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CONSTITUTIONALISM IN EUROPE SINCE 1945: RECONSTRUCTION AND REAPPRAISAL

By

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Abstract

Post-war constitutional reconstruction in Western Europe in the aftermath of the Second World War was strongly influenced by the desire to prevent a repetition of what had happened. Priorities were guarantees for democratic government and respect for human rights, but above all for political arrangements which would promote stability and offer safeguards against the excesses of the recent past.

In some countries, mainly the smaller ones, reconstruction consisted chiefly in the restoration of generally stable forms of government disrupted by war. In others, notably France and Italy, new constitutions had to be drawn up, whilst in the Western part of Germany a new state took shape in 1949 with the drafting of the Basic Law.

In respect of the form of government, constitutional reconstruction after 1945 saw the re-affirmation of parliamentary methods and structures, usually operating under multi-party conditions. In one major instance, France, parliamentary government of the traditional type worked indifferently, with the result that executive instability became a serious handicap. Elsewhere, parliamentary government, whether 'stabilised' in the West German manner or corresponding to the straightforward liberal model with a dominant elected chamber, has endured successfully for the past four decades. That this is so is attributable in part to the willingness of political parties to collaborate effectively in the maintenance of coalition relationships for the purposes of government, and in part to the steady increase in economic prosperity and individual social security occurring throughout Western Europe since 1950 or thereabouts. In short, the achievement of constitutional stability has been greatly assisted by the maintenance of a favourable social basis.

Radical reappraisals have subsequently been rare. But one occurred in France in 1958 which resulted in the establishment of a mixed presidential and parliamentary regime, with the parliamentary elements considerably modified to make way for a stronger executive authority. This example has had little influence elsewhere and when, in 1975 and after, Spain received a new constitutional structure, it embodied the parliamentary form of government under a constitutional monarch.

Basic political and civil rights have been widely acknowledged and, for the most part, reasonably well protected in post-war Western Europe. A keen preoccupation with human rights as indicative of individual freedom and autonomy is a relatively recent development pointing towards more meticulous constitutional checks on governments and law-makers than were generally regarded as necessary in the years of post-war reconstruction. This trend is manifest at a supra-national level in Europe too. Federal solutions remain relevant, chiefly because the evolution of the European [Economic] Community points in some degree in that direction.

The post-war record of constitutional stability is a remarkable one. If there are challenges for the near future they appear to stem from two dilemmas. First, parliamentary government in Western Europe is essentially party government by professional politicians: can the authority of such a ruling élite be maintained in conditions of competitive democratic politics? Second, the moral foundation for constitutional stability includes a strong emphasis on individual autonomy and well-being: how can this in the longer term be reconciled with the social discipline which may be necessary to permit effective action on such matters as environmental protection and the conservation of natural resources?

Constitutionalism in Europe since 1945: Reconstruction and Reappraisal

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Introductory Remarks

Constitutional reconstruction in Western Europe in and after 1945, and indeed such imposed re- construction as took place in Central and Eastern Europe too, was carried out in the aftermath of war, destruction and defeat. It was these harsh constraining conditions which defined to a large extent the problems to be dealt with and the priorities of those involved. The character of the post-war reconstruction can only be understood in relation to the particular circumstances in which it occurred.

Whilst reconstruction points our attention to past experience, reappraisal tends to suggest different preoccupations. Of course, a process of reappraisal can itself be set into the past as an event or set of events, and then it is possible, at least in principle, to treat it on the same terms as reconstruction. But often we are inclined to treat reappraisal as an exercise we undertake in the here and now. We take stock of the various reconstructions and re-appraisals which have occurred, and then seek to reappraise the situation now reached in relation to our own preoccupations and concerns. This procedure inevitably involves the risk of distorting earlier experience, of seeing what has been done with its varying record of success and failure, in terms of what we might like to do or think ought to be done now and in the future. For the most part an effort will be made here to mitigate the risks just alluded to by keeping the emphasis on past experience so that both reconstruction and reappraisal are considered in their varied historical contexts. Only towards the end of this paper, when some attention is given to present-day challenges and broader judgements on European constitutionalism and its prospects for the future, will there be a shift to a more explicitly normative discussion.

The Circumstances of Constitutional Reconstruction at the end of the Second World War.

The need for reconstruction was imposed by the conditions prevailing in many parts of Europe when the Second World War came to an end. The war had engulfed the whole of Europe with the exception of the two traditionally neutral states, Switzerland and Sweden, the Iberian peninsula where Spain and Portugal chose to remain neutral, and the Republic of Ireland which also stayed neutral. Everywhere else invasion, occupation, and the clash of warring armies occurred. The Nazi regime in Germany first took over most of the continent and was later to be driven back and defeated by the forces of the Soviet Union from the East, and of the USA, Britain and their allies from the West. The consequences of this immense conflict are in broad terms familiar enough: devastation and social dislocation occurred on a wide scale; whole populations were uprooted and put on the move; the economies of most countries were ruined; traditional political and administrative institutions were in many countries destroyed or rendered inoperable; military occupation was imposed on Germany and Austria, and something not entirely dissimilar followed in Eastern Europe in the wake of the decision to treat that part of the continent as belonging to the Soviet sphere of influence.

Much of Europe, and especially Germany, faced a political vacuum. The perception of having to face up to the consequences of defeat was strong, not only in Germany, but to a certain extent also in Italy, France and Austria. And in Eastern Europe many of the regimes which had disappeared had also been burdened with negative images of failure and defeat. Psychologically this awareness of defeat, of having failed to prevent the devastation of the continent, was important: it pointed to the overriding need to devise constitutional arrangements likely to be more durable than those of 1919 and the era of national self-determination. Thus for many societies after 1945 the reconstruction was strongly motivated by a desire to secure protection against past mistakes and above all to establish conditions of stability and security both within

individual states and in the relations between them. The process has been characterised by one well-known political theorist as a series of 'negative revolutions', animated by a political theory committed to 'moderation and compromise'. There is much force in this judgement.[1]

The reconstruction in post-war Europe was, furthermore, decisively shaped by political events which ensured that the reconstruction would take place on very different terms in the Western and Eastern parts of the continent. Soon after 1945 - indeed portents of this change were evident even before the war ended in Europe - the alliance between the USA and the USSR fell apart. The Soviet Union made clear its determination to treat Eastern Europe as the outer defences of its empire, and to see introduced in all the countries in that area suitably compliant Communist regimes. This process of Gleichschaltung was not completed until 1948 when Czechoslovakia was brought firmly within the fold, and indeed one potential client state, Yugoslavia, actually broke away from Soviet domination in 1948 in order to assert its independence and the right to introduce its own brand of communism. The overall effect of the Cold War and the division between East and West was, of course, that the central and Eastern European states were reconstructed under Communist regimes. In relation to constitutionalism and genuine constitutional government they became uninteresting. It is only very recently that this position appears to have changed radically with the prospect of a real constitutional reconstruction coming within reach in several states, notably in Hungary and Poland. This paper will not however, consider the Eastern parts of Europe at all. It will be assumed that our concern is with the West. For only here was it practicable after 1945 for serious constitutional argument to occur and real efforts to be made to devise regimes establishing constitutional safeguards.

One other aspect of the political circumstances in Western Europe has to be stressed. This is that there was a widespread feeling in favour of some kind of European unity. It was recognised that Europe had suffered greatly from nationalism

and its excesses, and had as a result paid a heavy price for failure to overcome its own internal conflicts. Not surprisingly, this view of past experience produced a reaction in favour of bringing the European states closer together. It was to take a few years after 1945 before various institutional schemes for European cooperation, integration and union came into operation. Nevertheless, the reaction against national exclusiveness and in favour of far closer ties amongst the European states did have an effect on constitutional reconstruction. There was to be less emphasis on national identity, a greater readiness to acknowledge the claims of minorities to special treatment, and some disposition to tone down in the sphere of inter-state relations the earlier stress on untrammelled national sovereignty.

One country in Europe occupied a peculiar position in relation to the reconstruction. This was Great Britain. After the USA and the USSR it was the most important of the victorious powers, and the only one with world-wide interests and commitments. Its institutions had carried the country successfully through six years of war, including times when ultimate victory seemed a remote prospect. Moreover, after 1945 Britain became heavily engaged in the reconstruction process in Western Europe as an occupying power responsible for large parts of Germany. Quite obviously, in these conditions there could be no question of reconstruction in Britain itself. The soundness of its institutions appeared to have been fully confirmed, and it was widely believed that the British constitutional tradition was uniquely valuable. Britain was, therefore, both a guiding hand in much of the constitutional reconstruction after 1945, and a rather detached observer of it. It was only long after the constitutional practices of several West European countries had been revitalised that it became fashionable in Britain to ask questions about the case for a reappraisal of its particular brand of constitutionalism.

Varieties of Post 1945 Reconstruction

Despite the fact that most European countries had felt the direct impact of war, there was not after 1945 a wholesale reshaping of constitutional conditions right across Western Europe. What happened in many countries was more like restoration and refurbishing. The approach to reconstruction varied widely, and was much influenced by the degree of authority and respect enjoyed by pre-existing political institutions and those holders of political office who had been driven into exile.

Undoubtedly it was in Germany (or rather in that part of it under the control of the Western Allies), France and Italy that the need for a complete re-writing of earlier constitutional documents imposed itself most decisively. But in several smaller countries reconstruction was more limited in scope and consisted chiefly in a restoration and reaffirmation, sometimes with amendments, of constitutions in force before 1939. This was the case in all the parliamentary monarchies -Norway, Denmark, Holland, Belgium and Luxembourg. Here the pre-existing constitutions were put back into operation, and only in Belgium was there for a while some argument about the future of monarchy itself, prompted chiefly by the ambiguous behaviour of Leopold III in relation to Germany during the Second World War. Eventually, this argument was resolved by Leopold's abdication in 1950 in favour of his son, Prince Baudouin..

Three other states which fell outside the sphere of Soviet control also reconstructed by reverting to constitutional provisions identical with or very similar to those in force before the Second World War: Finland, Austria, and Greece. In the case of Greece the outcome was political instability and periods of military rule right down to the establishment of the present constitution in 1975. As to Austria, there the constitution of the First Republic as modified in 1929 was re-introduced when the country came under four-power occupation in 1945. Eventually, nearly a decade later in 1955, it proved possible for the occupying powers to agree on their own withdrawal

and the restoration of complete Austrian independence. By then, the Second Republic was a going concern.

So there remain three examples of thorough-going constitutional reconstruction in the largest and most populous of the Western European countries - France, Italy and West Germany. Some general comments on these three cases are called for before we proceed to discuss more comparatively the principal components of the post-war constitutional reconstructions.

In France the Third Republic had been overwhelmed in war. A species of puppet Government had ruled part of the country from Vichy, claiming to be a legitimate successor to the discredited Third Republic, but committed to very different ideas of government from those which had been held to embody the Republican tradition prior to 1940. Meanwhile, in exile and claiming a higher legitimacy by virtue of its will to continue in the war against Germany was the movement headed by de Gaulle which in 1943 assumed the role of Provisional Government of Free France. French loyalties were torn apart in so many different directions between 1940 and 1945 that there was no prospect of simply resurrecting the Third Republic once the war was over. In fact when the issue was referred to the people in 1945, the vast majority voted in favour of the drafting of a new constitution.

However, there was no consensus on the kind of constitution it should be. The major party groups which emerged in 1944-45 were in considerable disagreement with each other, and there was at that time no widespread support for de Gaulle's ideas for a constitution designed to strengthen executive authority: ironically that appeared to some to be all too reminiscent of the ideology of the Vichy regime. So it seemed that there was no alternative to a return to the classical French Republican tradition. The resulting constitution was in its first version rejected in a referendum, but after

amendment secured acceptance by a narrow margin in late 1946 at a second popular vote.

Conceived without enthusiasm and launched amidst expressions of hostility from opposite sides of the political spectrum, the constitution of the Fourth Republic began a life which was to last for only twelve years. Indeed, it was hardly a genuine reconstruction at all. The constitution provided in effect for a re-vamped version of the Third Republic's institutions, but with some modifications to meet the main criticisms which had been made of the Third Republic. For example, there had been much criticism of the former Senate and its capacity to maintain a kind of conservative veto over most reformist programmes. The Fourth Republic was to have an emasculated second chamber (the Council of the Republic) which did indeed remain more or less without influence. Above all, however, a change in the electoral system back to proportionality and away from single member constituencies with elections by two successive ballots, was intended to strengthen the political parties at the expense of the largely rural conservative notables who had so often dominated French political life. Despite this the notables remained strong, whilst the parties were to prove incapable of effective cooperation in government, with the consequence that the Fourth Republic was soon to face the reproach that the constitution destroyed executive authority and provided no basis for the effective government of the country.[2]

In Italy the case for an entirely new constitution was much clearer. The Fascist dictatorship had been superimposed on the pre-existing parliamentary monarchy. This had inevitably brought discredit upon that form of government, though it was not a foregone conclusion in 1945-46 that it would be replaced. After a popular vote had gone against retention of the monarchy, the new constitution of December 1947 provided for a parliamentary Republic. It included a programmatic commitment both to decentralisation and to a wide range of welfare policies intended to promote greater social equality and solidarity within the whole society. It is in the Italian constitution that the early post-war sympathy for socialising ideals and qualification of much of the

traditional individualism of liberal political theory are most vividly exposed. This is not, of course, to say that this commitment has found an equally strong expression in policies subsequently pursued. In fact this was not what happened in Italy. Nevertheless, the emphasis on the social responsibilities of public authorities, derived in part from the social teaching of the Catholic Church, continues to have a diffused influence on the attitudes of Italian Governments. Amongst its unintended consequences is the manner in which it works against all serious attempts to weaken the structure of vested special interests, the growth of which has been such a marked feature of the post-1945 evolution of the Italian state and economy.

