and there are two public statements made by this Committee on the position of Turkey.

The first public statement was made in December 1992 and sets out details of the findings of the Committee's first three visits. In 1990, the CPT concluded that all forms of torture and ill treatment still exist in Turkey. Medical professionals examined the detainees and observed physical marks or conditions consistent with their allegations of torture by the police. In the fact-finding process, Turkish authorities also gave false information to the Committee. Furthermore, the Committee found that no progress had been made by the police in eliminating torture and ill treatment. The CPT recommended that legal safeguards against torture needed to be reinforced, and furthermore, education on human rights law matters and professional training for law enforcement officials had to be intensified[89].

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[89] See website http://www.cpt.coe.int/en/docspublic.htm, date accessed 30/05/03

On 6th December 1996, the CPT issued its second public statement with regard to Turkey. Again in this statement, the CPT found clear evidence of practices of torture and other forms of ill treatment at the hands of the Turkish police forces. The medical members of the CPT found marks of recent ill treatment. Accordingly, the CPT concluded that the authorities had failed to acknowledge the gravity of the situation. The statement argued that although public prosecutors receive allegations from detainees regarding ill treatment at the hands of the police, they failed to give them serious attention. Moreover, the provisions of the Turkish Penal Code (Articles 243 and 245) and the policy of the Turkish Courts in relation to them did not correspond to the seriousness of the offences involved[90].

3. Changes under the National Progamme

a. The Government has been aiming at strengthening legal and administrative measures, ranging from enhanced training programmes on human rights to the thorough and timely investigation of incidents of torture and prosecution of those responsible. Some recent measures introduced in this context are the following:
b. A circular was issued by the Office of the Prime Minister in June 1999 on the effective implementation of the Law on Apprehension, Custody and Interrogation and on the strict supervision of the implementation of this law.
c. In August 1999, provisions of the Criminal Code on torture and inhuman or degrading treatment were amended so as to align the definitions thereof with those of international conventions. Moreover, sanctions were increased in general, and criminal penalties were introduced for health services personnel issuing false reports on incidents of torture.
d. The Act on Prosecution of Civil Servants and other Public Employees was amended in December 1999, thereby speeding up the investigation and prosecution of public personnel.
e. In addition to the Ministries concerned, the Human Rights Directorate of the Office of the Prime Minister was authorized

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[90] As above

to undertake the necessary measures for the prevention of incidents of torture and inhuman or degrading treatment that may arise despite measures already in force.

f. Furthermore, a series of laws and amendments are planned to enhance the fight against torture and inhuman or degrading treatment. In this context, in the short term, the Turkish Government plans to review the Act on the Duties and Competences of the Police[91] and the relevant regulations, the Act on the Organisation, Duties and Competences of the Gendarmerie[92], and the Act on the Coast Guard Command[93]. Furthermore, it is also undertaking a modernization of the Forensic Medicine Institute.

In the medium term, the Turkish Government has planned to enact a new Criminal Code and a Code of Criminal Procedure; to explore the availability of financial resources for training law-enforcement personnel for the prevention of human rights violations; increase the use of technology in order to monitor places where incidents of human rights violations continue to occur; and to introduce legal provisions on the joint and several liability of the perpetrators of torture.

The national program also recognizes that changes in laws and practice are to be made, in order to align legal practices and procedures related to pre-trial detention with the provisions of the European Convention on Human Rights, the decisions of the Court and the recommendations of the CPT. With this in mind the national program aims at:

a) Undertaking legal arrangements to extend education at Police Academies from nine months to two years;
b) Putting into action, with the framework of the UN Decade of Education for Human Rights, the Human Rights Education Project of the Ministry of Interior and its Affiliated Agencies (2000 – 2007); and
c) Training law-enforcement personnel, within a period of seven years, in the framework of a project developed under the 1997

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[91] Act no. 2559
[92] Act no. 2803
[93] Act no. 2692

– 2000 Police and Human Rights Program of the Directorate of Human Rights of the Council of Europe.

Under the second reform package[94], the Act on the Duties and Competences of the Police[95] and the relevant regulations, and the Act on the Organisation, Duties and Competences of the Gendarmerie[96] have been amended to include an article aimed at providing for the prosecution of personnel responsible for the cruel, inhuman or degrading treatment complained of, and making it possible to seek compensation[97].

