LEGAL TREATMENT OF PAST POLITICAL VIOLENCE AND COMPARATIVE CONSTITUTIONALISM

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The article examines, from a comparative perspective, solutions chosen by legal systems facing the problem of treatment of past political violence on human beings. The comparison is peculiar in this case as it encompasses balancing the universal sense of human dignity with the need for national reconciliation within different contexts far enough in social and political terms. The analysis comes with an examination of the consequences of each legal solution both for human beings and for the national community as a whole. In spite of the diverse answers offered by States, a common feature can be singled out: constitutional democracy is founded on the quest for truth, either in absolute terms or in relative (or selective) terms.

1. The fall of authoritarian regimes poses everywhere the questions of how the political violence legitimised by those regimes should be qualified, to what extent it should be punished, and who should be held accountable for it. Hence derive hard dilemmas between the quest for the truth owed to the victims and the need for reconciliation, with the balance between the two differing widely according to countries, epochs, and situations, including the pre-existence of a civil war.

Therefore, attention must be paid to the different contexts so as not to reach the conclusion that choices in this respect are equivalent. In fact, any such conclusion would engender indifference for the consequences of diverse legal treatments of past political violence on human beings, that is, for the common human dimension lying beneath the surface of legal solutions. And, in turn, indifference would jeopardise constitutional discourse among different peoples.

The contextualisation of political choices should be accompanied by an understanding of their different consequences both for human beings and for the development of national communities. Such endeavours include something which is usually unknown to constitutional comparison. While comparing dilemmas and solutions affecting past political violence, we discover atrocities and other mischiefs occurred to other people or human beings, and which might therefore occur to everybody. This goes far beyond normal information gathering. It brings into our analysis an emotional dimension, which might lay the groundwork for an

intersubjective agreement over certain values characterising the international community. More precisely, reactions to past political violence test the degree of consensus on, and the interpretation of, respect for human dignity, which is the cornerstone of the 1948 Universal Declaration of Human Rights.

Drawing a line between moral and political considerations, and balancing the universal sense of human dignity with the need for national reconciliation, are difficult tasks. Of course, no such activity is required when comparing, e.g., electoral laws or federal assessments. On the other hand, comparing solutions affecting past political violence might afford insights into the identities of peoples, thus enhancing a deeper mutual understanding and clarifying the tasks of comparative constitutionalism.

2. After World War II and the Holocaust, the problem of dealing with past political violence was mainly centered in Europe, and was strongly influenced by the "never more". According to Ulrich Beck, the Nuremberg process marked a watershed with the past, since it substituted the old principle of non-retroactivity of crimes embedded in national legislations with a "cosmopolitan logic". This approach required that persons responsible for past atrocities be judged before international tribunals, notwithstanding the fact that they were not legally qualified as crimes at the time of their commission.[1]

The same principle, known as *Radbruchsche Formel*, was applied by German courts. Carl Schmitt called amnesty the only solution to escape from the vicious circle of the self-righteousness engendered by a civil war, where revenge is taken in the name of law, and the origins of peace in mutual forgetting are no longer remembered.[2] In a reversal from his appeals for a "total war" during the nazi regime, Schmitt advocated peace through amnesty, even though he maintained his previous representation of politics as founded on *amicus-hostis* relationships.

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1 Beck, U. "Per un Europa cosmopolita." *Lettera internazionale* 4 (2003).

2 Schmitt, C. "Amnestie oder die Kraft des Vergessens (1949). *Staat, Grossraum, Nomos*. Berlin: Duncker & Humblot, 1995: 218-221. On this see Krapp, P. "Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting." *German Law Journal* (2005).

In Germany this suggestion went unheeded. But the rule of retroactivity was not adopted everywhere. In Italy, retroactive sanctions were meted out in 1944 only to the high ranks of the fascist regime, while amnesty was given to other classes of subjects in 1946. Moreover, the courts followed a strict interpretation of the former provision and increased the number of cases falling under it. This "surreptitious restoration", as Piero Calamandrei called it in 1947, was due to the conservative attitude of judges, rather than to the amnesty. But the effects were quite the same. People began to forget that the fall of the fascist regime resulted both from a civil war and from the military defeat of the country. Meanwhile political parties, with the exception of the heirs of fascism, succeeded in veiling the facts with the overlapping myth of the "Resistenza", or resistance, conducted almost unanimously by Italians against fascism. Historians agree on the dynamics of these events. Only after the fall of the Berlin wall, a democratic historian dared to entitle a book on the *Resistenza* "A civil war", with the explicit intention of preventing fascists from exploiting the acknowledgment of a fact - civil war- for their own purposes.[3] This demonstrates that civil war had been removed from collective memory, which is perhaps the main reason why in Italy we are still at odds with our past.