France and Italy were able to reshape their constitutions autonomously. Germany was not able to do that. The country was divided between East and West, and subject to the authority of occupying powers. Constitutional reconstruction came sooner and was accomplished more rapidly than most observers would in 1945 have thought possible. This was essentially a result of the Cold War, and recognition by the USA that West German support was needed if Western Europe was to be successfully defended against threats from the East. The price of this was the restoration of the Western part of Germany as a nearly independent state, a process initiated in 1948 and completed in 1949 with the establishment of the Federal Republic of Germany and the coming into force of the Basic Law. This new constitution - in principle a provisional foundation only for the new state pending reunification of the whole country - was produced at the behest of the Western occupying powers. They defined in broad terms the political requirements it had to satisfy, and their military representatives had to approve in detail the draft constitution as it finally emerged from the Parliamentary Council in 1949. Nevertheless, the appearance of a constitution more or less imposed on West Germany and embodying requirements alien to the German political tradition is deceptive. In the West German case, certain general principles were prescribed - the constitution had to be democratic in spirit and federal in form. But how to satisfy the principles in the constitution was a matter left largely to the Germans, subject to such

views as were expressed when the provisions of the Basic Law came forward for approval or were the object of disagreement amongst the drafters of the constitution themselves.[3]

Another aspect of the conditions surrounding the emergence of the Basic Law deserves to be underlined. This is the fact that political activity had been revived first at the local and provincial levels of the society. As early as late 1946 a number of provincial or Land administrations were formed, and in the three years following this level of government and political life was consolidated. In some instances this went as far as elaborate constitutional provisions for these new German Länder. It was on this foundation that the Federal Republic was built and it was the constitutional provisions in some of the Länder which served as practical models in the drafting of the new federal constitution. In other words, there was not a tabula rasa even in the country most devastated by war and where the powers of the national political authorities had been taken over fully by occupation regimes.

Forms of Government and Civil and Political Rights in the European Reconstruction

(i) Parliamentary regimes

Throughout Western Europe those involved in post-war constitutional reconstruction came down in favour of a parliamentary form of government. That is to say, the new or restored constitutions were designed to confer full legislative authority on an elected assembly (co-existing in most cases with an upper chamber with more limited powers) which was then responsible for installing and sustaining the political executive or Government. Seen from the perspective of the latter, this meant that the Government was made responsible to a parliamentary assembly which could withdraw its confidence and thus enforce the Government's resignation .

Essentially this represented a reaffirmation of the institutional arrangements recommended in the classic liberal view of parliamentary government evolved in the

nineteenth century. How relations between Parliament and Government then developed depended, of course, on the number, character and behaviour of political parties, those features in turn being shaped by a complex range of conditions internal to each country as well as by the electoral laws in force. Where parliamentary government had previously been stable, generally it remained so after its restoration in 1945: Norway, Holland and Denmark provide clear examples of this. In these countries too there was such a strong commitment to the negotiation of often intricate coalition agreements between competing parties and social groups and organisations, that later their mode of parliamentary government was often to be designated 'consociational democracy', a democratic regime in which the interplay of numerous associations is mediated by the parties to facilitate a continuing consensus on public policy.[4]

In other countries, notably France and Italy, the record of success in operating a parliamentary regime was less persuasive. Both have had multi-party systems in which even the dominant parties (e.g. the Democrazia Cristiana in Italy) were internally divided, and many of the smaller parties had only tenuous organisations and low memberships. In such circumstances the maintenance of stable coalitions tended to be difficult or impossible: internal party competition dominated political life, and parties had little or no scope for disciplining their elected representatives. Classic 'régime d'assemblée' of this sort was in fact the consequence of the constitutional reconstructions in both France and Italy: Governments were hard to put together and rarely endured more than a year before being ejected from office by movements of opinion in the assembly. This kind of executive instability was to be instrumental in bringing about the replacement of the Fourth Republic by the Fifth in 1958 when de Gaulle returned to power with a mandate for a new constitutional reconstruction. In Italy there has occurred no comparable rejection of a form of parliamentary government associated with persistent executive instability: clearly ways of compensating for the weakness of Governments have been found and, moreover, there is in Italy no widespread perception of an acceptable constitutional alternative.[5] In any society this alone can be decisive in

sustaining an established constitutional tradition and whatever institutional methods are associated with it.

The West German Basic Law sought to stabilise the parliamentary form of government in a number of ways and, pari passu, to limit the capacity of Parliament (the Bundestag) to remove Governments from office without regard to the consequences. These protective measures reflected a desire for safeguards against a relapse into the unstable parliamentary regime of the Weimar era. They consisted essentially in making the Federal Chancellor the sole constitutionally responsible Minister, subject to election by the Bundestag and dismissable only when that body at the same time elects a successor (the constructive vote of no-confidence procedure).[6] These provisions, taken in combination with other changes like confining the presidency to a representational role and the application of electoral law conditions making it hard for very small parties to gain representation, have undoubtedly made for executive stability under the West German constitution. On the other hand, it has to be recognised that the overall party development in the Federal Republic was after 1949 highly favourable to the rapid establishment of consensus and the maintenance of stable coalitions. Splinter parties largely disappeared by 1953 at national level, and after 1957 only two major parties and one minor party were represented in the Bundestag. It is only since 1983 that there have been signs of some loosening up of the West German party system, with four parties gaining seats in the Bundestag (one of which, the CDU, consists of two distinctive and separately organised wings) and the prospect now of a fifth securing representation. If such conditions materialise the constitutional provisions for a 'stabilised' parliamentary regime would be exposed to more severe tests than they have so far had to face.

A further comment on the character of parliamentary regimes in Western Europe is necessary. None of them fully embodies the British principle of parliamentary sovereignty, though the constitution of the Fourth Republic of France came near to

attributing such authority to the National Assembly as the delegate of the sovereign people. In most countries parliaments co-exist alongside and in various relationships with other institutions in a manner which qualifies their authority. Since all states except Great Britain have written constitutions, this has necessarily meant that the rights of the elected parliamentary bodies must be limited by the formal provisions of the constitution. For example, constitutional amendment is likely to involve special procedures, including in some instances a popular vote; certain conditions may be entrenched and put beyond parliamentary intervention; and in some cases, the most significant of which is the Federal Republic, there may be wide scope for judicial review of constitutional disputes, extending as far as the invalidation of legislation held to be in conflict with the Basic Law. Such conditions point to a more complex pattern of institutionalised checks and balances than was usually associated with classical parliamentary government. They may also help to explain why the legislative assemblies of most West European states have not found it too difficult to accept the prospect of the transfer of powers, including those of law-making, to European institutions in Brussels and Strasbourg. In contrast, a genuinely sovereign institution like the British Parliament has found (and still finds) this process of adaptation hard to accept.

Finally, it has to be stressed again that the mode of operation of a parliamentary form of government depends decisively on the configuration of parties and the manner in which they behave. It is characteristic of the post-1945 political development of Europe that parties have, on the whole, grown stronger. They have become an indispensable means of representation, they are brokers and mediators in the resolution of conflicts of interest in the society, and they are the organisations in and through which most individuals pursue a career in politics or public affairs. Exceptions can be found to these generalisations and reference will be made below to one or two of the most important. Nevertheless, in some degree all West European societies testify to the dominance of party as the key instrument of representation and rule in our epoch. It

follows that if for any reason there are grounds for believing that parties may be failing to perform effectively the functions which prevailing constitutional procedures impose on them, then there would be a real prospect of institutional instability and of a loss of legitimacy for such constitutional provisions. We will return in the concluding part of this paper to this possibility.

(ii) Federal solutions

In the nineteenth century emergent constitutionalism in Europe was clearly associated with the formation and consolidation of nation states: in short, progress towards constitutional government was held to go hand in hand with the recognition of national ties and identities. And, almost inevitably, the nation state turned out to be more or less centralised, echoing in various ways the example set by the French state after the Revolution. This stress on the nation state was reinforced after 1918 when the principle of self-determination was accepted as the basis for re-drawing the political map of large parts of Europe.

The remarks just made point towards the relative weakness of the federal model within European political experience. There is only one long-established federation, Switzerland, and this was not affected after 1945 by any process of reconstruction: the Swiss confederation has unique characteristics both as a union of small states and as a political structure embodying popular vote or referendum as a key institution by which certain policy questions are resolved and the constitution itself develops.

In the post-war reconstruction the federal idea played a major part only in West Germany. Perhaps it hovered in the background in Italy and it was re-affirmed uncontentiously in Austria with the restoration of the pre-Second World War constitution, but it was not a major issue for debate. In the case of West Germany federation became a necessity for two reasons. First, the Allies insisted that the new constitution should be federal in character as a safeguard against an over-mighty central power in the future.[7] Secondly, those responsible for drafting the basic law were for

the most part firmly in favour of a federal state anyway. Political life had already been re-established in the Länder or provinces of the three Western zones of occupation, and there was in addition the strong pull of earlier German experience of numerous territorial sovereignties. Furthermore, Catholic Social teaching with its emphasis on the principle of subsidiarity was strong, and this pointed too towards federal solutions. All these factors appeared in 1949 to support the case for a federal constitution as a safeguard against the abuse of power in a centralised national state.

The outcome of these considerations was that the Basic Law provided for a federal structure. Indeed, the federal form of state organisation is declared to be inviolable:[8] the Federal Republic cannot abolish its own federal system. West German federalism does, however, differ in radical ways from the American model. Whereas the latter makes a sharp separation between the federation and the member states, leaving the latter relatively autonomous in many spheres and expecting the former to take full charge of national policy, German federalism prefers to maintain a distinction between the functions of law-making and execution, with the Länder or states chiefly responsible for the latter, but also having substantial rights in the national institutions of the Federation which are charged with legislating and determining national policy. Consequently the West German federal state is more closely integrated than federations built on the American pattern. There is a highly uniform legal order, a densely structured system of consultative and policy-formulating institutions, and close links between politicians and officials at the two levels of the system. A large part of the administration of services provided directly to the citizen occurs at the Land level, and this is virtually closed to direct intervention by the national Government. A major consequence of this type of federal structure is that there is in the Federal Republic a wide dispersion of influence within the political elite: the command of resources and the possession of extensive executive responsibilities confers on politicians from the Länder an important role in national politics if they are disposed to perform it.[9]

No other large West European state has a genuinely federal structure. Nevertheless, the experience of federal institutions has continuing relevance for two reasons. One is that federal solutions, or at any rate arrangements pointing in that direction, may be of some significance in coping with demands for decentralisation stemming from criticism of the centralised nation state. As early as 1947 certain federalising components were accepted in the Italian constitution, resulting in the creation of five special regions and, much later in the early 1970s, the extension to the whole country of a pattern of regional government. Two other countries, Spain and France, have in the recent past also shifted away from the model of the centralised nation state, in the former case to accommodate the demands of special groups in the population for a measure of autonomy, in the latter to experiment with a larger degree of decentralisation in the management of public services than was previously held to be acceptable in France. Whilst these remarks represent a simplification of complex and diverse efforts to loosen up previously centralised state structures, they do serve to draw attention to one of the reasons why fully federal systems are of continuing practical relevance and interest.

There is, however, another factor which sustains a concern with federal patterns of government. This is the slow and gradual process of integration which has been going forward within the European Community since it was initiated by the founding of the Coal and Steel Community in 1950.. There has, of course, always been much disagreement about the pace and objectives of integration, but there can be no doubt about the extent to which the member states of the Community have during the past thirty years become interdependent and subject to common rules and policies. Moreover, to a certain extent a centralisation of powers has occurred inside the Community, manifested in the central policy-making institutions of the Council of Ministers and the Commission. It does not require very much imagination to appreciate that the continuation of this process of integration and of the move towards 'closer union'[10] in Europe must require a strengthening of the federal idea. For in the light of

the strong sentiments of national identity which exist, it is virtually inconceivable that the European Community should evolve in the direction of a super-state, a kind of projection of France or Britain to the European level. The process can proceed further only if the constitutional principles implicit in federalism are adapted flexibly to accommodate diversity within the increasingly integrated and unified economy which extends across Western Europe. In other words, closer union in Europe is likely to mean at some stage in the future a confederation, probably of a loosely structured kind.

(iii) Basic Civil and Political Rights

Human rights have come sharply into prominence during recent years, so much so that there is a tendency to judge all constitutions according to the extent to which they endorse political democracy and affirm basic human rights. This preoccupation with human rights was present in the post-war reconstruction too, though with less overt concern for a highly specific definition of such rights and the formal machinery for their enforcement.

Most of the new post-1945 constitutions proclaim in different ways a respect for basic rights. The constitution of the Fourth Republic explicitly invoked in its preamble the principles proclaimed in the Declaration of the Rights of Man and of the Citizen, as well as enumerating a range of general social entitlements. The Italian constitution contains numerous lofty references to the principles to which the state is said to be committed, ranging widely from those which affirm civil rights to those which specify rights to social protection and indicate some of the conditions under which the economy should operate. The most powerful and concentrated statement of basic human rights occurs, however, in the West German Basic Law, the first 19 articles of which prescribe such rights and declare them to be inalienable and binding legal principles. This led logically to the establishment of a Federal Constitutional Court in 1951, and it is through the extensive jurisprudence of this body that the interpretation of basic rights has since then taken place. The outcome now is that the Federal Republic has a large quantity of

case law providing interpretations of the meaning of its constitution which renders it unique in Europe. Indeed, it is only in the USA that a judicial body, the Supreme Court, plays a comparable part in declaring what the constitution means and in adapting its terms to the demands now made on it.

However, the point just made about the judicialisation of disputes relating to individual rights enjoying constitutional protection needs to be qualified by a comment on the nature of judicial decision-making in systems of law based on the Roman Civil Law tradition. In such conditions judges tend to view their task as the discovery of what the law really is. It is a matter of correct deductions from texts or principles to specific conclusions, and in this process strictly procedural considerations play a large part. This approach to the judicial function differs substantially from that found in the Common Law tradition. Here, whether in the USA with its written constitution or in the UK with judges confined to a narrower range of review, there is a stronger belief in the importance and legitimacy of judge-made law. Review is a method of adapting the law, of filling gaps, and of developing the constitution itself. This confers, actually or potentially, an important political role on judges, no matter what may be their status of neutrality in a party sense. On the whole, in Continental Europe the judiciary retains a narrower view of its functions. There is generally less inclination on the part of judges to embark on the kind of wide-ranging critical assessment of the meaning of terms in a constitution or law that is sometimes manifested in Common law jurisdictions and, therefore, less risk that their conclusions will have a radical political impact. The record of the West German Federal Constitutional Court may be held to support this view: the Court's conclusions are large in volume and extensive in range, but there are relatively few judgements which have changed in a decisive way the quality and value of the rights protection under the constitution. One example of such a judgement, however, is the 1957 ruling on the joint tax liabilities of married couples which ultimately worked strongly in favour of treating men and women equally.[11]

Success and failure in performance: occasions for reappraisal.