It is undeniable that there are thousands of cases pending before the national Courts and before the European Court concerning the terrible toll of lasting physical and psychological damage inflicted on Turkish citizens by police officers and gendarmes whose proper duty was to protect them. Unfortunately, especially after the military coup, torture became part of the procedures adopted by the military and public forces against civilians. The practice of torture in Turkey has often been publicly recognized even by high Turkish officials, such as the former General T. Sunalp, who stated in an interview held in 1988 that *"there was torture in Turkey, there is torture in Turkey and there will be."*[98] This shows how torture had become a part of every day affairs in Turkey during the 1980s.

According to the international human rights organisations *incommunicado* detention is the key to the problem of torture in Turkey. While police forces still hold detainees *incommunicado* with the permission of the State, it is hard to see an end to the practice of torture. This is because *incomunicado* detention provides the right conditions for the perpetrator owing to the absence of witnesses, thereby allowing the perpetrator to obscure or minimize medical evidence of abuse. It is through indirectly allowing police officers to perform acts of torture and ill treatment and by refraining from taking the necessary steps against such perpetrators, that the Government also plays a part in the practice of torture.

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[94] A package that has been called the European Union Harmonisation Laws

[95] Act no. 2559

[96] Act no. 2803

[97] See website www.eturkey.org.tr/abportal/uploads/files/Law, date accessed 02/08/02.

[98] Semih, G.M., above at note 87, p. 55

On the other hand, reports concerning the political situation in Turkey show that security officials use methods that do not leave physical traces of abuse, such as beating detainees with weighted bags instead of clubs, or applying electric shocks to a metal chair where detainees are made to sit, rather than directly to the body. Commonly employed methods of torture practiced in Turkey also include systematic beatings, stripping and blindfolding, exposure to extreme cold or high pressure water hoses, beatings on the soles of the feet, hanging by the arms, vaginal or anal rape with truncheons and squeezing and twisting of testicles; female detainees also often face sexual abuse.

Turkish legislation requires that detainees are medically examined twice – once during detention and before being arraigned or released. However, in practice the examinations are either not carried out or else, the examination occurs too long after an incident of torture has taken place thereby not revealing any definitive evidence. In some cases, the Government even took action against doctors who attempted to report torture. Dr Sebnem Korur Fincanci, who had reported and certified the death by torture of a man while in detention, lost her position at the Government Forensic Medicine Institute[99].

The European Court has considered several complaints of torture and often held that the domestic legal remedies in Turkey were insufficient since prosecutors had not taken adequate steps to investigate claims of torture[100]. In view of its application to join the European Union, the Government is trying to establish effective procedures. On the 24th July 2001, the Ministry of the Interior issued a circular that clarifies the duties and obligations of law enforcement officers with respect to custody, formal arrest, detention and interrogation. This was a sure step seeking the prevention of torture by bringing this regulation further in line with the judgments of the European Court in respect of pre-trial detention.

The Circular followed the important amendment to Article 19 of the Constitution whereby the period of police custody was reduced to four days from a previous established one of fifteen days. Another

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[99] Preventing Torture, Human Rights Watch Report, http://www.hrw.org/reports/2000/turkey2/Turk0009-01.htm, date accessed 03/08/02.

[100] Yildiz v. Turkey Application No: 32979/96

important amendment to this article is reflected in the notice which is to be given to the next of kin of any person detained. While the original version of Article 19 permitted for situations where the next of kin of the person arrested would not be informed in *"cases of definite necessity pertaining to the risks of revealing the scope and subject of the investigation compelling otherwise"*, the amended version does not allow this exception. However, the Law is still far from ensuring the complete prevention of torture since it excludes from such protection abuses from the competence of the State Security Courts and abuses occurring in state of emergency provinces.

Statistics prepared by the UN and human rights monitory bodies show that the situation on torture and mistreatment has improved, however there are some factors that have contributed to this decrease that must be noted. Primarily, there is a decreased use of *incommunicado* detention and a slight decline in detentions in general. Another important factor is the near complete absence of PKK activities which have eased the treatment of detainees by security officials. There has also been an increase in the awareness of this problem and many are expressing concern. Despite this, torture remains widespread in the South East and especially, in regard to the treatment of political prisoners. On the other hand, according to the Turkish authorities, during 2000 – 2001, 1,472 proceedings for allegations of ill treatment and 159 proceedings for allegations of torture were initiated against security force members[101].

