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Subject: Safeguarding human rights and fundamental liberties as an important objective
in the construction of the new Europe

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**Safeguarding human rights and fundamental liberties as an important objective in
the construction of the new Europe**

A necessary premise is to reiterate the advisability for the European Union as such to adhere to the "Convention for the Safeguarding of Human Rights and Fundamental Liberties" (European Convention on Human Rights) adopted by the Council of Europe on 4 November 1950. This implies not only the acquisition by the Union¹ of a stronger subjectivity; it also presupposes the possibility for anyone who considers they have been harmed of appealing directly to the European Court whenever the Union and not one of the Nations comprising it may be considered as the defending party.

a) **Human dignity**, which pertains to all human beings by the sole fact that they are human beings², forms the basis of all human rights systems and the title by which goods are due to each human person and may consequently be claimed by them. This dignity is *ontological* and *non existential*. Human dignity must therefore not be confused with any existential perception of the person, such as his capacity to act, or to maintain a given quality of life. In these cases, the rights would become dissociated from the actual human essence and the substance of a man would be confused with certain events involving him (for instance, his capacity to relate to others), which would be detrimental: human dignity would be curtailed solely because a person was handicapped, or perhaps sick, or because the person was a being who still lacked the capacity to express himself and to autonomously relate to others.

It is therefore necessary to move beyond any concept of the person that is the expression of an exaggerated legal-statism such that "the physical person is not a human

¹ See F.TULKENS, "L'union européenne devant la Cour européenne des droits de l'homme", in *Revue universelle des droits de l'homme*, 12 (2000), p. 50-57).

² Cf., for all, S.COTTA, "Persona", in *Enciclopedia del Diritto*, vol. 33, Milano, 1983, p. 159 ff.; R.SPAEMANN, "Über des Begriff der Menschendwürde", in *Das Natürliche und das Vernünftige. Aufstätze Anthropologi*, Piper, München, 1987, p. 77-106.

being" but "the unified personified expression of the regulations governing the behaviour of a human being" (Hans Kelsen, *Introduction to the Problems of Legal Theory*).

b) **Human cloning** for reproductive purposes, which is part of the eugenics project, is not compatible with a legal system such as the European one in which the fundamental aim is to protect the dignity of each and every human being (see, for example, art. 1 of the European Bioethics Convention), which in any case extends such protection to the unborn child, guaranteeing it "adequate protection with regard to the application of biology and medicine" (Steering Committee on Bioethics, Draft Protocol on the Protection of the Human Embryo and Foetus, art. 1), which does not recognize freedom to reproduce as an unalienable subjective right, just as it does not recognize abortion as being an unalienable right (of significance, insofar as it is in accordance with the respect of the needs for justice inherent in all human beings, is the decision of the German Federal Court declaring illegitimate the provision introduced by the fifth *Strafrechtsreformgesetz* regarding the non punishable nature of the voluntary interruption of pregnancy within the first twelve weeks after conception (§ 218a StGB), insofar as it would be incompatible with the constitutional obligation of protecting the life of the unborn child (BverfG, decision of 25 February 1975, in BverfGB 39, 1-44). Consequently, the German court maintained that the State is under the obligation to defend the conceived being even by applying criminal penalties in order to put an end to "the abortion epidemic" that regulations like those provided under the above-mentioned criminal code entrust exclusively to the self-determination of the woman alone, thus undermining, in the case of a married couple, also the very principle of the unity of the family and of marriage. Such a position, that is, the State's duty to protect "menschliches Leben, auch das ungeborene", was reaffirmed in the decision handed down on 28 May 1993).