In this section a few remarks will be made about the record of the post-1945 reconstruction in practice. This will then facilitate some comments on the one major 'reappraisal' which took place in the thirty years between 1945 and 1975 - the replacement of the Fourth by the Fifth Republic in France.

In important respects post-war constitutionalism evolved in highly favourable conditions. The popular reaction against earlier mistakes and excesses remained strong; Western Europe found itself exposed to a Soviet threat and on this account received a guarantee of its security in the shape of NATO and a commitment from the USA to defend Europe; economic recovery came quickly and went ahead with remarkable persistence over many years; there was a gradual recovery of national identities but no revival of nationalism as a destructive force making for international conflict.

These conditions promoted a rapid stabilisation of the new constitutional regimes. This process was underpinned by two important factors. One was the relatively widespread agreement on an economic and social order resting extensively on a free market and private property, but qualified by acknowledgement of a legitimate role for public authorities in the management of the economy and the maintenance of adequate levels of employment, investment and economic growth. The relative strength of the commitment to market methods as opposed to Government intervention in the economy varied from one country to another. But nowhere was a socialised command economy accepted, just as a return to a laissez-faire view of the state's role was everywhere ruled out. Of equal importance was the existence in most countries of multi-party conditions in which generally the parties proved far more willing than formerly to cooperate in sustaining the constitutional order. The one great exception to this was France, where blockage in the party system eventually provoked radical changes in the regime.

The outcome, particularly in Northern Europe, including the Federal Republic of Germany, was that the reconstructed constitutions were applied with success. Stable parliamentary government under coalition constraints became the norm. It was relatively easy to find consensus in societies committed to economic growth and generous social policies intended to protect everyone in the society to the maximum extent possible against the hazards of life. Naturally, it took some time for these developments to take shape and come to fruition. But by the early 1960s they were seen by many tc be the norm in Scandinavia, the Low Countries, the Federal Republic, and Austria. The same was largely true of Britain.

The mode of parliamentary government re-established after 1945 was one in which the parties were becoming far more important than the parliamentary institutions themselves. As a result parliamentary institutions have in many countries receded into the background, becoming little more than vehicles for the expression and transmission of the interests and opinions of parties. There was, however, one case in which restored parliamentary rule did not prove successful, France.

It is true that France was not the only country in which a restored parliamentary regime resulted in a high degree of executive instability. Italy also encountered these difficulties, but they did not prompt any serious challenge to the form of government as such, chiefly because a single party, the D.C., was dominant after 1947 and nearly all the parties, with the exception of the Communists, were prepared to enter into coalition arrangements if necessary. The case of France was, however, different. There the parties were collectively responsible for a level of executive instability which proved to be a severe handicap in the effort to resolve the very difficult problems of decolonisation which France then faced. Internal tensions increased and the regime lost respect in the eyes of its citizens. Nevertheless, though the objective pressures were strong, it is unlikely that the Fourth Republic would have been replaced by the Fifth had there not been an alternative political leadership available in the shape of de Gaulle

who, most crucially of all, had his own well-defined views of the kind of constitutional settlement needed in France.

The Fifth Republic, established under the constitution of 1958, expresses an unusual and so far successful compromise between a parliamentary regime and one which acknowledges an executive authority founded on popular vote. Admittedly, these different conceptions of how best to distribute authority amongst institutions were not clearly articulated in the original 1958 constitution, which was potentially more 'parliamentary' than 'presidential'. However, the 1962 amendment in favour of direct election of the President changed that position. Henceforth the President could claim a popular mandate and by virtue of that uphold a wide interpretation of the constitution's definition of presidential power and duties. It is true that in some degree a bicephalous executive has survived, with a prime minister dismissable under somewhat difficult terms by the National Assembly. However, with the exception of the period 1986-88, the majorities in the Assembly and those expressed by the popular vote for the President have coincided. As a result the executive authority of the President has been extensive,and he is widely accepted as the principal voice in government.

Along with the strengthening of executive authority there occurred a severe reduction in the authority and power of Parliament. The French National Assembly was subjected to a range of procedural limitations vis à vis the Government, and its legislative rights were curtailed in various ways.[12] Equally significant was the decision to make a parliamentary mandate and the holding of ministerial office incompatible, which in turn has made it easier during the past thirty years for a high proportion of ministers to come to office from the public service. To an extent without parallel in Western Europe, the constitution of the Fifth Republic has thus weakened parliamentary government, this process being accompanied by a considerable strengthening of the bureaucracy. This unusual attempt to reconcile what look like conflicting principles has

had widespread support in France, where the Fifth Republic appears to be firmly established. But it has found few imitators in Europe.

The constitution just discussed represents an effective response to an impasse created by the weakness of the executive authority. Reappraisals in very different conditions took place in the 1970s in Spain and Portugal. Here the problem was how to escape successfully from the constraints of long periods of authoritarian rule, by Dr Salazar in Portugal and by General Franco in Spain. It is impossible here to consider in detail the constitutional changes which occurred in both countries in the period 1970–76, and later. Portugal gradually made a transition from quasi-military and revolutionary rule to a form of government which embodies parliamentary and presidential elements. In Spain the transition to a new constitution was complex and cautious, in part because General Franco had made transitional arrangements for the years after his death, notably by providing for restoration of the monarchy. Since Franco and his movement were not without support, the transition had to be handled carefully. The new constitution of 1978 established a constitutional monarchy with full parliamentary government, and this has proved to be remarkably effective in accommodating Spain to conditions of competitive party politics, majority rule, and acknowledgement of an extensive code of basic rights. In addition the new constitution had to provide for a substantial degree of autonomy for the provinces of Spain, some of which were and are the source of demands which threaten the stability of the national state.

The constitutional reconstruction of Spain in the mid-1970s is one of the most successful examples known of an orderly transition from authoritarian to democratic rule. No doubt this success was due extensively to favourable conditions not experienced sixty years ago when Spain underwent a period of great instability. There was by 1975 a larger and more mature middle class, industrial development had made substantial progress, and there was in Western Europe as a whole an environment of stable democratic institutions which worked strongly in favour of a movement in the

same direction in both Spain and Portugal. Moreover, both countries quickly aspired to join the European Community, and it was a precondition of such a step that reasonably stable democratic conditions should exist. In January 1986 both acceded to the Community. As in the case of Greece, which joined the Community in 1981, membership became a powerful factor working in favour of the consolidation of the new democratic regimes.

Contemporary challenges and constitutional responses

During the past ten or fifteen years there are essentially three issues which have influenced constitutional development in some degree in most West European countries. The first is the call for decentralisation, the second is the pressure for more meticulous attention to human rights, and the third is the need to adapt to the continued erosion of the rights of the national states now within the framework of the European Community.

There is no single or decisive source of the call for decentralisation. In some instances it clearly stems from national minorities distinguished variably by language, culture or religion from the majority of the population. Examples of this kind are to be found in Great Britain, in Spain and in Italy. In Belgium too there is a similar problem, unusual in that it occurs in the shape of a division of the whole population into two communities distinguished from one another by language. Constitutional amendments in the fulfilment of earlier constitutional commitments have taken place in Belgium[13] and Italy to meet this demand for greater internal autonomy, the new Spanish constitution provided for a process of political devolution, whilst in France measures of administrative decentralisation were put into effect without constitutional change after 1981. Even in Britain, there were in the 1970s attempts to confer a degree of political devolution on Scotland and Wales, though these were ultimately unsuccessful and did not come into operation after adverse popular votes had been recorded in 1979. Whether constitutional concessions can accommodate the demands of minorities depends, however, on the extent to which the demands made are negotiable. In some instances, for

example in the case of Basque separatism, Corsican separatism, and Republicanism in Northern Ireland, the nature of the demands rules out a negotiated solution and agreement on acceptable constitutional amendments. This occurs because the minorities in question reject entirely the state of which they are part: their objective is unilateral independence.

In all Western societies sensitivity in respect of human rights has become greater. This process has to some extent also been accelerated by the consolidation of institutions at the European level, notably the European Community and its body of law, and the European Court and Commission of Human Rights in Strasbourg which operate within the framework provided by the Council of Europe and the European Convention on Human Rights (1950). As a result of these developments it has become possible for citizens and organizations to challenge their domestic jurisdictions in various ways by demanding that they apply the higher standards embodied in provisions to which their own states have acceded. Slowly and in a piecemeal way something like a European jurisprudence relating to the rights of individuals and private corporate bodies is taking shape.

The domestic response to these trends is variable. In France there has since 1974 been some strengthening of the Constitutional Council's powers to rule on the compatibility of proposed legislation with the constitution. There has too been the appointment of a 'médiateur' who functions as a type of ombudsman to whom individuals can appeal for redress of grievances. In West Germany, in contrast, it has not been deemed necessary to extend further the protection already afforded by the procedures of individual constitutional appeal, though in the face of modern data storage methods action has been taken to strengthen protection of the individual's privacy, and the ombudsman device has been set up by several Länder. The country most seriously affected by these pressures for an extensive and meticulous interpretation of rights is Britain. The reason for this is to be found not so much in the abuse of powers in

Britain or in real limitations affecting individual rights, as in the tensions produced by the impact of formalised principles and procedures on a constitutional tradition which is unwritten, informal and embodies the principle of parliamentary sovereignty. It has so far proved hard to reconcile these different approaches to rights protection - on the one hand specific, flexible and discretionary, on the other general, abstract, and often inflexible. No enactment of the European Convention into domestic law has occurred in Britain, despite the demands for such action which has been generated by the relatively large number of decisions by the European Commission confirming breaches of the Convention on Human Rights.

Thirdly, there is the need to adapt the nation state to ever closer integration in the European Community, an association now embracing twelve member states. So far it has been possible to achieve a large measure of economic integration without a serious clash between the Community and one or more member states, and without changes making it obvious to citizens that they are no longer subject principally to the exclusive jurisdiction of their domestic political authorities. It is possible that the 1985 legislation on the Single Market, the achievement of which is scheduled for 1992, will make qualitative changes necessary, though this is by no means certain. It is conceivable, for example, that the development of the Community might thereafter be arrested at a stage which could be designated economic integration by cooperating quasi- sovereign states. In that event no immediate constitutional reappraisal would be necessary either by member states or by the Community as a whole. On the other hand, such an outcome to a process dedicated to 'closer union' appears to be unlikely. The integration process has so far been dynamic, and has already affected many sectors of social life which are not in a narrow sense part of the economy. The urge to harmonise will remain strong,and there will continue to be a demand to subject the Community institutions themselves to more effective democratic control. It is, therefore, likely that the nation state will face a continuing erosion of its domestic sovereignty, and for that reason will need to consider seriously both its own internal constitutional adaptation to changed

external circumstances, and the extent to which changes are required in the Community's institutions to take account of the accumulation of powers at that level.

Reappraisal in a New Age

The constitutional reconstruction of post-1945, along with later exercises in construction and reform in Western Europe, present a series of remarkable achievements. Superficially at least the extent of success can be seen in the way in which constitutional conflict has diminished or vanished altogether in many states. Broadly speaking, the whole of Western Europe is committed to democratic government, protection of basic human rights, and the pursuit by the political authorities of a high level of economic well-being and social security. There are disputes about how best to pursue the economic and social objectives, some arguing for more reliance on market relationships, others pressing for more stress on public service provision and regulation. But these are for the most part differences in degree, and not of principle, and this has been confirmed by the revival of market-oriented economic policies in the 1980s. Far from stimulating a reinforcement of socialist doctrine, this phase has accelerated the decline of genuinely socialist arguments and proposals: the social foundation for Western constitutionalism remains managed capitalism and a socially conscious market.

Under these conditions it is doubtful whether Europe faces the challenge of a radical reappraisal of prevailing constitutional forms amd methods. It appears likely that present support for a democratic political order, committed extensively to consensus, and sensitive to the individualist emphasis on the sanctity of private rights and claims, will persist. There are, however, some features of present circumstances which may prompt a search for constitutional change, and in this concluding section these will be presented briefly. It should be noted immediately that the matters to be raised point in different and conflicting directions, thus making the task of reappraisal especially difficult.

(i) There is some uneasiness in the face of the impersonality and remoteness of governing institutions. Often this is expressed as a complaint against bureaucracy and

its defects. A variety of responses is possible; one is to strengthen responsibility of political officeholders, another is to decentralise, and yet another is to widen individual participation. Arguments have been advanced in many countries for all these possibilities. The crucial difficulty lies in reconciling the demand for responsive, non-remote government with the imperatives of efficiency in modern large-scale social organisations. No satisfactory solution to this dilemma has been found, except perhaps in relatively small societies such as Switzerland which are internally highly differentiated. But the creation or reproduction of such conditions is difficult and, as a rule,impossible.

(ii) There are signs of something approaching hyper-sensitivity in respect of individual rights, an attitude accompanied by a tendency to underrate both individual duties and collective social benefit functions. This strong emphasis on individual claims is proclaimed in the subjectivist and individualist premises of much modern political theory, especially that proceeding from the Anglo-American tradition. It is an approach that renders many forms of collective action difficult or impossible. This may turn out to be a matter of especial significance in relation to the protection of the environment and similar issues, all of which have now become matters of urgency. Yet it is difficult to tackle such problems on an individualistic basis: the environment encloses us all and its protection, along with conservation of natural resources, may well call for the acceptance of constraints currently regarded as incompatible with the standards of human freedom and economic well-being to which we aspire.

