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SYMPOSIUM

**"ECONOMIC AND POLITICAL RIGHTS FROM
A CONSTITUTIONAL POINT OF VIEW"**

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REPORT

**"HUMAN RIGHTS ARE CONSTITUTIONAL
IN MORE SENSES THAN ONE"**

by
Mr Ugo MIFSUD-BONNICI
(Member, Malta)

1. Not all Constitutions contain Human Rights provisions. In fact the Rights of Man are not created by Constitutions, though it is wise to have them recognized by the supreme law of the land. Human Rights predate the United Nations' Universal Declaration of 1948, a very important document indeed in the march towards their universal recognition. Human Rights are not simply a matter of national law, civil or criminal, or of administrative or constitutional law. In fact they are also part of International Law, not only because of so many International Conventions and Covenants defining their content and declaring their safeguard, but also because they form part of what the Romans called the *jus gentium*, the law common to all nations, even before their being assigned, their natural law classification.

2. Human Rights are a matter of great juridical import. They are rights of every one as against every one else. Although there is no unanimity concerning their source and origin, there seems we have arrived at a consensus concerning their binding nature. During a recent meeting of the Venice Commission, of which I have the honour of forming part, one eminent jurist expressed the opinion that discussions as to their source can be divisive, and that it would avoid controversy were the question to be settled merely pragmatically by saying that they are universally recognized whatever their origin.

3. It is however not that simple. Human Rights are transcendental in nature. Their civilizing usefulness lies in their being seen as superior to other rights and not dependent on their being legislated upon by the State. This supremacy derives from their origin. In the American Declaration of Independence they are proclaimed as given by the creator of man, God, and therefore inalienable. In the French Revolutionary document these rights were described as natural and imprescriptible. God given or arising from Natural Law, Human Rights do not depend on the State. The concept appears first on the shores of the Mediterranean, in Greece, as a lay affirmation, but with a religious reference, in Sofokles' *Antigone*, where the right to a decent burial is seen as a human right above human law ordained by a King. In its essence, however, in its present elaboration, it is the result of a belief, inherent in the Judeo-Christian and Islamic tradition, that every single human being has an immortal soul and a personality, above all material things and other non-human creatures. The State exists for human beings and not vice-versa. The religious tradition was transformed by the Enlightenment philosophers, first of all Kant, into a lay tenet which saw the individual, every individual, as an end and not an instrument or passive object. Though Natural Law is an unwritten law, it gives us all an ethical conscience. It is not merely a matter of what we should do or refrain from doing, it is also a respect for the human dignity of others, and a recognition of their rights¹.

4. When we say that today no one denies the existence of these rights, it does not mean that they are universally observed. That is why it is necessary to have the principle of the Rule of Law and to have Courts to which the human being whose human (and indeed even civil and legally established) rights have been breached may turn for protection and enforcement. The Rule of Law by Constitution and State structure, the ordinary Courts and the Constitutional Courts to act as interpreters and enforcers of the Constitutional Rule of Law and ordinary and administrative Courts to see that the law governs a particular country and its citizens. Today, moreover, at the International level, we have the International Criminal Court, as well as the Court at the Hague, and in Europe we have the Council of Europe's Court of Human Rights at Strasbourg, and we can say that International Human Rights Law is *jus cogens*.

5. It is not difficult to concede to certain "primary" human rights their paramount nature. These are obviously fundamental human rights: the very right to exist, the right to life, the right to

¹ One has to beware of Kant's distinction of three classes of rights in his *Metaphysical principles of the Theory of Philosophy of Law* (para.41) where he sees rights as *i.* innate, therefore universal but not actionable; *ii.* private, therefore defensible through private action, *iii.* public, for the defence of which the State itself intervenes. In the modern formulations all "human rights" are of public interest.

liberty of the person, to liberty of belief and conscience, that is the right to direct one's conduct and to seek the aim of pursuing one's perfection and realization as a person, morally and culturally; to personal integrity, the right to form a family and to own such material property as is necessary for the dignity of one's personality. In fact the Universal Declaration was not seriously queried, not even in the erstwhile Communist Soviet Russia and similar regimes. Liberty of expression and of association would raise some controversy as to their limits. Civil, economic and political rights pose more "political" problems.

6. However one must go down to the very roots of all these human rights. They are grounded on the basic common factor of the dignity of every human being. Equality, solidarity, liberty, are all connected so are the rather more complex concepts of reasonability and moderation (in modern parlance, proportionality), which we now see as essential to civilized living and civilized governance. In fact the International Covenant on Civil and Political Rights² has in its preamble the consideration that "in accordance with the principles proclaimed in the Charter of the United Nations, 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", and further emphatically "these rights derive from the inherent dignity of the human person".