Only in this case is it possible to avoid a selective genetics that surreptitiously reintroduces the nazi myth of pure race. Therefore it may be coherently claimed in solid juridical terms that the "selection" of the child to be procreated is a true abuse of power. And the right to conscious and responsible procreation cannot be allowed to become an absolute power of one subject to oppress another, who is reduced to the level of a product, a thing, a programmed object. Furthermore, cloning entails the exploitation of the woman, who is reduced to several of her merely biological functions (provider of eggs or acting as surrogate mother), and reverses the fundamental relationships pertaining to human beings: filiation, consanguinity, kinship, parenthood.

c) Similar considerations may be made with regard to euthanasia.

Despite common belief to the contrary, euthanasia, in particular euthanasia "on request", is not an act that allows freedom and autonomy of the will to be reaffirmed against blind necessity. Indeed it is questionable whether the application of the principle of autonomy to the practice of euthanasia is actually correct. For this to be the case, it is necessary to respect three fundamental conditions: a) that the request is the *true* expression of the patient's will; b) that the physician is legitimately empowered to practise euthanasia *only* or *fundamentally* because the patient requests it; c) that the legality of euthanasia on request refers solely to those actually involved and not to the rest of society.

It seems quite illusory to imagine that, in a terminal condition, which is characterized by intense pain and suffering and by relatively severe impairment of the psycho-affective sphere, a person is able to give a *truly free* expression of their will.

It is hard to believe that the physician would agree to the patient's request to be helped to die essentially to satisfy this desire and without taking into account his personal assessment of the situation. It is much more likely that the physician would be willing only in those cases in which he is the one that decides that the patient's life no longer has any objective value. In any case, no solution that is even only legally acceptable exists. If the patient's request could actually be disregarded, the physician would appear as the "master" of the requester's life. If it could not, the requester would appear to have ascendancy over the physician's conscience, as the latter would be obliged to take action even when he deemed that it was not justified by the circumstances. Consequently, one of the two subjects involved in the relationship would be reduced to object status. With the cessation of any inter-subject relationship also the relationality specific to legality ceases, together with legality itself, which is replaced by violence.

Lastly, it is at least questionable whether euthanasia is a purely private affair, with no negative repercussions on society. Even Kant claimed that man is "responsible for the humanity of his own person". The right of ownership, not only with reference to material goods, but also to one's own body and life, cannot be considered to be absolute.

The fact that euthanasia is practised covertly with relative impunity is not however sufficient grounds for decriminalizing it. Any such conviction arises out of a fundamental error, namely having confused *factuality* with *legality*. Legality does not consist in *what is done customarily*, but in what *must be done*. If legality was restricted to merely acknowledging a state of fact it would no longer have any reason for being.

On the other hand, a law regulating only *border cases* does not seem justifiable either. Indeed juridical sociology warns us against the danger of the so-called "fruit salad effect", consisting in the tendency to invent general rules to cover each exceptional or marginal case. The sum total of laws must not be expected to cover all possible hypotheses, including border cases. If it were, this could lead to the absurd situation of eliminating criminal law since each law would situate problems on the outer boundaries of its field of relevance. Furthermore, law has long since embodied the concept of "state of necessity" to allow exceptional situations to be catered for. This may be used, for example, by the physician who, in his attempt to "soothe the patient's pain" actually accelerates the latter's death.

Another important aspect to be emphasized is the fact that euthanasia "on request" must not be seen as an "inevitable alternative" to the so-called "use of disproportionate medical measures"³ insofar as the latter is not required either morally or ethically and is therefore completely avoidable.

If euthanasia is to be viewed as a need of the terminally ill patient to die "with dignity" it is clear that with the application of disproportionate medical measures it must be acknowledged that this dignity is rarely respected. However, it is also true that the alleged right to be "put to death" is based on a conception of human dignity that, unlike the classical conception, in which it is considered to be linked to the person's ontological order, is based on the "quality of life" and thus on completely subjective criteria.