(iii) Pointing away from the two previous issues is the future evolution of supra-national institutions and relationships. The dynamics of economic integration has been in favour of economies of scale, and a remarkable degree of concentration across national boundaries has already occurred. Economic integration has called for appropriate supra-national institutions, and holds out the prospect of further development towards political integration in Western Europe. Yet this, if it takes place, is almost certain to magnify the problems of remoteness and large size of governmental institutions. This cannot be reconciled easily or completely with the stress on individual

rights and participation referred to above. There is too in relation to the evolution of the European Community an external imponderable. Profound political changes are taking place in central and Eastern Europe, pointing towards democratisation, protection of human rights, and rejection of the monopoly power of the state inherent in post-war communism. This is bound to have implications for the European Community, pointing perhaps towards a need to arrest its further consolidation as a political bloc sharply demarcated from its neighbours to the East.

(iv) Finally, it needs to be recognised that stability and prosperity have brought risks for the quality and standing of political elites. Broadly speaking, what has happened is that politics as an activity has been thoroughly professionalised, becoming the specialised concern of parties and their most active members. The professional politician does, however, live under the imperatives of democratic politics in pluralist societies. This means that he (or she) can rarely offer leadership, but has instead to give priority to adjustment, compromise and consensus formation. Whatever the practical benefits of such an approach to political activity may be, it rarely offers inspiration or commands enduring respect. Furthermore, the democratic politician who lives off rather than for politics is exposed to temptations of a material character which constantly threaten his reputation and standing:[13] the ease with which in some countries the dominant political elites vote themselves financial privileges makes them sitting targets for public disapproval. Overall, the result is that the standing of the contemporary professional politician is not high. This in turn may increase the susceptibility of the mass electorate to the attractions of personalities and political movements with unconventional programmes and claiming to stand for completely different values from those advanced by current professional party politicians.

The incidence of this phenomenon varies greatly, and it is in addition much influenced by specific problems and circumstances. A recent example in several countries is the level of foreign immigration. Nor is it certain that constitutional measures can usually deal with the problems just referred to. However, at the very

least there may in some countries be a case for re-appraising the position of the professional in politics and, more generally, of the privileges conferred on parties. To command respect, the professional politician should not enjoy too high a level of job security, and equally there is no strong case for relieving parties of the need actively to gain and keep members and their financial contributions. The Greeks were perfectly familiar with the descent from democracy into oligarchy. This development may have gone some way in contemporary Western Europe and, if so, this would justify an effort of constitutional reappraisal.

July 1989.

Footnotes

1. Carl J. Friedrich, The Political Theory of the New Democratic Constitutions, in Constitutions and Constitutional Trends since World War II, edited by A J Zurcher, New York, 1955, p.34.

2. The most comprehensive treatments of the politics of the Fourth Republic is provided in P M Williams, Crisis and Compromise: politics in the Fourth Republic, London 1964.

3. For a detailed account of the drawing up of the Basic Law see J.F. Golay, The Founding of the Federal Republic of Germany, Chicago, 1958.

4. The phrase 'consociational democracy' came into common currency in the 1970s, and this owed much to A.Lijphart, The Politics of Accommodation; pluralism and democracy in the Netherlands, Berkeley, 1968.

5. A good general survey of Italian political methods is to be found in G. di Palma, Surviving without governing; the Italian parties in Parliament, Berkeley 1977.

6. Arts. 63 and 67, Basic Law.

7. It was one of the conditions laid down in the 'Frankfurt documents' of July 1948 that the new West German constitution should be federal in character.

8. Art 79(3), Basic Law.

9. For a detailed account of the West German federal structure, see N. Johnson, State and Government in the Federal Republic of Germany: the Executive at Work, Oxford, 1983, Chap.5.

10. These words appear in the Preamble to the Treaty of Rome, 1957, establishing the European Economic Community.

11. B Verf GE 6, pp 55-84.

12. Constitutional amendments in 1970 and 1971 established three regions and two Cultural Councils in Belgium, these to be the basis for a considerable internal decentralisation.

13. The distinction between living <u>for</u> and living <u>off</u> politics was made famous by Max Weber, notably in the lecture Der Beruf zur Politik, 1919. The distinction is made in many other passages in his writings on political sociology.

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PARLIAMENTARY CRISIS AND HOW TO STRENGTHEN DEMOCRACY

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Klaus von Beyme

PARLIAMENTARY CRISIS AND HOW TO STRENGTHEN DEMOCRACY

1) Constitutionalism and parliamentary system

There was a crisis of parliamentary systems between the two world wars and the new constitutions after 1945 reacted - and sometimes overreacted - to this crisis. The foundingfathers of the new Republics in France, Italy and Germany constitutionalized the parliamentary system which had developed under the old regimes (Belgium 1831, Netherlands 1815, Norway 1814, Sweden 1809, Italy, Statuto Albertino of 1848) inspite of a more dualistic constitution which did not recognize the supremacy of parliament.

The new constitutions were obsessiveley concerned with avoiding the inter-war crisis of parliamentarism and materialized some of the theories on the "rationalization of parliamentarianism" discussed in many countries on the continent since the old debate launched by Redslob on the authentic (e.g. British) and the phony (e.g. the French) forms of parliamentarianism. France was an exception because it reproduced in the Fourth Republic (1944-1958) a still more liberal and democratic replica of the Third Republic (1871-1940). Only with de Gaulles access to power an extreme rationalization of parliamentarianism took place in France. René Capitant and Michel Debré had developed the French version of a rationalized parliamentary system already under the Fourth Republic. It took shape in 1958 in a process which was completely dominated by de Gaulle's executive without major involvement of parliament.

The communication which took place was rather between the executive and the people than between the traditional two major powers in the parliamentary system. This process which led to the Fifth Republic of France was the result of the only major crisis of parliament which can be traced in post war Europe (except Greece in 1967). But the parliamentary crisis was only a minor aspect of a system's crisis, unable to cope with the problem of decolonization. It is most likely that de Gaulle, having solved the Algerian problem, could have as well governed with the constitution of the 4th Republic with the only difference that he might have prefered to withdraw from the post of a prime minister to that of president of the republic with much less power than under the constitution of 1958. The later crisis of 1969 showed, however, that even the power of a president under the semi-presidential system of the 5th Republic was rather limited. In France there remained alive a certain nostalgia for the "true parliamentary system" of the 4th Republic, but it gradually withered away. Mitterand - once a forceful opponent of de Gaulle's system was aptly using it for his own purposes. He completely abandoned the former concept of his Socialist Party for reparliamentarizing the system. (cf. von Beyme, 1987, pp. 56ff)

De Gaulle's return to the semidualist system was less inspired by the presidential system than by the Orleanist-type pre-parliamentary constitutional dualism. Under de Gaulle, the claim to have a monopoly of representing the nation occasionally led to the sort of phenomena which had once made politics difficult in constitutional monarchies: for instance, when the majo-

rity in parliament felt itself to be in opposition. In a pure parliamentary system, the sort of opposition which the president of the Senate, Monnerville, tried to organize in 1962 would be scarcely conceivable.

It was not until the parliamentary election of March 1986 that there was once again talk of a new crisis in the semipresidential system. The UDF and RPR together wanted to do a 'Macmahon' on Mitterand. Using the historical precedent, they threatened that in the event of their victory, he would have to 'se soumettre ou se démettre' (yield or resign). The 'cohabitation' of different majorities would be made impossible right at the outset by individual components refusing to cooperate in a coalition. That, in turn, represents the beginning of a renewed discussion on the possibility of transforming the Fifth Republic into a full presidential system. This is precisely what earlier experts regarded as impossible. To begin with, no less an authority on France than Stanley Hoffmann regarded the regime moving back towards a parliamentary system as more likely. However, the 'internal logic of the system' was often put forward as an argument in favour of 'presidentializing' it. The 1981 change in power appeared to have halted this development. In 1964, Mitterand had branded the gradual expansion of the powers of the President as a 'permanent coup d'état'. (Mitterand, 1984) As of 1974, the candidate of the Left has adjusted one step at a time to the presidential idea and the supremacy of the President. (Duhamel, 1980, p. 279) Since 1981, he has even reacted in a more Gaullist fashion than de Gaulle himself over certain

issues. For the eventuality of two hostile majorities, even the Socialists are, once again, beginning to reopen the discussion on complete 'presidentialization' of the system. Without showing any enthusiasm for the American system, Guy Mollet (1973, p. 150ff) had, in resignation, once suggested removing the hybrid element by letting the people choose between two models, a parliamentary one and a presidential one - a well-meaning proposal but one which could certainly have demanded too much of the people and could, under certain circumstances have left the decision regarding the system to short-lived majorities. The left wing, as represented by Pierre Mauroy (1985, p. 14), is still strictly against a full presidential system. The electoral reform of 1985, a return to proportional representation in Parliament, on the other hand, could be seen as a step towards parliamentary government, but the decision was revised after the victory of the gaullists during the next elections.

In all the other European countries more or less traditional forms of parliamentarianism took shape. Some systems modernized their constitutions rather late such as Sweden (1971 and 1975) in order to diminish the power of future monarchs. Others launched a debate on modernization and rationalization such as Italy. But in Italy it was predominantly the Socialists who launched the debate about a change in the system. Reform of electoral law, a unicamerial system (as introduced by Denmark and Sweden after 1945) and the popular election of the President of the Republic along the french model were demanded. (Amato, 1982) The critics (Pasquino, 1982) did not hesitate to

show that these propositions were mainly in the interest of the smaller coalition partner in government, such as the Socialist Party under Craxi. They are neither in the interest in the two major parties (Communists and Christian Democrats) nor in the interest of the minor parties such as Republicans, Liberals and Social Democrats. This is the major reason why the debate will go on without effective results and constitutional amendments.

All the rest of the parliamentary systems have introduced minor changes in the rules between the powers of parliamentary systems. One of the largely overrated attempts to rationalize parliamentary systems was the German constructive vote of non-confidence, imitated by Spain in 1977. This provision was a typical reaction to the problems of the Weimar Republic without knowledge of the forthcoming problems of the Republic of Bonn. Where the mechanism of confidence was involved to topple a government (1972 against Brandt without success, 1982 against Schmidt successfully) the provision showed rather detrimental sides. It forced the coalition partner who wanted change to conspire behind the back of the acting Federal Chancellor and contaminated the climate among the coalition partners. At best it was superfluous because of the considerable concentration of parties in the system. Both Germany and Spain ended up with 4 major parties inspite of much fragmentation at the fringes of the party system and the new social movements.

Constitutional rationalization of parliament proved to be unnecessary, because most of the governments are no longer toppled by the shifting parliamentary majorities. The author

(von Beyme, 1985, p. 329) has demonstrated that 1947-1983 only 20 governments in Europe fell because of a vote in parliament. The major reasons for cabinet disintegration were elections (143) and change of coalitions (81). Parliamentary systems - compared to pre-war times have democratized. Elections - as they should - have become the main reason for governmental change. Parliamentary oligarchies are still existent, but less powerful than they used to be. Governmental stability - always endangered in the early periods of parliamentarianism (figures in von Beyme, 1973, pp. 875ff) has increased. Only extremely fragmented multiparty systems such as Finland, Italy (and for ethnic conflicts Belgium) show little government stability of about one government per year (Belgium one and a half), whereas the average is about 30 months. (von Beyme, 1985, p.331) The most important developments away from the crisis of parliaments in the pre-war years are not the constitutional arrangements for limitations of the parliamentary principle, but are the changes in the party power structure of parliament.

2) The changing power structure within parliaments: the parliamentary groups

In some constitutions - especially in Lutheran countries such as Denmark and West Germany - the representative principle is explicitely written down to defend deputies against imperative mandates. This defense was directed against mass pressure in the constituency or lobby pressure from organized interests. But it did not apply to the pressure from the party outside parlia-

ment which was able as well to enroach on the free conscience of parliamentarians.

In the days of the older parliamentarianism there was since Duverger (1977) the assumption that the preponderance of parliamentary groups outside parliament depended on the genesis and social background of the respective party: bourgeois parties developed within parliament knew a hegemony of the parliamentary group - socialist parties, on the other hand, rather a preponderance of the Weltanschauungs' Party outside parliament. The differences have withered away. In Socialist parties parliamentary groups gained in power. In bourgeois parties, - especially among the Christian Democrats, less so among conservative parties - the party outside has been strengthened with growing importance of members, party conventions and party democracy.

The development of the Parteienstaat or partitocrazia may have weakened parliament as a whole, but has strengthened cabinet stability and the capacity for continuous state intervention on the lines of a coherent programme. The question of how to strengthen democracy cannot be answered unless we know the internal power structure in the parties and parliamentary groups which streamline parliamentary decisions. It has been rightly suggested by experts that we should use as our units of analysis not Parliament as a whole or even parliament minus the government but rather these party grouping and/or combinations of them.(King, 1976, p. 13) In modern parliamentary systems there are very few decisions made on a non-party basis, such as "free votes" in the House of Commons (Richards, 1972), or "non-party" or all-party committees of one sort or another where the back-

bencher behaves more like an American congressman, for whom the executive-legislative dualism is sometimes more important than the party dimension. In those rare committees the back-bencher may feel free of party bias and so be able to confront government: "you can get the minister and grill him - grill him in an all-party atmosphere".(King, 1974, p. 101) But in general the partisan dimension is the most important unit of analysis of behaviour in parliaments. There are now few parliaments where individuals, minorities or even parliament as a whole have considerable importance vis-à-vis the government, and where the centres of parliamentary decision are dispersed to the extent, say, of the Italian parliament. (Di Palma, 1976, p. 150)

Democratization of parliaments developed concomittantly with party penetration. This meant in most cases increasing influence of the parties outside parliament on parliamentary decisions.

The development of the Parteienstaat, which, according to some German theories, made the old system of liberal representative democracy an obsolete form of the parliamentary system (Leibholz, 1967, p. 93), has indeed shifted the balance of power in all modern mass parties. This is all the more so as the party system has become more concentrated in the post-war period, and as the bourgeois parties have become modern "catch-all parties" without restricting themselves to certain social or religious groups. The most notable example of such a party is certainly the CDU in Germany, which can be called the first authentic "Volkspartei" in Western Europe.