Under the national program, a number of legislative measures have now been adopted. There has been the enactment of a law amending Article 16 of the Anti-Terrorist Act, and a law on the Establishment of Monitoring Boards for Punishment Enforcement Institutions and Detention Houses. These are a few of the first steps taken towards the prevention of torture. Although the Government has made progress by the changes effected to the law and through the education programmes given to the staff in the public service, it is still not understandable how the Government can divide the fight against torture into short-term or medium-term categories. The

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[101] See 2001 Regular Report on Turkey's Progress Towards Accession, Commission of the European Communities, Brussels

eradication of torture can only succeed by a strict systematic plan, which aims to achieve the goal immediately.

Furthermore, the distinction between torture, inhuman or degrading treatment developed by the European Court is being used by the Government in order to claim that there is no torture but only inhuman treatment, even if all these acts are prohibited under the European Convention on Human Rights. This shows that although there have been changes in the legislation, the real will to end torture in Turkey is somewhat lacking.

CONCLUSION

When I planned to write this work, Turkish law and practice was far from fulfilling the Copenhagen Criteria. However, various steps have been taken with the aim of bringing the legal position in line with international human rights standards. The Turkish Parliament has since February 2002 adopted three reform packages: the first one was adopted on the 6th February 2002, the second one on the 4th April 2002 and the last one was adopted on the 3rd August 2002.

The aim of these packages is to seek to bring at least the legislation in line with international human rights standards and thereby satisfying one of the requirements which would lead Turkey to membership within the European Union. To mention a few of the changes planned, one can refer to the abolition of the death penalty and amendments made in relation to freedom of expression.[102] In fact, such amendments were proposed upon a study of not only human rights documents but also of the judgments delivered by the European Court of Human Rights. These reform packages are an important signal of the determination of the majority of Turkey's political leaders to further align Turkey's position to the values and standards of the European Union. These important programmes have in fact been adopted in record time and with an overwhelming majority, bringing along significant development in human rights protection within Turkey. It is with the implementation of these packages that broadcasting in different languages and dialects is

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[102] These amendments were discussed in the fourth chapter of the original work. However as indicated in the introduction, this chapter was left out from this abridged version.

being allowed, and that possibilities for the teaching of minority languages have been furthered.

However, there is still some concern to be mentioned. The Turkish Government has made all these changes with the aim of becoming a member of the European Union, and hence it was the pressure of the European Union which was strongly insisting on these reforms that has brought about these changes in the national laws. The changes were not, therefore, occasioned by a real national change of mentality on the fundamental importance of human rights in a democratic society. Secondly, although many provisions of the Constitution have been changed there was, and still is, no a desire of adopting a new Constitution. This results in forever working within the parameters of a Constitution which was adopted and accepted by the Military Government during the coup in 1980. Under the provisions of this Constitution, the Military have established a National Security Council which meets with the Government once a month to discuss issues related to political matters and security issues. Consequently, through the power that the military was granted under the 1982 Constitution, it continues to exert influence over politics in a manner largely incompatible with the concept of a democratic State. It still publicly airs its views on a wide range of non-military issues and justifies these intrusions by reference to its purported role as a guardian of the Republic. The State Security Courts are still under the control of Military even if such Courts may judge civilians as well.

Neither have there been many changes in the electoral system. The Electoral Law of June 1983 still maintains the system of proportional representation on a provincial basis, but subdivides the more populous provinces for electoral purposes. This often leads to a democracy based on the majority rule limiting pluralism and the role of political participation of minorities within this regime.

Although these developments have been initiated with the aim of obtaining membership to the European Union, they help in sustaining a hope for improvement, an improvement that is required in every country since protection of human rights is always developing. In that respect, what has to be done in Turkey is that the overall reform package needs to be carefully implemented in order to fully assess its impact. However, the most important power in the protection of human rights is the political will of the Government and the peoples of the country. Without this will, there

will be law without implementation, thereby leading to no protection or development at all. To be able to achieve this will in the minds of the people, education is necessary to make people aware of their rights and also aware of the protectors of their rights.

BIBLIOGRAPHY

Benoir, F. B., *'The Council of Europe and National Minorities, Katlijin Malfliet &Ria Laenen, Minority policy in Central and Eastern Europe: The Link Between Domestic Policy, Foreign Policy and European Integration,'* Louvain, KUL, 1998, p.145.