At any rate, Ulrich Beck's assumption about the pre-eminence of the "cosmopolitan logic of justice" over the national one after World War II should be corrected. The Nuremberg trial gave only the first example of that logic, which nonetheless was not followed by all European States. The dichotomy prosecution vs. amnesty (or similar measures) prevailed.

3. During the last decade of the XX century, such dichotomy was overridden in at least two important cases. The first came from the Hungarian Constitutional Court, which repeatedly struck down laws retroactively, allowing criminal prosecution of those responsible for political violence under the communist regime. The only exception were such acts as were defined war crimes and crimes against humanity by the Geneva Conventions, which could be tried directly in Hungarian criminal courts. The sense of these decisions differs strikingly from the attitude of Italian ordinary

[3] Pavone, C. *Una guerra civile*. Torino: Bollati Boringhieri, 1991: XI.

courts on the 1944 retroactive sanctions against the high ranks of the fascist regime. Italian courts circumscribed the area of those sanctions seeking to maintain as far as possible continuity with the past. On the other hand, the Hungarian Constitutional Court emphasised, as attested by the then-President of the Court, Lazlo Solyom, that the revolutionary character of the 1989 Constitution consisted in the establishment of the rule of law and therefore in legal certainty, which "necessarily partial and subjective justice" would undermine.[4]

Such a refusal of the Radbruch principle in the name of legal certainty does not depend on the nature of the crimes of Nazism and Communism. Although nothing similar to the Holocaust was perpetrated in Central Europe, "the brutality, torture, inhuman treatment, killing by security forces" were the same. The difference lies in the fact that, in 1945, justice was done immediately after the hideous events, while in 1990 "the period of Communist terror caused a regression of more than a generation. Communist regimes were not overthrown by revolution; the transition was either negotiated or the old system simply collapsed. Successor parties to the Communist parties remained in the political arena; in many countries they regained power by democratic election. Under these conditions the problem was transformed into a constitutional question. The political desire either to do justice or to take revenge could be fulfilled within strict legal limits"[5].

The Hungarian lesson helps us to realize that respect for legal certainty might reasonably prevail over the natural justice approach not just wherever democracy doesn't follow from a civil war, but where the burden of memory is less acute throughout society. In these cases, legal certainty reflects the reasons of the new constitutional order vis-à-vis the fact that retroactive sanctions are usually employed under authoritarian regimes, even by explicitly substituting the *nullum crimen sine lege* principle, as the Nazi regime did. Such cases are difficult to reconcile with the dichotomy prosecution vs. amnesty, expressing the legacy of the transition processes following World War II.

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[4] Solyom, L. "The Role of Constitutional Courts in the Transition to Democracy." *International Sociology* 18.1 (2003): at 138.

[5] Solyom, L. "Equality of Victims- Equality of Regimes?" *Europe's Century of Discontent. The Legacies of Fascism, Nazism and Communism*. Eds. S. Avineri and Z. Sternhell. Jerusalem: Hebrew University Magnes, 222.

4. After the demise of apartheid in South Africa, also the international pressure for prosecuting those responsible for gross human rights violations presupposed the dichotomy prosecution vs. amnesty. But since there was no victor on either side of the negotiations, prosecution was a threat to a peaceful transition to democracy. A compromise had to be reached between the international demand for prosecution and the national appeal for peaceful transition, reconciliation and justice: "Although amnesty was a price to be paid for a peaceful transition, a line had to be drawn between a blanket and conditional amnesty. The compromise was conditional amnesty on application". In this regard, the 1995 Promotion of National Unity and Reconciliation Act established the "Truth and Reconciliation Commission", whose task was to give a complete picture about past human rights violations, facilitate the amnesty process and bring about national reconciliation among the people of South Africa.[6]

In political terms, conditional amnesty was certainly the product of a compromise, which, in strictly legal terms, is an intermediate solution between blanket amnesty and prosecution. But these approaches are far from giving an account of the meaning of the establishment of the Commission and, furthermore, of its experience.