The development of social democratic parties in northern Europe, from the ghetto of working-class sub-culture to the modern catch-all party which attracts more and more groups from the middle class and the intelligentsia, has also contributed to a shift in the power balance. Again, West Germany is frequently suspected to have developed the most outspoken Tweedledee-Tweedledum party system. And if we compare the statutes of the two biggest parties in that country, the internal provisions for the relationship between party and parliamentary groups are almost identical: the social democrats make the parliamentary group responsible to the central institutions of the party only in a very indirect way (§ 20) and the Christian Democrats appear only slightly more in favour of the autonomy of the parliamentary group: "resolutions of the party conventions and the program" are "**the** basis of the work of the CDU parliamentary group". (Flechtheim, 1973, pp. 360, 364) Similar statements can be found in the statutes of most other social democratic parties.

In northern Europe one sometimes finds greater differences between the formulation of the rules by bourgeois parties on the one hand and by social democratic parties on the other hand. The precarious equilibrium between party and parliamentary group, attributed to a middle stage of development in Duverger's typology, is formally stated in party rules such as those in the statutes of the Finnish Centre Party, where "common deliberations of party delegations and the parliamentary group on the governmental policy" are prescribed. (Nousiainen, 1969, p. 36) In Switzerland the Conservatives clearly emphasize a complete

autonomy of the parliamentary group, whereas the Social Democrats since 1966 have provided only a certain autonomy for the parliamentary group within the general resolutions of the party congress of the party leadership (art. 21).(Gruner, 1969, p. 205)

In the post-war period, a clear and global tendency towards the parliamentarization of formerly anti-parliamentary groups has continued to take place. Mental reservations against the majority principle of parliamentary government were to be found in the programmes of some conservative of Christian parties (such as the Christian Historical Union in the Netherlands) even after the war. The socialists meanwhile adapted to parliamentary government step by step via the "ministerial socialism" of individual socialists in bourgeois government up until the complete takeover of governmental responsibility. Parliamentary socialization has integrated even those parts of the more radically minded socialists in the governing socialist parties. Surveys among the younger rebels in the parliamentary groups show that these usually dropped out of parliament or gave up certain ideas of the direct realization of the "public will" as formulated by groups in the electorate outside parliament. (Badura/ Reese, 1976)

Recent surveys of parliamentarians show that to some extent Duverger's typologies are still viable. In a polarized party system such as that of Italy, the communist MP is party-oriented in his activities and attitudes while the Christian Democratic deputy looks towards parliament and his parliamentary group rather than towards his own party.(Leonardi et al., 1978, p. 173) This does not mean, however, that the bourgeois parties are completely concentrated on within-parliament information systems;

but, as surveys in other countries demonstrate, their channels of information are less closely connected with the extra-parliamentary party than with interest groups and administrative agencies. Empirical inquiries into the attitude of parliamentary deputies towards the parliamentary groups show that the representatives of bourgeois parties usually demand greater independence from the parliamentary groups (not only from the party outside), and tend to emphasize the "free mandate" even more than do the social democrats.

Nevertheless, occasional surveys are not capable of verifying for once and for all the global typologies concerning the relations between parties and parliamentary groups. Clear changes have to be taken into consideration which make these typologies less useful, and which need further differentiation of the hypotheses. According to the abovementioned figures for Italy, the political parties as primary sources of information for the deputies do not show such considerable differences (PCI, 100 per cent; DC, 71 per cent) as must have existed when the Communists were still a party that reluctantly participated in parliament, and when the predominance of small cliques of Christian Democrats was so unbroken that the mass mobilization of the party outside parliament seemed to be less necessary.

The more evident orientation towards the party of deputies of workers' parties may, in many cases, cause frustration and disenchantment. In Britain only 18 per cent of Labour deputies (as against 80 per cent of the Conservative party) saw their party head office as a major source of information. The remainder were considerably dissatisfied with the information service

and research support that was provided.(Barker/ Rush, 1970, p. 234) Nor is it likely that the help given to Conservative deputies is very much more superior to that in the Labour Party: Conservatives simply expect less, and are therefore less often disappointed.

Surveys in other parliamentary systems have given more emphasis to the hierarchical structure of information. In multi-party systems such as in the Netherlands the smaller parties have so little help from their head offices that they have to rely to a greater degree on private sources and interest groups. The larger parties are run mainly by party specialists who rely heavily on a few extra-parliamentary actors as well as on expert knowledge. (van Schendelen, 1976, pp. 231-50) This hierarchical structure of information and activity is overlooked in some "incentive studies", which explain political behaviour in terms of "strong inner needs". (Woshinsky, 1973, p. 3)

The question of how to strengthen parliament implies among other things the pluralization of information. This has certainly increased since the development of new social movements. Also deputies under pressure of party discipline have more communication with groups outside the parties proper. Within his party the tendency to form wings and opinion groups has increased as well. All the major catchall parties have shown this in the 1980s, most strikingly the German SPD.

Oddly enough the ecological parties have tried to impose the most rigorous restrictions to individual behaviour among their deputies by the device of rotation in office and limita-

tions to the income of deputies. This has strengthened the collective bodies enormously and given the parliamentary group considerable power over their members because the deputies financially and organizationally are more dependent on their party than deputies in traditional parties.(Fogt, 1983) This practice has, however, generated counterveiling forces within the ecological parties. Correntocrazia and internal party strife develop more disintegrating force than in other groups.

3) Democratization of parliamentary systems by oppositions?

The hopes of many liberals, radicals and libertarian socialists to democratize parliaments via strengthening the individual deputy were doomed to failure under the conditions of the party state. The "decline of parties" did not take place. If the parties lost members in some countries, and party identification was declining in many countries - though less strikingly in Europe than in America - they were able to strengthen their roles in elite recuitment and policy formulation. Both functions predominantly take place in parliament.

Not even referenda - except in Switzerland which has no parliamentary system - were able to break the power of party machines. Italy is the most striking example. The people in the 1970s and 1980s in most referenda decided as they were told by their respective parties. Attempts to kill progressive parliament bills as in the case of divorce and abortion failed. Even unpopular institutions such as public subsidies for the parties were not revoked by popular decision. Hopes for counter-

legislation by the people were also doomed to failure.

The only way to democratize parliament and the dominating parliamentary majorities and governments was to increase responsiveness to popular demands from below. Extra-parliamentary oppositions and new social movements were more successful during the 1970s and 1980s than ever in the history of parliamentarism.

New oppositions, even when they think of themselves in terms of fundamental oppositions have more impact on parliamentary decisions than in the early periods of parliamentary government. The Greens were harrassed by a lot of petty impediments from the part of the party establishment when they first entered parliament. But nevertheless they integrated fairly quickly into the system. In cases where vital issues were at stake they entered informal coalitions. On the German Laender level they entered so far twice even a formal coalition. (Hesse, 1985, Berlin 1989)

The ideological zeal of an opposition is sometimes shaped by its ability to influence legislation. This ability is least developed in the Westminster model of a winner-takes-all situation. Especially after a landslide victory of the government party, such as Mrs Thatcher had in 1983, the opposition tends to be demoralised. Labour attendance in the Commons these days is so poor that it is beginning to worry even the government Whips, and Labour Whips appear to have difficulty in finding speakers.(Hattem, 1984) Loose talk about "post-parliamentary democracy" is possible only in countries with a weak opposition. Fortunately the British public still rates Parlia-

ment very highly because it does not differentiate between the formal and the real powers of the House.(Norton, 1981, p. 245)

In studying the impact of ideological orientations we have to concentrate our analysis on the aspect of programme realisation in parliament. Here, just as in the electoral arena, oppositions tend to concentrate on a couple of issues dear to them. Specialisation in debate has been studied for Denmark. (Damgaard, 1977, p. 205) The results in a multi-party system with a high degree of fragmentation can hardly be generalised, however, since the Danish party system encourages parties to concentrate on a few issues per se.

The high degree of specialisation especially for opposition parties is also functional to party interests with regard to the electorate. It has been stated that emphasis on more than six or seven issues creates confusion, rather than adding to electoral mobilisation. (Budge/ Farlie, 1983, p. 15) This observation also holds more or less true for oppositional parliamentary behaviour. It is less adequate with regard to the exercise of control powers. Here the oppositional parties can use all the issues available to inquire, to investigate and to try to mobilise by criticising the government. In most parliaments, however, a good deal of the opposition's control power is given away, because of the tendency of opposition parties to expand issues to general discussion, as demonstrated in the debates on the annual budgets. This has the side-effect that the bureaucracies responsible for the accounts are increasingly more effective in controlling the governments than the oppositions. The

oppositions are - in this case - also handicapped by the fact that 95 per cent of most budgets are not open to annual changes, even if the oppositions win their argument. The opposite handicap of oppositions - such as in France - lies in too much centralisation in the distribution of parliamentary seats. The French "parachutés" sometimes strengthen localist aspects of the debate in order to gain profile in their constituency. The general powerlessness of parliament also affects localist interests of opposition parties which fail to control government in its major policy orientations. (Birnbaum, 1977, p. 34ff)

In the times of modernisation euphoria, the planning functions of parliament were widely discussed. To the benefit of the oppositions, not all of the ideas for a parliamentary involvement in planning were implemented. The exercise of the legislative powers of oppositions demands a much greater concentration on a few issues, simply because the amount of work oppositions can undertake is limited, and because the help of parliamentary staff can not substitute for the direct and indirect help which the bureaucracy gives to the parties in power. The party system and its structure is an important intervening variable here. In a quasi two-party system or in a net division of the political arena into two political camps (Scandinavia, West Germany; Austria is an exception), the opposition usually has greater incentives to introduce counter-proposals to government initiatives than in the consociational climate of a multi-party system with its blurred boundaries between the ruling coalition and the temporary opposition.

The more ideologically-minded the opposition is, the more it tends to apply a "holistic" strategy of counter-bills, which are alternative in every aspect, as was the case with the SPD under Schumacher. With its growing integration into the political system the zeal of the SPD for using legislative initiatives as an instrument of opposition was largely weakened. During their time in opposition the Christian Democrats (CDU) preferred to use their power to initiate calculated inputs by amendments to SPD bills and - especially during the phase of the withering away of Chancellor Schmidt's majority after 1980 - did so with remarkable success, usually concentrating on projects in economic and social policies.

Sometimes the opposition has to be co-operative, however, even in the use of its amending power. Usually it does not press too many amendments in order not to force the governmental coalition to abandon the relevant project altogether, to avoid taking the blame for the failure to resolve an urgent problem.

Especially with regard to the legislative function, co-operative opposition is a widespread phenomenon, a fact which renders the older dualist typology of co-operative and competitive oppositions irrelevant. The great majority of all bills in parliaments are passed unanimously or almost unanimously. In Germany it can be shown that bills whose content is close to the ideological core beliefs of the parties, for example concerning the distribution of wealth or additional rights of participation, can expect less co-operation in the legislative process from the opposition. Even those oppositions which are dubbed "unfair" by Sartori, like the Italian Communists, have

joined ranks with the Christian Democrats to support some three-quarters of legislation.(Cazzola, 1974, p. 99)

Is this "irresponsible" opposition? In many parliamentary systems highly competitive opposition parties show traits of "parliamentary co-government" in times of crisis: in Italy during the time when Moro was held a prisoner by terrorists, in Germany from the building of the Wall in Berlin to the Schleyer incident.

In multi-party systems the differentiations between oppositional attitudes are much more difficult to identify. Even parties in government are partly in opposition with regard to some issues. In a political system with proportional government, like the one we find in Switzerland, issues structure areas of conflict. Sometimes occasional oppositional attitudes of parties in government can be found only by studying the behaviour of the parties during the referenda in the various cantons. (Kern, 1981) What has been dubbed the "helvetic malaise" is partly caused by the two-way possibilities of initiating legislation which encourages the blurring of opposition and government parties and invites occasional oppositions on many levels.

Oppositions in the post-modern parliamentary system - postmodern being recently applied for non-hegemonic systems with power dispersed (Rose, 1988, p.2f) - are more quickly integrated into the system than in earlier periods. What they lose in thrust towards rapid change they gain in influence.

New parties were earlier acknowledged as having Koalitionsfähigkeit - the ability to form coalitions - than older ones. To reach this status took the Communist and right-wing parties, e.g. the Austrian Liberal (FPÖ), decades. On the Land-level the German Green Party has already been partly accepted after only a couple of years. Even though the new oppositions, like, for example, the Greens, were initially discriminated against by denying them their fair proportion of committee seats or by applying against them the whole rigour of parliamentary rules which are rarely evoked in cases of poor discipline by deputies of the established parties, they have become candidates for coalitions in a much shorter period of time than used to be the case. Political systems learns with regard to new oppositions: some SPD members claim that a coalition with the ecologists is necessary for socio-therapeutic reasons, i.e. to further an integration process. (Heptner, 1985, p. 12) Considerations of this kind apparently motivated Mitterand to accept the Communists in the new government coalition in 1981, though he did not need them for a parliamentary majority. Inspite of a lot of noise in some European parliaments, oppositions have not only broadened but have also become more rapidly integrated as well. All the forecasts prophesying transformations of the political systems have proved to be premature, even in cases when national party systems did not gravitate back to normalcy, as in Denmark in contrast to Norway.

Conclusion

(1) The constitutionalization of parliamentary systems mainly responded to the crisis of parliamentarianism between the two world wars. This crisis - such as occasional crises in the post-war periode (in France 1948, in Greece 1967) were not caused by the parliamentary crisis.

Social scientists increasingly abandoned the legal zeal for rationalizing parliamentarianism in order to make it workable. It became workable not because of new rational constitutional devices but through the acceptance by all the relevant parties - the Communists not excluded. Party concentration in many countries, most striking in Germany, France and Spain overcame former deadlocks in the system. Highly fragmented systems such as Belgium, Finland and Italy compensated the weakness by oligarchic partitocrazia.

Some countries recognized a crisis of the system. It was most frequently perceived as a crisis of the party system, hardly as a crisis of the parliamentary institutions. Where changes are being discussed, such as in Italy, they do not touch the core of government - parliament relations. In most countries there is little inclination to imitate a semi-presidential system such as created by de Gaulle in France in order to streamline the parliamentary system.