Brems, *'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights'*, 1996, p.240; Lavender, *'The protection of the margin of Appreciation'*, 1997, p.380

Brolmann, C., Lefeber, R., Zieck, M., *'Peoples and Minorities in International Law'*, Martinuss Nijhoff Publishers, London, 1993, p.283-86.

Capotorti, F., *'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities'*, New York, 1986.

Coliver, S., *'The Article 19 Freedom of Expression Handbook, International and Comparative Law, Standards ad Procedures, International Center Against Censorship'*.

Dienstein, Y., quoted from Zdenkowski George, *'The Covenant on Civil and Political Rights and Euthanasia'*, The University of New South Wales Law Journal 20 (1997)

Dijk van, P., and Hoof van, G.J.H., *'Theory and Practice of the ECHR'*, Third Edition, Kluwer Law International, 1998,The Hague, The Netherlands

Fawcett, J.E.C., *'The Application of the ECHR'*, 2nd ed., Oxford, 1987,

Gormley, P., 'The Right to Life and the Rule of Non-Derogability Peremptory Norms of Jus Cogens', in *'The Right to Life in International Law'*, edited by Ramcharan, B. G., Martinus Nijhoff Publishers, 1985, Netherlands' pp.120-159.

Henrard, K., 'The Protection of the Cultural Rights of Minorities in the Context of Individual Human Rights and Minority Rights', in Auwert van der, P., Pelsmaeker De, T., Sarkin, J., and Lanotte Vande, J., *'Social, Economical and Cultural Rights, An Appraisal of Current European and International Developments'*, Maklu –Utgevers, 2002, p.121.

Janusz, S., (ed.), *'Human Rights: Concept and Standards'*, Dartmouth publishing Company Limited and Unesco Publishing, 2000.

Joseph, S., Schultz, J., Castan, M., *'The International Covenant on Civil and Political Rights, Cases, Materials and Commentary'*, Oxford University Press, 2000

Kaufmann, E., and Fagen, P.W., *'Extra-judicial executions: An insight into the Global Dimensions of a Human Rights Violation'* (1981) 3(4) Human Rights Quarterly, pp.81-100

Kelberg, L., *'Torture: International Rules and Procedures, in An End to Torture: Strategies'*

Keown, J., (ed.), *'Introduction, Euthanasia Examined'*, Cambridge University Press, 1996

Klebes, H., *'The Council of Europe's Framework Convention for the Protection of National Minorities'*, (1995) Human Rights Law Journal, 92.

Neuwahl, N. A., and Rosas, A., (ed.), *'The Treaty on European Union: A Step Forward in The Protection of Human Rights The European Union and Human Rights,'* Martinus Nijhoff, 1995

Persaud, I., and Greaty, C.A., (ed.), *'The Reconstruction of Human Rights In The European Legal Order in European Civil Liberties and The Convention On Human Rights'*,

Preece, J.J., *'National Minorities and the European Nation-States System'*, Oxford University Press, 2000, p.20.

Ramcharan, B.G., (ed.), *'The Concept and Dimensions of the Right to Life, The Right to Life in International Law'*, Martinus Nijhoff Publishers, 1985.

Ramcharan, B.G., *'The Drafting of Article 2 of the ECHR: The right to life in International Law*, Martinus Nijhoff Publishers, 1985.

Rantzen v. Miror Group Newspapers Ltd, 1993, Bosma, T.H., Freedom of Expression in England and under the ECHR: in Search for a Common Ground, A foundation for the Application of the Human Rights Act 1998 in English Law, School of Human Rights Series, Volume 6, Intersentia-Hart, 2000.

Semih, G.M., *'The Institution Process of the Turkish Type of Democracy'*, Amac publishers' 1989, Istanbul, p. 55.

Shelton, D., *'International Law on Protection of the Fetus in Abortion and Protection of the Human Fetus'*, edited by Frankowski, S., and Cole, G., Martinus Nijhoff Publishers, 1987,

Steiner, H., and Alston, P., *'International Human Rights in Context, Law, Politics and Morals'*, Second Edition, Oxford University Press, 2000, p.1203.

Taubinger Von, L.M., *'Suffering and Struggle of the Kurds'*, Martinus Nijhof, The Hague, 1975, p.245.