The National Unity and Reconciliation Act was challenged by the Azanian People' Organisation (AZAPO) before the provincial high courts of South Africa on the ground, inter alia, that the word 'amnesty' as used in the postamble was not intended by the drafters of the Constitution to exonerate perpetrators, including the state, from criminal and civil liability. The case was finally brought before the Constitutional Court, which held that as a result of what had transpired in the apartheid's "shameful period....shrouded in secrecy" it would have been difficult to uncover the truth, and that the Act seeks to deal with this problem by ensuring that victims of human rights violations "receive the collective recognition of a new nation" through a cathartic process of telling what happened to their loved ones. Perpetrators are granted amnesty in exchange for the truth without exposing themselves to criminal or civil action. Truth-telling gives perpetrators also the

[6] Keiseng Rakate, P. "The South Africa Amnesty Process: Is International Law at the Crossroads?" *Zeitschrift fur oeffentliches Recht* (2001): at 98.

opportunity "to obtain relief from the burden of guilt or an anxiety they might be living with for many years".[7]

The decision demonstrated that a truth-seeking process based on an intersubjective dimension lies at the core of the solution afforded in the Act. Contrary to those of the Commissions established in the same years in Argentina, Chile and El Salvador, the hearings of the Truth and Reconciliation Commission were open to the public, thus encouraging a mutual, albeit very painful, relationship between victims and perpetrators. This ensured an extraordinary impact on the people. Moreover, the attempt of the African National Congress leaders to refuse amnesty by assuming only a "collective responsibility" for actions legitimized by a "just war" was rejected by courts, which reaffirmed the rule of individual responsibility, forcing those leaders to testify before the Commission.[8]

By shifting the attention from the result of the process to the process itself, these elements throw a different light on the South African treatment of past political violence with respect to other experiences. Only the result, that is, conditional amnesty, appears intermediate between amnesty and prosecution. But the process appears unique, as it is founded on the search for truth among individuals through public hearings, rather than on the search for official truth.

5. The experience of the South African Commission is now appreciated worldwide. But its importance for contemporary constitutionalism was immediately recognised by Peter Haberle in his book on "The problem of truth in the Constitutional State".[9] According to Haberle, such Commission demonstrates that the quest for truth is intrinsically connected with the foundation and development of constitutional democracies.

Also the quest for truth acquires, of course, different meanings in different situations. During the transition, the quest for truth is expected to lay the foundation for reconciliation by revealing the truth about past atrocities. When it is fully acquired, democracy involves instead a learning process associated with the ongoing

[7] *AZAPO v. President of the Republic of South Africa*, 4 SA (1996), 562 (CC), Para. 17.
[8] Neier, A. *Taking Liberties. Four Decades in the Struggle for Rights*. New York: PublicAffairs, 2003: 367 ff.
[9] Haberle, P. *Wahrheitsprobleme im Verfassungstaat*. Baden-Baden: Nomos, 1995: 22 ff.

dialogue on the values, opinions and truths disseminated throughout society. But also an "open society", within Karl Popper's meaning of the expression, needs to rely on individual and collective identities, and therefore on memory.

Legal treatments of past political violence have far reaching consequences on democracy precisely because they correspond to different politics of memory, both individual and collective. Amnesty, as we have seen, may be understood as mutual forgetting, seeking to efface psycho-social traces "as if nothing had happened". Selective amnesty, as provided in the South African National Unity and Reconciliation Act, requires instead an active role of memory, conjures up the past to the extent of making it present again. The quest for truth, which is owed to the victims for moral reasons, appears here strictly connected with the need for maintaining the roots of identity and for constructing the dialectics between tradition and change lying at the core of constitutional democracy.

On this ground, as Paul Ricoeur has noticed, both the "too much" and the "not enough" of memory fail to separate the past from the present. In both cases, "the past doesn't want to pass", obsessing the present as a phantom. The politics of a just memory should avoid this risk.[10] Among the diverse treatments of past political violence, the South African experience deserves attention for having put the premises of a politics of just memory.

[10] Ricoeur, P. *Ricordare, dimenticare, perdonare. L'enigma del passato*. Bologna: Il Mulino, 2004: at 83.