(2) Changes in parliaments are created by shifts in the power structure of parties, rather than by individual institutions forming part of the parliamentary system. The party state penetrated the parliamentary systems. Individual deputies are more

subject to party discipline than ever. There are, however, still differences in the degree of independence in the information system of the deputies among bourgeois and worker's parties. Even the Green parties inspite of their libertarian outlook have created more dependence of their deputies on the parliamentary group and party conventions than the conventional political forces.

(3) Democratization of parliamentary groups did not work out via strengthening the individual deputies and securing constitutionally his independence. Also the hope to break the power of party machines in parliament via referenda as a kind of counter legislation did not work out. Where the instrument is used frequently the majorities in the referenda largely reflected the majority in parliament (with the exception of Switzerland, which has no parliamentary system).

The greater impact of new oppositions is the most effective way of strengthening democracy. New oppositions are more quickly integrated into the systems than ever before, and they use a policy-mix of opposing amending, and cooperative strategies.

Inspite of many prognoses that parliament and the established parties in it will be weakened it remained the most important arena for decision making, though most of the decisions are preformulated first at the level of party conventions, coalition agreements and later in cabinets and ministries. But modern parliamentary systems are no longer judged by the model of separation of powers. They are an interlinked system in

which government has mostly the predominant position, but only as long as it commands a parliamentary majority.

Neither corporatism and the big interests nor the social movements have made parliaments superfluous. Many of the theories on the crisis of parliament start from too simple a theory of representation and overlook the multitude of forms of participation, representation and governance in a modern society.

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Les Cours constitutionnelles et les droits individuels

L'un des événements majeurs, ayant marqué le constitutionnalisme, en Europe, depuis une quarantaine d'années, est certainement la création et le développement des Cours constitutionnelles, création et développement qui ont été largement motivés par le souci de protéger les droits des individus contre un pouvoir trop puissant et de limiter les prérogatives de majorités parlementaires et gouvernementales susceptibles de porter atteinte à ces droits.

Historique : naissance et développement de la protection des droits individuels par les Cours constitutionnelles.

Le phénomène de croissance de la justice constitutionnelle s'explique par la fin du dogme de la loi protectrice des libertés des individus. En effet, depuis la Révolution française de 1789, il était considéré, en Europe, que le législateur agissait toujours dans l'intérêt des individus et qu'il était infaillible ; le législateur, protecteur naturel des droits des individus, ne pouvait être soupçonné de porter atteinte à ces droits. Ainsi, à la différence de ce qui se passait aux Etats-Unis, la loi expression de la volonté générale (1) ne pouvait être soumise au contrôle des juges ; et les diverses tentatives d'implantation du système américain de contrôle de constitutionnalité en Europe, avaient échoué. On peut résumer l'état du droit existant de chaque côté de l'Atlantique, jusqu'à la seconde guerre mondiale, par la

1 Selon la formule de J.J. Rousseau, reprise à l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789.

formule suivante : aux Etats-Unis, la *Constitution* est sacrée ; en Europe, c'est la *loi* qui est sacrée.

Le dogme de la loi protectrice des libertés a été ruiné et détruit par ce qui s'est passé en Allemagne et en Italie au cours des terribles expériences nazie et fasciste : les législateurs de ces pays, loin d'être des protecteurs des libertés, ont souvent permis que soient portées de graves atteintes à celles-ci. Les leçons tirées de ces expériences, en Europe, sont les suivantes : les individus doivent être protégés non seulement contre les actes de l'administration mais aussi contre la loi ; et comme en Europe, les tribunaux ordinaires refusent de contrôler la loi, il faut créer un tribunal spécial pour assurer ce contrôle. D'où la mise en place des tribunaux ou cours constitutionnelles qui va se répandre dans divers pays à partir de 1946.

En fait, la création des cours constitutionnelles ne se fait pas à partir de rien : le modèle a été mis au point entre les deux guerres, notamment sous l'influence de Hans Kelsen, et des systèmes ont déjà fonctionné. En effet, dès 1920 ont été créées la Cour constitutionnelle tchécoslovaque (Constitution du 29 février 1920) et la Haute Cour constitutionnelle d'Autriche (Constitution du 1er octobre 1920). Et l'Espagne républicaine créera, à son tour, un «Tribunal des garanties constitutionnelles» en 1931. Contrairement à ce qui est parfois affirmé par certains auteurs, ces institutions ont fonctionné effectivement (1) et ont eu une jurisprudence : leur existence n'a donc pas été seulement théorique.

Après la seconde guerre, l'Autriche est le premier pays européen dans lequel fonctionne une justice constitutionnelle : en effet, une loi constitutionnelle du 12 octobre 1945 établit la Haute Cour constitutionnelle dont l'activité avait été suspendue le 13 mars 1938. La République fédérale d'Allemagne va ensuite créer un Tribunal constitutionnel fédéral (ainsi que des cours constitutionnelles dans les Lander) par la Loi fondamentale du 8 mai 1949 ; et ce tribunal sera mis en place par une loi du 12 mars 1951. En Italie, la nouvelle Constitution du 27 décembre 1947 institue une Cour constitutionnelle mais celle-ci ne se mettra en place

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1 Sur ce point, cf. P. CRUZ VILLALON,

qu'en 1956, après que le Parlement ait enfin réussi à désigner les derniers cinq juges. En 1958, la nouvelle Constitution française du 4 octobre prévoit l'existence d'un Conseil constitutionnel qui -même si au départ il n'a pas été conçu comme tel- deviendra progressivement une Cour constitutionnelle. La Constitution turque de 1961 crée une Cour constitutionnelle qui sera mise en place par une loi du 22 avril 1962. Et il en ira de même en Yougoslavie, avec la Constitution du 7 avril 1963 qui institue une Cour constitutionnelle fédérale et des Cours constitutionnelles au niveau des Républiques fédérées.

Après cette première «vague» de créations des années cinquante et soixante, une deuxième «vague» se produit à la fin des années soixante-dix et au début des années quatre-vingt : il s'agit essentiellement de créations intervenant soit dans des pays ayant mis fin à des régimes de dictature (Portugal, Grèce, Espagne) soit dans des pays de l'Est (Pologne, Hongrie). Au Portugal, la Constitution du 25 avril 1976, révisée le 30 septembre 1982, établit un Tribunal constitutionnel. En Grèce, la Constitution de 1976 a créé un système mixte, combinant modèle américain et modèle européen, avec une Cour spéciale supérieure. En Espagne, la Constitution du 29 décembre 1978 a institué un Tribunal constitutionnel, qui a commencé à fonctionner en 1980. On doit signaler aussi, bien qu'elle procède d'une autre logique, la création en Belgique d'une Cour d'Arbitrage par la loi constitutionnelle du 8 août 1980, dont la mise en place a eu lieu en 1983. .

Du côté des pays de l'Est, c'est la Pologne qui a innové en créant par la loi de révision constitutionnelle de 1982, un Tribunal constitutionnel qui a effectivement commencé à fonctionner au 1er janvier 1986. La Hongrie a suivi en établissant un «Conseil du droit constitutionnel» (loi constitutionnelle de décembre 1983) qui devrait être transformé, cette année, en véritable Cour constitutionnelle. Enfin, en Union soviétique, les premiers fondements d'une justice constitutionnelle ont été posés par la révision constitutionnelle de décembre 1988.

Au total, en Europe, les pays suivants sont dotés d'une Cour constitutionnelle (selon le modèle autrichien ou

européen) : Autriche, R.F.A., Italie, France, Turquie, Chypre, Yougoslavie, Malte, Portugal, Espagne, Belgique, Pologne, Hongrie. Il faut ajouter à cet ensemble des pays à système mixte (Grèce) ou se rattachant plutôt au modèle américain : Suède, Norvège, Danemark, Irlande. La Suisse constitue un cas à part, car le Tribunal fédéral qui existe depuis la fin du XIXème siècle, ne peut être rattaché à aucun des deux modèles

Cette expansion de la justice constitutionnelle en Europe s'est évidemment accompagnée d'une floraison de Chartes de droits fondamentaux insérées dans les Constitutions d'après guerre : à l'exception, en effet, de l'Autriche et de la France qui ont conservé des textes plus anciens, la quasi-totalité des pays sus-mentionnés ont intégré dans leurs Constitutions des déclarations des droits directement invocables par les individus à l'encontre du pouvoir et de l'Etat.

Ainsi ont été mis en place les deux éléments indispensables à une bonne protection des droits individuels à l'époque contemporaine : les Cours constitutionnelles et les Chartes de droits fondamentaux. Ces deux éléments sont liés et, en quelque sorte, indissociables : car on ne conçoit pas, de nos jours, qu'un pays soit doté d'une charte de droits fondamentaux sans justice constitutionnelle pour les faire respecter ; ou que, inversement, il soit doté d'une justice constitutionnelle sans charte constitutionnelle des droits fondamentaux. Il y a cependant des pays, en Europe, qui n'ont ni l'un ni l'autre de ces éléments : par exemple le Royaume-Uni ; mais des propositions de réforme ont été formulées même dans ce pays.

En outre, il convient de ne pas oublier que dans le cadre de l'Europe des vingt-et un ou de l'Europe des douze, existent aussi des protections internationales des droits individuels, lesquelles peuvent être complémentaires ou concurrentes des précédentes.

I. Les conditions d'existence d'une protection constitutionnelle des droits individuels.

Ces conditions nous semblent au nombre de deux : l'existence d'une Cour constitutionnelle, et d'une Charte constitutionnelle des droits fondamentaux.

A . L'existence d'une Cour constitutionnelle (ou d'un Tribunal constitutionnel).

1 . Le système européen de protection constitutionnelle des droits individuels privilégie le modèle de la Cour constitutionnelle -c'est-à-dire le modèle autrichien ou kelsénien par rapport au modèle américain.

En Europe, treize pays en l'état actuel ont adopté le système de la Cour constitutionnelle (cf. *supra*). Certes, la protection constitutionnelle ainsi accordée aux droits individuels n'est pas assurée de la même manière dans les divers Etats et l'on doit sans doute réserver le cas de la Turquie et pour le moment, ceux de la Pologne et de la Hongrie. Mais cela tient moins à l'efficacité du système de la Cour constitutionnelle qu'au contexte institutionnel et politique.

En revanche, dans des pays tels que la Suède, le Danemark et à un moindre degré la Norvège, c'est le système même du contrôle à l'américaine qui nous paraît être en cause, car la faiblesse de la protection juridictionnelle des droits individuels au niveau constitutionnel nous semble être en relation directe avec l'inadaptation du modèle américain au contexte institutionnel et politique européen (1).

2 . Selon le modèle américain, tous les tribunaux sont aptes à vérifier la constitutionnalité d'une loi, si une exception est soulevée à l'occasion d'un procès arbitraire : il s'agit, selon la formule consacrée, d'un «contrôle diffus» déclenché à propos d'un cas concret et donnant lieu à une décision dont les effets sont relatifs, c'est-à-dire limités à l'instance en cause.

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1 Voir sur ces points et pour plus de détails, notre ouvrage : *Les Cours constitutionnelles*, P.U.F., 1986, p. 6 et s.

Selon le modèle européen, les tribunaux ordinaires n'ont pas le droit d'apprécier la constitutionnalité d'une loi (1) car ceci est réservé à un tribunal spécial, constitué à cet effet, et qui exerce un «contrôle concentré» ou «centralisé», en rendant des décisions à effet général ou absolu, c'est-à-dire s'appliquant au-delà même des cas ayant donné lieu à ces décisions.

Si le modèle kelsénien a été si facilement adopté en Europe (alors que le modèle américain n'a pu s'acclimater) c'est essentiellement parce que 1°) les cours constitutionnelles sont situées en dehors de la hiérarchie judiciaire ; 2°) elles ne sont pas composées, en majorité, de magistrats mais de juristes (ou même de non juristes) ayant exercé d'autres fonctions que celles de magistrats (avocats, professeurs de droit, fonctionnaires) ; 3°) elles ont un statut constitutionnel les mettant à l'abri de possibles représailles susceptibles d'être exercées par les autorités politiques qu'elles contrôlent ; 4°) leurs membres sont désignés avec la participation ou l'accord des principaux partis susceptibles de gouverner, ce qui confère une légitimité au contrôleur au regard des contrôlés.

Face au législateur, et d'une manière générale à la majorité gouvernementale et parlementaire, la Cour constitutionnelle est un organe assez puissant pour limiter l'action de celui-ci (ou de celle-ci) et pour éviter que les droits individuels ne soient méconnus par lui (ou par elle). En Europe (continentale), les juges ordinaires n'ont pas une autorité et une légitimité suffisantes pour s'opposer à la volonté politique ou la limiter car ce sont le plus souvent des magistrats de carrière, c'est-à-dire des juges qui, comme les fonctionnaires, ont une carrière à faire tout au long de leur vie professionnelle.

3 . Une véritable Cour constitutionnelle suppose donc que tant son indépendance en tant qu'institution que celle de

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1 Il faut mettre à part le cas portugais car les tribunaux ordinaires ont bien le droit d'apprécier la constitutionnalité d'une loi, mais appel de leurs décisions peut être fait devant le Tribunal constitutionnel.

ses membres, soient garanties par la Constitution et placées sous son propre contrôle.

On peut estimer que ces conditions sont réunies pour les Cours constitutionnelles dont on connaît bien le fonctionnement c'est-à-dire les Cours autrichienne, allemande, italienne, française, espagnole, portugaise et belge. Il est plus difficile de se prononcer pour les Cours des pays de l'Est mais il semble qu'il y ait, en ce domaine, des progrès.

4 . Lorsque les diverses conditions sus-évoquées sont réunies, nous pensons que la Cour constitutionnelle est le meilleur instrument, en Europe, de protection constitutionnelle des droits individuels et qu'elle apparaît comme un élément indispensable de cette protection. Bien évidemment, ceci peut être débattu ou discuté.

B . L'existence d'une Charte constitutionnelle des droits fondamentaux.