Theodore, O., et al (ed.), 'The Right to Life/ the Right to Die", in *The Jurisprudence of Human Rights: A Comparative Interpretive Approach*, Abo Akademi University, Turku/Abo, 2000

The April Report of the Turkish Parliament Commission on Unsolved Political Killings, the Library of Turkish Grand Assembly, 1995.

Whitman and Laber, *'Denial of Ethnic Identity, Helsinki Watch Report', 1987*, Chapter V, updated in 1990, p.38.

Zwaak, L., *'Turkey towards membership of the European Union: The role of Human Rights.'*

Zwamborn, M., *'Human Rights Promotion and Protection Through The External Relations of the European Community and The Twelve'* (1789) NQHR 11

2001 REGULAR Report on Turkey's Progress Towards Accession, Commission of the European Communities, Brussels, 2001

Kaufmann, E., and Fagen, P.W., *'Extra-judicial executions: An insight into the Global Dimensions of a Human Rights Violation'* (1981) 3(4) Human Rights Quarterly, pp.81-100

Kelberg, L., *'Torture: International Rules and Procedures, in An End to Torture: Strategies'*

Keown, J., (ed.), *'Introduction, Euthanasia Examined'*, Cambridge University Press, 1996

Klebes, H., *'The Council of Europe's Framework Convention for the Protection of National Minorities'*, (1995) Human Rights Law Journal, 92.

Neuwahl, N. A., and Rosas, A., (ed.), *'The Treaty on European Union: A Step Forward in The Protection of Human Rights The European Union and Human Rights,'* Martinus Nijhoff, 1995

Persaud, I., and Greaty, C.A., (ed.), *'The Reconstruction of Human Rights In The European Legal Order in European Civil Liberties and The Convention On Human Rights'*,

Preece, J.J., *'National Minorities and the European Nation-States System'*, Oxford University Press, 2000, p.20.

Ramcharan, B.G., (ed.), *'The Concept and Dimensions of the Right to Life, The Right to Life in International Law'*, Martinus Nijhoff Publishers, 1985.

Ramcharan, B.G., *'The Drafting of Article 2 of the ECHR: The right to life in International Law*, Martinus Nijhoff Publishers, 1985.

Rantzen v. Miror Group Newspapers Ltd, 1993, Bosma, T.H., Freedom of Expression in England and under the ECHR: in Search for a Common Ground, A foundation for the Application of the Human Rights Act 1998 in English Law, School of Human Rights Series, Volume 6, Intersentia-Hart, 2000.

Semih, G.M., *'The Institution Process of the Turkish Type of Democracy'*, Amac publishers' 1989, Istanbul, p. 55.

Shelton, D., *'International Law on Protection of the Fetus in Abortion and Protection of the Human Fetus'*, edited by Frankowski, S., and Cole, G., Martinus Nijhoff Publishers, 1987,

Steiner, H., and Alston, P., *'International Human Rights in Context, Law, Politics and Morals'*, Second Edition, Oxford University Press, 2000, p.1203.

Taubinger Von, L.M., *'Suffering and Struggle of the Kurds'*, Martinus Nijhof, The Hague, 1975, p.245.

Theodore, O., et al (ed.), 'The Right to Life/ the Right to Die", in *The Jurisprudence of Human Rights: A Comparative Interpretive Approach*, Abo Akademi University, Turku/Abo, 2000

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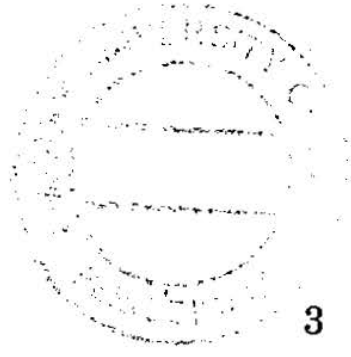
CONTENTS Volume 7 Number 3 2004

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



Foreword

Papers

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.