It is therefore worth stressing what could be considered as the *legitimate* expectations of a dignified death: 1) the patient's right to maintain a confidential dialogue and relationship with the care provider and with persons close to him; 2) the right to know the truth concerning his own condition; 3) the right to benefit from available medical techniques affording the mitigation of pain; 4) the right to accept or refuse any action to

³ This may be defined concisely as the use of means that are particularly stressful and fatiguing for the patient who is therefore condemned to an artificially prolonged agony. This "disproportionate use" occurs when the "principle of proportionality" is not correctly observed (cf. following note).

which it is planned to subject him; 5) the right to refuse exceptional or disproportionate remedies at the terminal stage⁴.

d) **The family**, which, as stated in art. 16 of the 1961 European Social Charter, is the fundamental cell of society, is not adequately protected in the present EU Charter of Fundamental Rights. Three articles refer to it, and are contained, although not comprehensively, in the chapters on Freedoms and Solidarity. Consequently, while art. 7 guarantees the right to the respect of one's private and family life, art. 9 in its turn guarantees the right to contract marriage and the right to found a family in accordance with the national legislations governing the way it is exercised, in full respect of the principle of subsidiarity. The third article concerns basically the principle of solidarity. While it is true that art. 33, paragraph one, guarantees the protection of the family on the juridical, economic and social plane, paragraph two of the same article sets out to prevent any difficulty of reconciling family and professional life. In concrete terms it lays down that "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child".

If we compare these provisions with art. 16 of the Universal Declaration of Human Rights and with art. 12 of the European Convention on Human Rights, it is obvious that a clear-cut distinction has been made between marriage and family. Marriage is no longer

⁴ From the practical point of view, the criteria for applying the so-called "principle of proportionality" (regarding the resources deployed, the consequent costs - both economic and human - and the benefits obtained) may be identified as the following:

- a) in the absence of other remedies it is possible, with the patient's consent, to use experimental and/or in any case risky means;
- b) in the absence of satisfactory results, after consulting the patient, his relatives and the physicians involved, the therapies mentioned in section a) can be suspended;
- c) it is always legitimate to content oneself with the *normal* resources available to medicine; there is no obligation to undergo costly or risky treatments, even when no longer only experimental;
- d) in the face of imminent death it is legitimate to interrupt any treatment except those that may be considered *normal* treatment in any case due to the patient. (The following are considered normal treatments: parenteral feeding, hydration, oxygen therapy and hygiene of the patient's body).

viewed, as it is in the common constitutional traditions, as the foundation of the family but as only one of the ways in which a family may be founded. Furthermore, all reference is omitted to heterosexuality as a prerequisite for the exercise of the *jus connubii* with the consequent cancellation of one of the elements that has always been present as a constituent part of it - heterosexuality. There is nevertheless in marriage a foundation that has had and will continue to have different forms, but which has retained its essential nucleus in the course of history precisely because the ontological structures of marriage, as also of the family, reside in man, in every human being; marriage, which is thus not a relationship based on the fluctuating will of the parties but an institution and substantial reality that underpins conjugality and familiarity and thus transcends the will of the parties and possesses an intrinsic law of its own.

Sexuality as a bodily characteristic is a constituent element of the person himself, not a simple attribute thereof. As shown by the more sophisticated medical and psychiatric theories, far from any androgynous utopia, masculinity and femininity are two mutually completing dimensions of self-awareness, self-determination and, at the same time, two ways of being complementary in the form of one's bodily self. Sexuality becomes the expression of the personal essence of the human being.

Any indifference to gender thus leads to the subject being deprived of a constitutive part of his personal identity. However, it also means that his person is less guaranteed, as it is "generic" in its identity, in that subjectivity in which fundamental rights and duties are inherent, which is to be recognized and juridically protected.

The needs of marriage are rooted in the ontological structure of the human being and it does not befall the law to modify this structure because it cannot. Law has the task of recognizing and "supporting" it, drawing the consequences of importance to the system and to an effective protection of the person, even modifying the positive discipline if and when this becomes necessary. However, it cannot deliberately compress this substance, deform it or mystify it, confusing what is essential with what is incidental.