1 . Le premier problème qui se pose au Royaume-Uni -lorsqu'il est question d'instaurer une protection constitutionnelle des droits individuels, à l'exemple d'autres pays européens-, est qu'il n'existe pas de charte constitutionnelle des droits fondamentaux et qu'il faudrait donc d'abord commencer par en instituer une. De même, on peut constater qu'au Canada, bien qu'il existât une justice constitutionnelle apte à assurer un contrôle de constitutionnalité des lois, la protection constitutionnelle des droits de la personne n'a véritablement commencé à être effective que lorsqu'une «Charte des droits et libertés» a été insérée dans la Constitution, lors du «rapatriement» de celle-ci, en 1982.

Enfin, on soulignera qu'en France, la protection constitutionnelle des droits individuels n'a été vraiment assurée qu'après que le Conseil constitutionnel ait, en 1971, décidé d'appliquer la Déclaration des droits de l'homme de 1789 et le préambule de la Constitution de 1946, comme textes de droit positif.

2 . On doit cependant constater que les Constitutions modernes -c'est-à-dire celles adoptées après la seconde guerre mondiale- comportent toutes une charte des droits et libertés, qui constitue généralement la première partie du texte fondamental.

Seule la Constitution française du 4 octobre 1958 fait exception ; mais, dans son préambule, elle renvoie à la Déclaration des droits de l'homme de 1789 et au préambule de la Constitution de 1946, et ceci a permis au Conseil constitutionnel de doter la France d'une double déclaration des droits : celle de 1789 qui garantit la jouissance des droits et libertés classiques ou droits de la première génération et celle de 1946 qui énumère les droits économiques et sociaux ou droits de la deuxième génération.

On notera qu'en Autriche -la Constitution date de 1920- il est aussi fait application de textes plus anciens en matière de protection des droits fondamentaux, comme le Traité de Saint-Germain.

En revanche, les Cours allemande, italienne, espagnole, portugaise, yougoslave, polonaise assurent une protection des droits individuels à partir de chartes des droits et libertés insérées dans la Constitution.

Il y a sans doute une cohérence plus grande dans ces derniers cas, dans la mesure où toutes les dispositions relatives aux droits fondamentaux, ont le même âge et ont été rédigées à la même époque par des constituants ayant la possibilité de concevoir globalement la charte des droits et d'harmoniser le contenu des différents éléments de la charte. Ainsi, par exemple : alors qu'en France, le droit de propriété est affirmé dans la Déclaration de 1789 et le principe des nationalisations dans le préambule de 1946 -soit cent-soixante ans plus tard- en Espagne, les deux principes sont énoncés dans le même texte et leur formulation est nécessairement coordonnée.

3 . En fait, il n'y a pas de différences considérables entre les systèmes selon qu'est applicable une charte moderne des droits et libertés ou des textes anciens : car les Cours constitutionnelles se reconnaissent autant de pouvoirs d'interprétation au cas où existe une charte moderne et

complète (cas allemand ou italien) qu'au cas où un tel document n'existe pas (cas français ou autrichien).

On peut même dire que les Cours allemande ou italienne ont une jurisprudence beaucoup plus audacieuse ou constructive que leurs homologues autrichien ou français : les premières font appel, au-delà du texte proprement dit de la Constitution, à des «valeurs» fondamentales ou contrôlent l'activité du législateur en appréciant la proportionnalité de ses décisions ou leur rationalité ; tandis que les secondes cherchent à rester près des textes .

En définitive, les techniques d'interprétation utilisées par les Cours constitutionnelles relativisent la portée des chartes constitutionnelles des droits et libertés.

4. Une dernière question doit être envisagée : les Cours constitutionnelles utilisent-elles les conventions internationales comme normes de référence en matière de protection des droits individuels ?

Ceci concerne surtout la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. En fait, seule la Cour autrichienne fait directement application de ladite charte. On peut aussi noter que le Tribunal constitutionnel espagnol est tenu de s'y référer pour interpréter la Constitution en matière de protection des droits fondamentaux. Le Conseil constitutionnel, en revanche, a refusé d'en faire application en 1975 et a maintenu jusqu'ici sa jurisprudence. Le Tribunal constitutionnel portugais quant à lui, est partagé puisque l'une de ses chambres applique la Convention tandis que l'autre s'y refuse. Les Cours allemande et italienne n'en font pas d'application directe.

II. Les techniques de protection des droits individuels par les Cours constitutionnelles.

La question qui se pose ici est de savoir de quelle manière les Cours constitutionnelles pourront être saisies pour assurer la protection constitutionnelle des droits

individuels : quelles sont donc les voies de recours et quelle est leur efficacité ?

Pour répondre à cette question, on ne décrira pas dans le détail la manière dont chaque Cour peut être saisie pour assurer la protection des droits individuels. Mais l'on tentera de regrouper les cas semblables en étudiant tout d'abord les voies de recours spécialement aménagées pour permettre aux individus de réclamer la protection de leurs droits ; puis, la voie du contrôle concret des normes ; et enfin celle du contrôle abstrait. Il est bien entendu que, devant une cour constitutionnelle, toute voie de recours aboutit normalement à une décision ayant effet général ou absolu.

A . Les voies de recours directes spécialement aménagées pour la protection des droits individuels.

Ces voies de recours directes et spéciales sont aménagées devant les Cours allemande, autrichienne, espagnole et belge.

1 . *Le recours constitutionnel allemand.*

Le recours constitutionnel a d'abord été prévu dans la loi (relative au Tribunal constitutionnel) du 12 mars 1951 puis a été constitutionnalisé par la révision constitutionnelle du 29 janvier 1969. Selon l'article 93 § 1er al. 4-a de la Constitution : «Quiconque estime avoir été lésé par les pouvoirs publics dans l'un de ses droits fondamentaux» peut introduire un recours constitutionnel.

Ce recours peut être intenté pour lésion de ses droits fondamentaux par tout individu contre tout acte des pouvoirs publics c'est-à-dire les actes administratifs réglementaires ou individuels, les jugements ou arrêts des tribunaux et cours, et enfin les lois.

Il ne peut être introduit que sitoutes les voies de recours existantes ont été épuisées. Ce «principe de subsidiarité» est strictement appliqué en matière de recours contre les lois ; de même qu'il est exigé dans ce cas que le requérant soit affecté personnellement, actuellement et directement par la loi et que le recours soit introduit dans le

délai d'un an. En fait, si les recours constitutionnels sont très nombreux (plus de 3 000 par an actuellement et plus de 50 000 depuis 1951), ils sont dirigés en grande majorité contre des actes administratifs et surtout contre les jugements des tribunaux, spécialement les jugements des tribunaux suprêmes. Le recours constitutionnel apparaît donc souvent comme permettant d'accéder à un quatrième degré de juridiction. Enfin, dans une proportion de 97 % environ, les recours constitutionnels sont «filtrés» par des Commissions de trois juges et ne parviennent pas jusqu'à la chambre du Tribunal constitutionnel chargée d'examiner les recours constitutionnels.

Le recours constitutionnel joue cependant, selon la doctrine allemande, un grand rôle dans la mesure où tout individu peut défendre ses droits directement contre tout acte des pouvoirs publics et où, même si les recours sont presque toujours écartés par des Commissions de trois juges, la multiplication des recours et des réponses qui leur sont données peut avoir un effet «pédagogique» susceptible de diffuser et de populariser la défense des droits individuels.

2 . *Le recours direct autrichien.*

Depuis une révision constitutionnelle intervenue en 1975, la Cour autrichienne peut être saisie directement par tout individu qui estime ses droits lésés par une loi contraire à la Constitution ou par un règlement contraire à une loi.

Si le système allemand a été pris comme exemple, il existe cependant deux différences : tout d'abord il n'est pas exigé qu'il y ait lésion des droits fondamentaux énumérés par la Constitution, ce qui signifie que la lésion de tout droit, même non protégé constitutionnellement, peut être invoquée ; ensuite, le recours n'est pas possible au cas de lésion des droits par le jugement d'un tribunal. En revanche, comme dans le cas allemand, joue le principe de subsidiarité selon lequel le recours n'est recevable que si une autre voie de droit ne permet pas d'obtenir le même résultat.

Le recours autrichien est loin d'avoir, en pratique, la même importance que le recours allemand : en effet, on compte de 20 à 30 recours individuels par an et de 1976 à

1983, la Cour n'a admis la recevabilité de ces recours que dans 15 cas. Enfin, sur cette période, un seul recours a abouti à l'annulation d'une loi.

Ces résultats assez modestes s'expliquent peut-être par le fait que la Cour autrichienne peut soulever d'office les questions d'inconstitutionnalité d'une loi à l'occasion d'un recours contre un acte administratif, et que ceci constitue la principale voie utilisée par les individus. Une autre explication est qu'il n'y a pas de recours contre les décisions juridictionnelles.

3 . *Le recours «d'amparo» espagnol.*

L'*amparo* est une voie de recours tirée de la tradition du droit hispanique en matière de protection des droits individuels. En fait, cette voie de recours est assez proche, telle qu'elle est organisée devant le Tribunal constitutionnel, du recours constitutionnel allemand, tout en présentant un certain nombre de différences.

Cette action est ouverte aux individus, au défenseur du peuple et au ministère public, au cas de violation des droits et libertés énumérés aux articles 14 à 30 de la Constitution : c'est-à-dire essentiellement les droits et libertés classiques, à l'exclusion des droits économiques et sociaux, et notamment des droits de propriété. L'*amparo* peut être introduit contre un acte administratif ou un acte juridictionnel mais non contre une loi. Il obéit au principe de subsidiarité, les voies de droit normales devant être épuisées au préalable. Le recours doit être formé dans un délai de vingt jours. Il convient d'ajouter que si la chambre compétente en matière de recours d'amparo, estime que tel recours contre un acte administratif ou juridictionnel soulève une question d'inconstitutionnalité d'une loi, elle peut renvoyer l'affaire à l'assemblée plénière du Tribunal qui statuera alors comme en matière de contrôle concret des normes.

Comme en République fédérale d'Allemagne, le recours direct a eu un succès considérable, et cela à tel point qu'il a fallu instituer en 1988, une procédure de filtrage des recours. Comme en République fédérale d'Allemagne, également, le recours d'amparo est essentiellement dirigé

contre des actes juridictionnels et fait apparaître le Tribunal constitutionnel comme un quatrième degré de juridiction.

4 . *Le recours direct belge.*

Une révision constitutionnelle intervenue en 1988 a permis d'étendre les attributions de la Cour d'Arbitrage jusqu'alors essentiellement limitée au partage des compétences entre l'Etat, les communautés et les régions. Désormais la Cour peut être saisie directement par les individus au cas d'atteinte au principe d'égalité ou à la liberté d'enseignement.

Le système a commencé à fonctionner au 1er janvier 1989 et plusieurs décisions ont déjà été rendues. Il est encore trop tôt pour tirer quelques enseignements de la pratique suivie. On remarquera cependant que la Cour d'Arbitrage semble concevoir assez largement les conditions de recevabilité des recours, notamment quant à l'intérêt pour agir.

B . Le contrôle concret des normes.

Le contrôle concret des normes permet également aux individus de faire protéger leurs droits par les Cours constitutionnelles : il consiste essentiellement à permettre ou à faire l'obligation aux tribunaux ordinaires de renvoyer toute question d'inconstitutionnalité d'une loi soulevée devant eux par voie d'exception, à la Cour constitutionnelle. Ce système existe devant les Cours allemande et autrichienne, italienne, espagnole et belge.

Il n'est pas nécessaire de décrire chaque procédure car elles sont pratiquement agencées de la même manière. On notera simplement quelques différences entre elles et la manière dont elles fonctionnent réellement.

En RFA, Italie , Espagne et Belgique, toute juridiction peut renvoyer une question d'inconstitutionnalité à la Cour constitutionnelle. En Autriche, en revanche, seules la Cour suprême judiciaire, la Cour administrative, et, depuis 1915, les Tribunaux supérieurs d'appel peuvent opérer ce renvoi.

On peut relever aussi que tantôt les lois antérieures sont susceptibles d'être aussi contrôlées (Italie), tantôt elles ne le sont pas (R.F.A.). Par ailleurs, il peut y avoir quelques difficultés quant au pouvoir du juge qui opère le renvoi, d'apprécier ou non la nécessité de ce renvoi.

En définitive, le contrôle concret des normes n'a véritablement d'importance, sur le plan pratique, qu'en Italie ou il est la principale voie d'accès à la Cour constitutionnelle. Alors que les Cours autrichienne, allemande et espagnole sont saisies d'une dizaine ou d'une vingtaine de renvois préjudiciels par an, la Cour italienne en reçoit, quant à elle, un millier. Il est vrai que devant cette cour, les autres procédures n'existent pas.

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C . *Le contrôle abstrait des normes.*

Les procédures de contrôle abstrait des normes sont beaucoup plus diversifiées. A première vue, elles n'ont pas pour objet la protection des droits des individus dans la mesure où elles sont généralement déclenchées par des autorités publiques ; mais, en fait, elles aboutissent souvent à ce même résultat.

Il faudrait distinguer entre contrôle *a priori* et contrôle *a posteriori* ; mais, en fait, ici aussi il n'y a pas de différences majeures quant au résultat obtenu. Il suffira de dire que le contrôle *a priori* fonctionne essentiellement au Portugal et en France et aussi de manière très limitée en Italie (pour les lois régionales) et en Autriche. Il a une fonction primordiale en France.

On exposera successivement la saisine par des autorités politiques, par un groupe de parlementaires et par des autorités publiques.

1 . *La ,saisine par des autorités politiques.*

Une grande variété de modalités de saisine peut ici être relevée.

Tout d'abord, saisine par les gouvernements ou exécutifs des Länder (RFA), des provinces ou régions (Portugal, Italie), des communautés autonomes (Espagne) : il s'agit ici plutôt d'un contrôle de la répartition des compétences entre l'Etat et les collectivités composantes.

Des recours peuvent être introduits aussi par le Président de la République (France, Portugal), le Premier ministre ou Chef du gouvernement (Espagne, France, Portugal), le président d'une assemblée du Parlement (France). Certaines autorités peuvent concevoir leur rôle comme celui d'un protecteur des libertés : ainsi en a-t-il été en France pour le président du Sénat au début des années soixante-dix.