Bibliography

Baldassarre, *Globalizzazione contro democrazia*, Roma-Bari, 2002.
Braudel, *Il Mediterraneo*, Milano 1994
Cardini, Europa. *Le radici culturali*, Rimini, 2002
Bifulco, Cartapa, Celotto,; *"Europa dei diritti,Bologna* 2001.
Facchi, *Immigrati, diritti e conflitti*, Bologna, 1999.
Gambino, *Gli altri eroi: la sfida del multiculturalismo*, MilanoBologna, 1996.
Gamble, *Fine della politica*, Bologna 2000
Haberle, *Per una dottrina della Costituzione come scienza della cultura*, Roma, 2001.
Habermas, *Morale, diritto, politica*, Torino, 1992.
Hardt-Negri, *Impero. Il nuovo ordine della globalizzazione*, Milano, 2002.
Kymlicka, *La cittadinanza multiculturale*, Bologna, 1999.
Livi Bacci, *L 'Europa nella rivoluzione geo-demografica*,
Luciani, *Sui diritti sociali, Scritti in onore di Mazziotti di Celso*, Milano '95
Marconi, *"I diritti della globalizzazione"*, Sociologia del diritto, n.1, 2062.
Martiniello, *Le societa multietniche*, Bologna, 1997.
Mernissi, *Islam e democrazia*, Firenze,2002.

Palici Di Suni Prat, *Intomo alle Minoranze*, Torino, 1999.
Papisca, Mascia, *Le relazioni intemazionali neIl' era del1 ' interdipendenza e dei diritti umani,*
Padova,1997
Passerin d 'Entreves, *La dottrina del1o Stato*, Torino, 1967.
Pera, *Introduzione a L 'identita del1'Europa e le sue radici*, Venezia, 2002
Popper, *La societa aperta ed i suoi nemici*, I, Roma, 1973.
Rodota, *Repertorio di fine secolo*, Roma bari, 1992.
Rol1a, Ceccherini, *The Constitutional Protection of Linguistic Diversity in some of the European Countries, Centro di ricerca e formazione suI diritto costituzionale comparato,* Universita degli Studi di Siena, sd
Salazar, *Dai riconoscimento alla garanzia dei diritti sociali. Orientamenti e tematiche decisorie della Corte Costituzionale a confronto,* Torino, 2000.
Salvador, *Lengua espanola y lenguas de Espana,* Barcelona 1987.
Sartori, *Pluralismo, multiculturalismo e estranei. Saggio sulla società multietnica,* Milano, 2002.
Spadaro, *Contributo per una teoria della Costituzione, I, Fra Democrazia relativista ed assulutismo etico, Milano,* 1994.
Taylor, *"The Politics of Recognition", in* Gutmann (edit), Multiculturalism. *Examining the Politics of Recognition*, Princeton 1994.

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

EVA PFÖSTL*

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.

Bibliography

Allievi, 2002: S. Allievi, *Musulmani d'Occidente. Tendenze dell'Islam Europeo*, Roma, Carocci, 2000

Andò, 2002: S. Andò, "Cristianesimo e Islam tra società e Stato", *Rassegna Parlamentare*, gennaio-marzo 2002, pp. 158-203.

Barber, 1996: B. R. Barber, *Jihad vs Mcworld: How Globalism and Tribalism are Re-Shaping the World*, New York, Ballantine Book Edition, 1996.

Bellucci, 2001: R. Bellucci, "Immigrazione e pluralità di culture: due modelli a confronto", in *Sociologia del diritto*, n.3, 2001..

Cacciari, 1996: M. Cacciari, "L'invenzione dell'individuo", *Micromega – Almanacco di Filosofia*, n. 5, 1996.

Cardini, 1999: F. Cardini, *Europa e Islam. Storia di un malinteso*, Roma-Bari, Laterza

Carrozza, 1994: P. Carrozza, "Nazione", in *Digesto delle discipline pubblicistiche*, IV Edizione, Torino, Utet, 1994.

Ceri, 2002: P. Ceri, *Movimenti globali. La protesta nel XXI secolo*, Roma-Bari, Laterza, 2002

Chabod, 1961a: F. Chabod, *Storia dell'idea d'Europa*, E. Sestan and A. Saitta (editors), Roma-Bari, Laterza, 1991

1961b: F. Chabod, *L'idea di Nazione*, a c. di E. Sestan e A. Saitta, Roma-Bari, Laterza, 2002.

De E Sousa Santos, 1990. D. De Sousa Santos, "Stato e diritto nella transizione post-moderna", *Sociologia del diritto*, XVII, 1990, 3.

Ferrarese, 2000: M. R. Ferrarese, *Le istituzioni della globalizzazione, Diritto e diritti nella società transnazionale*, Bologna, Il Mulino, 2000

Franchetti – Sonnino, 1877: L. Franchetti – S. Sonnino, *Sicilia 1876*, Firenze, 1877.