Laws that take this nature into account must not be viewed as a melancholy return to the past⁵, but rather as the fruit of that longing for truth that characterizes each human

⁵ One example of what is stated in the text is represented by several US provisions that have aroused considerable controversy and which, in stark contrast with the Western European laws, protect two elements that represent the very foundation of that idea of marriage disseminated for centuries in western culture and linked to the deeper-lying structures of the human being -

being, of the desire to obtain a value that cannot be considered as a subjective manifestation of preferences based on vague sentimentalism. Indeed a regulatory pluralism lacking in truth, without any original references to meaningful roots, is no doubt respectful of diversity, although at the risk of establishing a cohabitation characterized by constraining and non communicating barriers and lacking any basic references from which any complementary modes or mutual enrichment could spring. It is therefore necessary to seek a common principle of truth that cannot be entrusted to a relatively hasty expression of a mere historical or political consensus, but is embodied in the fundamental structures of the person with his relations with his fellow human beings.

e) As regards another fundamental freedom, religious freedom, "the first of all freedoms" - as Francesco Ruffini defined it - it is deemed advisable to include in the future European Constitution Declaration no. 11 annexed to the Final Act of the Treaty of Amsterdam which guarantees respect of the status of churches and religious communities, as provided for by each Member State. In this way, the declaration, although of purely political value, would become fully productive of legal effects. Thus even neglecting the nevertheless important and widely debated issue of an explicit reference in the European Constitutional Charter to the great religious, spiritual and intellectual movements and traditions, which represent a significant heritage for our times and for the future of Europe, as well as the recognition due also to the specific contribution that has been made by the

heterosexuality and indissolubility. I am referring to the *Defense of Marriage Act* passed by Congress under the Clinton Administration on 21 September 1996 according to which "no State, territory or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex, that is treated as a marriage under the law of such other State, territory, possession or tribe, or a right to claim arising from such relationship". While this Act, in a fashion not unlike that of the *Family Code* of California as reformed in 2000, therefore specifically protects marriage as an institution that may be born only out of the exchange of vows between a man and a woman, there are also other provisions emanating from individual States of the Union which protect the actual indissolubility of marriage insofar as the parties are recognized as having the right to include in the marriage contract a clause stating their commitment to living a "lifelong relationship", thus giving rise to the so-called "covenant marriage".

churches and the religious communities, we believe that, in addition to individual religious freedom also institutional freedom must be guaranteed in full respect of the identity of the religious denomination itself and of the non confessional nature of the State, that is, of the non interference by the State in the *interna corpora* of the religious faith or community.

The (temporal and spiritual) constituent dimensions of the person, as well as of the civil society composed of men and women are not indeed extraneous to each other; the temporal order and the spiritual order, with their respective laws, both contribute to the global realization of man as such. State or intergovernmental powers, together with those of the church, by respectively promoting temporal good and spiritual good, are complementary in the contribution they make to the global formation of the human being. The link between international organizations and churches, which substantiates and grounds the institutional significance of the latter, is represented by their common commitment to a real promotion of society or, more exactly, of the human being in its moral and factual components.

In full respect of their respective fields it would thus be possible to attain a real harmony, although, like all human undertakings, one that is never definitive, in the implementation of a truly lay principle, namely the principle that, if correctly interpreted, does not mean indifference to the religious problem but is a guarantee of the safeguarding of the freedom of religion in a regime of a plurality of faiths and cultures and of cooperation among the different orders. This in any case clearly emerges in the white paper on governance (COM [2001]428 of 25 July 2001) which recognizes the specific contribution that can be made by the churches and religious communities to the process of formation of the Union.

In other words, the democratic State must view religion also as a public fact and each State must find a principle of action that renders the various religions compatible not only as points of view that are purely private but also public. The lay condition itself must be redefined as the capacity for dialogue and principled tolerance among positions that are not obliged to lay aside their faith to enter this space.