Article 1 begins with the proclamation of a basic right of all peoples: "All peoples have the right of self-determination". No doubt it is not consonant with human dignity to appertain to a people who are not free to choose their destiny and to govern themselves. Colonialism is a usurpation of this fundamental right. The fact that colonialism was for centuries tolerated or accepted does not mean that it has not always been unnatural. It was unnatural and contrary to human dignity, forestalling true social, cultural, and economic development. Some of its evils linger even after liberation.

Article 2 moves on to the individual plane, with sub article 1 binding each state "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Subarticle 2 obliges states "*to take the necessary steps. in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*". These necessary steps are spelled out in article 3, with States made to undertake: "*(a)to ensure that any person whose rights or freedoms as therein recognized are violated would have any effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,(b)to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial,administrative or legislative authorities,or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;(c) to ensure that the competent authorities shall enforce such remedies when granted*"The leitmotifs of human dignity and Rule of Law permeate the whole document, so that these civil and political rights reinforce, integrate and complement the "primary" human rights re-enunciated by the document. Laws are to regulate the safeguard of rights, and special protection is given by Article 14.: "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*". The Covenant enunciates a number of rights with regard to liberty of movement, liberty of religious belief and its exercise, liberty of expression, liberty of

² Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)of 16 December 1966 and entered into force 23 March 1976, in accordance with Article 49

association and liberty of forming a family. Article 25 is the more politically charged in that it provides that: *“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: 1..To take part in the conduct of public affairs, directly or through freely chosen representatives; 2.To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; 3.To have access, on general terms of equality, to public service in his country.*

An interesting feature of this Covenant was that it provided (under article 28) for a Human Rights Committee with a monitoring mandate.

7. On the same day another Covenant was signed, the International Covenant on Economic, Social and Cultural rights. Different in this from the other Covenant, which demanded immediate application, this Covenant was a “framework” international instrument requiring gradual application by the States, in proportion to their means and their actual concrete situation. No monitoring Committee was provided for in this Covenant. The subject matter in this case is much more complex and less “elementary”. Thus in article 1 which deals with self-determination, one finds an additional, complimentary but perfectly reasonably deducible subarticle 1 which declares that all peoples have a right to determine freely their own political regime and to pursue their economic, social and cultural development, and another consequent subarticle 2 which states that they have a right to freely dispose of their natural and other resources without prejudice to their international obligations. So also article 6 whilst recognizing the right to work, has a subarticle 2 which obliges the State to take measures to ensure the full implementation of this general principle. Article 7 concerns just and fair work conditions. Article 8 deals with the right of all individuals to form part of a trade union, indeed to unite with others to begin one, and article 9 recognises the right of every person to have social security. In turn article 10 extends the right to protection and assistance to cover the family described as the natural and fundamental nucleus of society. Articles 12 (right to good conditions relative to every person’s health) and 13 (right to education) are of the utmost importance in that they proclaim right to basic personal (and incidentally societal) indispensable needs for wellbeing and progress. Article 14 goes into further detail in that it requires States to provide for free but obligatory primary education. To my mind this is not enough, and in my own country, when I was Minister of Education (from May 1987 to April 1994) I piloted through Parliament a law which made all state education, from kindergarten to university free of charge, in the meantime binding pupils to continue with their education until 16 and in some instances further. The point to be emphasized here is that whilst most of the rights in the Covenant have, in principle, a universal obligatory force in their minimum level, their further development and way of exercise have to be adopted in the particular circumstances of the different states. Their entry into International Law involves their basic principle: national law and national courts would implement or see to the implementation of these principles, as incorporated in the national laws of that particular State.

8. Human Rights protection, though no monopoly of Constitutional Courts is pre-eminently constitutional, in the sense that their respect and safeguard is central to the very structure and democratic consistency of any democratic State. Protection and reinstatement of human rights is essentially of public interest. You cannot have a civilized state without having a common guarantee for the essential human rights of human beings living therein. It is in the interest of any state, indeed of all humanity, that human rights be safeguarded and their breach remedied. In the hierarchy of laws, human rights laws, treaties, conventions, covenants, international human rights law, prevail over all other legislation. Constitutions which would deny human rights are not to be deemed “constitutional”.

9. The best protection that human rights can receive is that through the cultivation of a human rights culture and the culture of the Rule of Law. Ultimately even Law itself is in need of the culture of law observance.