Gellner, 1983: E. Gellner, *Nations and nationalism*, Oxford, Basil Blackwell, 1983.

Gioia, 1994: A. Gioia, "Territorio in diritto internazionale", in *Digesto delle discipline pubblicistiche*, IV Edizione, Torino, Utet, 1994.

Gil, 1978: J. GIL, "Nazione", in *Enciclopedia Einaudit*, Torino, Einaudi, 1978, vol. 9.

Häberle, 1982: P Häberle, *Verfassungslehre als Kulturwissenschaft*. Berlin, Duncker & Humblot, 1998

Held, 1999: D. Held et al, *Global transformation*, Oxford, Polity Press, 1999.

Klausewitz, 1832: K. V. Klausewitz, *Vom Kriege* [1832], W. Hahlweg (ed.), Bonn, Ferd. Dümmlers Verlag, 1952.

Labriola, 2002: S. Labriola, "Inviolabiolità dei diritti fondamentali della persona umana e libertà religiosa nell'articolo 2 della Costituzione italiana", *Rassegna Parlamentare*, gennaio-marzo 2002.

Leach, 1978: E. Leach, "Etnocentrismi", in *Enciclopedia Einaudi*, Torino, Einaudi, 1978, vol. 5.

Lewis, 1990: B. Lewis, *Europe and Islam*, Brasenose College, Oxford University, 1990.

Marconi, 2002: P. Marconi, "Libertà religiosa e sviluppo", *Rassegna Parlamentare*, Gennaio-Marzo 2002.

Ornaghi, 1994: L. Ornaghi, "Stato", in *Digesto delle discipline pubblicistiche*, IV Edizione, Torino, Utet, 1994.

Ortega Y Gasset, 1921: J. Ortega y Gasset, "España invertebrada" (1921), in *Obras completas*, Madrid, Alianza Editorial - Revista de Occidente, 1983, vol. III.

1929: J. Ortega y Gasset, "La rebelión de las masas" (1929), in *Obras completas*, Madrid, Alianza Editorial - Revista de Occidente, 1983, vol. IV.

1940: J. Ortega y Gasset, "Del Imperio Romano" (1940), *Obras completas*, Madrid, Alianza Editorial - Revista de Occidente, 1983, vol. VI.

Poggi, 1991: G. Poggi, *The State. Its nature, development, and Prospects*, Stanford, Stanford University Press.

Papastergiadis, 2000: N. Papastergiadis, *The Turbolence of migration*, Cambridge, Polity Press, 2000

Rebuffa, 1999: G. Rebuffa, "Politics, Sovereignity and Globalisation", *Mediterranean Journal of Human Rights*, vol. 3 N. 2, 1999.

Resta, 2002: E. Resta, *Il diritto fraterno*, Roma-Bari, Laterza, 2002.

Sbailò, 2001: C. Sbailò, "Schmitt o Leopardi. Quale politica nell'età della deterritorializzazione", *Politica del Diritto*, XXXIII, 1, 2001.

Schmitt, 1950: Carl Schmitt, *Der Nomos der erde im Völkreccjt des jus publicum* euoopaeum, Köln, Greven Verlag, 1950.

Shacht, 1964: J. Schacht, [1964], *An Introduction to Islamic Law*, Oxford University Press, 1964.

Smith, 1976: A. D. Smith, *The ethnic origins of nations*, Oxford, Basil Blackwell, 1986.

Troeltsch, 1924: E. Troelstch, *Spektator-Briefe Aufsätze über die deutsche Revolution und die Weltpolitik,* H. Baron (ed.) and introduction by F. Meinecke, Aalen Scientia, 1966.

Vatikiotis, 1991: P. J. Viatikiotis, *Islam and the State*, London, Routledge, 1991

Vico,1744: G. B. Vico, *Principj di Scienza nuova*, in G.B. Vico, *Le opere,* F. Nicolini (ed.), Milano-Napoli, Ricciardi, 1953

Weber, 1922a: M. Weber, *Gesammelte Aufsätze zur Wissenschaftlehre*, J. Winckelmann (ed.), Tübingen, Mohr, 1985.

1922b: M. Weber, *Wirtschaft und Gesellschaft,* III, J. Winckelmann (ed.), Tübingen, Mohr, 1985.

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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