2 . *La saisine par un groupe de parlementaires.*

Cette possibilité existe dans un certain nombre de pays : en République fédérale d'Allemagne, le Tribunal constitutionnel peut être saisi par un tiers des députés du Bundestag ; en Autriche, par un tiers également du Conseil national ; en Espagne, par cinquante députés ou cinquante sénateurs ; en France, par soixante députés ou soixante sénateurs ; au Portugal et en Pologne, par un dixième des députés.

Cette voie de recours est relativement peu utilisée dans la plupart des pays. Elle l'est en revanche, beaucoup en France où elle constitue l'action principale en matière de protection des droits individuels : des progrès considérables ont pu être réalisés dans ce domaine, en France, depuis qu'a été instituée cette voie de recours c'est-à-dire en 1975 (voir *infra*).

3 . *La saisine par des autorités publiques et notamment par l'Ombudsman.*

Les Cours constitutionnelles polonaise et yougoslave peuvent être saisie par toute une série d'autorités publiques qu'il serait trop long de décrire ici.

On s'arrêtera davantage sur les saisines par le «défenseur du peuple» en Espagne et le «Provedor da Justiça» au Portugal. En effet, le soin de saisir la Cour constitutionnelle confié à une institution qui ressemble à l'Ombusdman, mérite de retenir l'attention car cela peut être un instrument fort utile de protection des droits individuels par la Cour constitutionnelle. Il est encore trop tôt cependant pour avoir une idée de l'efficacité de cette procédure.

III . Résultats et portée de la protection des droits individuels par les Cours constitutionnelles.

On ne peut examiner, même de manière limitée, les différentes questions que soulève cette dernière interrogation ; il sera donc procédé à un inventaire ou à une problématique.

A . Les effets directs : le bilan de la protection des droits.

Il est difficile sinon impossible de répondre de manière satisfaisante à cette question. Un colloque avait été consacré à ce thème en 1981 à Aix-en-Provence, à propos de quatre expériences (allemande, autrichienne, italienne et française). Il y a près de dix ans, la richesse de l'inventaire était déjà considérable (1) : on mesure aujourd'hui ce que représente sa mise à jour alors surtout qu'il faudrait y ajouter les résultats obtenus par les autres Cours constitutionnelles.

On relèvera cependant un certain nombre de tendances ou d'orientations déjà notées au moment du colloque de 1981. Tout d'abord, les droits économiques et sociaux sont certainement moins bien protégés que les droits et libertés classiques : mais cela tient à la nature même de ces droits et aussi, à la manière dont les rédacteurs des Constitutions ont traité la question (en Espagne, par exemple, il est

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1 Les actes du colloque ont été publiés *in Cours constitutionnelles et droits fondamentaux*, Paris, 1982 (nouveau tirage en 1986).

expressément prévu dans la Constitution que ces droits ne seront pas protégés aussi fortement que les autres droits par le Tribunal constitutionnel). Ensuite, il semble que plus le contrôle de constitutionnalité se perfectionne, plus l'accent est mis sur le respect du principe d'égalité ; on constatera aussi qu'en Autriche et en Italie, la violation de ce principe constitue, très nettement, la principale cause d'annulation des lois ; on soulignera également qu'en Italie, l'invocation de ce principe tend à devenir un moyen d'assurer un certain contrôle de l'interventionnisme économique de l'Etat. Enfin, une question reste en suspens : qu'en est-il des effets horizontaux des droits fondamentaux, c'est-à-dire des effets que peuvent produire ces droits dans les relations entre les individus et plus seulement dans les relations des individus et de l'Etat ?

De nombreuses autres questions mériteraient d'être posées à l'occasion d'un nouveau bilan qui pourrait être fait dix ans après celui dressé au début des années quatre-vingt. On dira simplement que l'œuvre accomplie par les Cours constitutionnelles en matière de protection des droits individuels est considérable etirremplaçable.

Il faut aussi mesurer que cette action des Cours constitutionnelles en faveur de la protection des droits individuels a eu des effets indirects non moins considérables.

B . Les effets indirects : l'influence de la jurisprudence relative à la protection des droits sur l'ordre juridique et politique.

En mettant en œuvre les chartes constitutionnelles des droits et libertés, et en leur assurant une application effective, les Cours constitutionnelles n'ont pas seulement protégé les droits des individus ; elles ont aussi, indirectement provoqué des changements considérables dans l'ordre juridique et dans l'ordre politique.

1 . *L'influence sur l'ordre juridique* a été souvent décrite, notamment dans les systèmes allemand ou italien mais aussi, aujourd'hui, e droit français.

Le phénomène d'«irradiation» ou de rayonnement des droits fondamentaux dans l'ensemble de l'ordre juridique est suffisamment connu pour qu'il soit inutile d'y insister. Au fur et à mesure qu'elles sont appliquées et interprétées par les Cours constitutionnelles, les normes constitutionnelles *imprègnent* les autres branches du droit et conduisent à les transformer progressivement. Le processus est plus ou moins rapide selon les pays ; mais ses effets sont, à plus ou moins long terme, incontestables et capitaux. Alors surtout que ses effets sont relayés, normalement, par les tribunaux ordinaires qui, prenant en compte la jurisprudence constitutionnelle, modifient la leur en conséquence et amplifient ainsi la portée des décisions des Cours constitutionnelles.

2. *L'influence sur l'ordre politique* n'est pas moins importante, car si le contrôle exercé par les Cours constitutionnelles a pour effet direct de protéger les droits des individus, il a aussi pour effet indirect de limiter les pouvoirs des majorités qui gouvernent.

L'exemple de la France est particulièrement caractéristique, de ce point de vue : car, au cours de la période 1980-1989 qui a vu se succéder quatre majorités parlementaires et gouvernementales, à l'occasion de trois alternances, le Conseil constitutionnel est apparu clairement, aux yeux de tous, comme un élément stabilisateur et modérateur de la vie politique, à travers ou grâce à, une jurisprudence essentiellement provoquée par la défense des droits fondamentaux.

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En conclusion, on posera une question qui concerne essentiellement les pays de l'Europe des douze dans lesquels existe une protection des droits individuels assurée par la justice constitutionnelle.

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The significance of constitutionalism in Hungarian political changes

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At the start of the analysis I have to raise two questions:

1. Why is it **interesting** intellectually to follow the Hungarian, or more generally, the East European political changes from a constitutional point of view?
2. Even if it is interesting what we can see in Eastern Europe, is it **relevant** from a more general point of constitutional view?

In the following pages I will argue to demonstrate that the Hungarian political changes are interesting because the constitutionalism in our political situation is a **paradoxical** case, and it is an intellectual challenge to explicate the inherent paradox. Moreover, I will try to demonstrate that the existence of a constitutional system, the acceptance of constitutionalism cannot be in itself a sufficient guarantee of a democratic society; and I will try to show what is missing.

Generally speaking constitutionalism represents a political system which is capable for self-regulation, in which the norms

and rules of behavior are codified in a more-or-less axiomatic way, with a certain logical rigor, without allowing direct personal interference and dependencies. The axioms are fixed in the constitution which is supplemented by procedural rules explaining how to live up to and how to apply the codes of the constitution. Now, what is **missing** from the Hungarian, and more generally from the East European case is the existence of such a self-regulation; and direct personal interference, subordinations, and dependencies are not eliminated by the codification of social-political behavior. This case is usually attributed to the fact that in Eastern Europe the constitution is not an axiomatic codification of behavioral norms and rules in a self-regulating society but something else. This generally accepted statement, however, is not necessarily true.

In a genuine constitutional democracy the constitution is a kind of formal framework which is coordinated with the informal, sometimes unspecified social network and relationship within which people live and behave. In Eastern Europe it is the formal framework itself which makes personalism or personal dependencies possible, and ultimately it is a safeguard of a voluntarist system. My first statement, therefor, is that **one of the problems of constitutionalism in Eastern Europe is not the lack of a codified set of rules, a formal framework of behavioral norms but the lack of an historically developed civil automation and self-regulation of social relationships.**

The next question is this: How is it possible that if we have a formal framework, a precise axiomatic system as a constitution yet there is no guarantee for eliminating personalism and personal dependencies, or voluntarism from our legal system?

There are two logically possible answers:

a/ The axiomatic system is perfect, crystal clear but **it is not translated into and supplemented with procedural rules** which guarantee the validity and applicability of the norms or the codes.

b/ The axiomatic system is perfect, crystal clear, and well described procedural rules exist but **the principles of the constitution give place to political manipulations.**

I am afraid in the East European case both a/ and b/ are true. Let me give some examples. In the Hungarian constitution the right of free speech or the right of religious freedom has been codified. They, however, were not granted automatically but were conditional upon local interpretation of applicability by different administrative organs or bodies. Most recent researches demonstrates, that after 1956, for example, during the retorsion trials extreme differences occurred in sentences for the same charges in the different counties, despite the existence of only one central code. Or, in other cases, even if the interpretation could have not been ambiguous, the limitations built into the constitution prohibited the exercise of these rights. The best example of such limitations is the reference to the interests of

a socialist society which is an important point I want to address separately.

All the East European constitutions are **Stalinist constitutions.** The fundamental principle of such a constitution is to make civil behavior an instrument of the realization of an escatological goal. Its guideline is to **permit individual and social activities only which serve the purposes of socialism.** Socialism, however, is an undefined and in an exact manner **undefinable** notion what means that the constitution an open one, open in the sense of allowing different interpretations and voluntarism by the interpreters. The axiomatic, automatic self-regulation by the constitution becomes impossible; the criterion of unambiguous regulation is **in principle** impossible. My second statement is that **the possibility of actual political manipulation of any kind is built into the Stalinist type of constitutions.** We can draw the conclusion in an aphorism: **Unconstitutionalism becomes an organic part of constitutionalism.**

2.

In a rigorous analysis I still need one point to demonstrate if I want to consider the above conclusion true: and the point is the undefinable character of the notion 'socialism'. There are a few constitutions world-wide which mention socialism without being a constitution of a communist country (see for example the Indian or the recent Portuguese constitution) and without having that type of ambiguity I mentioned above. It does not mean, of

Dans ces pays (Belgique, Espagne, France, Italie, Grèce, Irlande, Portugal, R.F.A.), les droits individuels sont protégés par trois catalogues de droits fondamentaux (la Constitution ; la Convention européenne des droits de l'homme, les droits fondamentaux reconnus dans le cadre de la C.E.E.) mis en œuvre et appliqués par trois hautes juridictions (la Cour constitutionnelle ou les tribunaux, la Cour européenne des droits de l'homme, la Cour de justice des communautés).

On ne doit pas se plaindre de cette «sur-protection». Mais n'y a-t-il pas (ou n'y aura-t-il pas) un problème de combinaison de ces catalogues et de ces protections ? Certes, on peut considérer qu'ils sont complémentaires et se renforcent mutuellement. Mais il faudrait peut-être, un jour, tenter d'y voir plus clair car, s'il est incontestable que l'on va vers un «droit public européen» commun à plusieurs pays d'Europe, et donc à une sorte de charte commune des droits individuels, il est quand même nécessaire de préserver certaines spécificités et identités nationales.

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course, that socialism is definable in some cases; it means that the undefinable character does not necessarily create problems in constitutionalism. The real problem is - and this is my third

3. statement - that **in Eastern Europe constitutional rights are conditional to the interpretations of socialism.** There are no references to specify who, which body, and how, by what rules and procedures can interpret this notion and that's why the notion is undefinable from a constitutional point of view. There is an unspecified premise behind the actual wording and codification of the constitution: a **social philosophical** and a **political institutional** premise of the **supremacy** of the Marxist-Leninist (in essence: Stalinist) ideas and party. It is a Machiavellian solution in the sense that the Prince (here: the Party) who gives the laws is actually above the laws. The similarity is valid in an other way too: the Prince who is above the laws, also pretends to be obedient at least for the illusion and manipulation of the masses. The communist regimes, too, try carefully to maintain a virtual constitutionalism, the illusion of a legal-constitutional legitimacy. Why? Before trying to answer the question, let me present a few interesting examples.

First of all, let us consider the case of the **trials.** The characteristic adverb of these trials is "conceptual" which simply means **prefabricated.** In Hungary they were started in 1949, with the infamous Rajk-trial. László Rajk was one of the top communist leaders of the time, former minister of interior who was arrested by fellow communist leaders, tried for espionage and

treachery, sentenced to death, and executed with a few other convicts. Among the espionage charges was the collaboration with Western and especially Yugoslav agents and conspiration to overthrow the communist regime. One can enumerate quite a number of factors which can explain the historical and political situation and atmosphere at that time which helped to bring about such sentences - like the hysteria over the outbreak of the cold war, the break between Tito and Stalin, etc. - but neither any nor all of them provides a sufficient explanation why the system required the theatrical arrangement to provide the illusion of constitutionalism of these trials. Why could not simply execute the top leadership its victims or its enemies (or supposed enemies) in such a monopolistic power situation? Why was it important to arrange even a show and to require a guilty statement from the accused persons? And how could the communist leaders persuade their ex-comrades to confess sins they had never committed? It is still an open question which boggles the mind of many analysts and to which, quite frankly, I hardly have a satisfactory explanation. (The best illustration of my point is probably Arthur Koestler's famous book, Dark at Noon.) One might refer to the obsession of the communist leaders to present themselves as altruistic and benevolent people who design and create a better society; to the messianistic interpretation of their role in a society; but none of the explanations is good enough to convince me why it was necessary to hide the fact that the system was a purely dictatorial and fully repressive one when in its early years it openly confessed that it was the

dictatorship of the proletariat. Maybe because even that tenet was false: the proletariat had no more civil rights than any other subordinated segment of the society; it was the dictatorship of the top party elite rather than any significant social stratum.

In a later case, in the Imre Nagy trial, one can discover one rational element why the leadership in 1958 tried to present at least certain constitutional illusion to the case. Here the trial was also "conceptual" in the sense that the sentence was depending on political predetermination and not on the result of a due process and a fair trial. The trial, however, was a rational element of the legitimization effort of the Kádár-regime, a desperate attempt to justify both the secession between Kádár and Nagy in November, 1956 and the elimination of the most serious political rival.

These trials were a minor part of a huge facade which tried to hide the cruel dictatorship and voluntarist repression behind a constitutional democratic illusion. The major part of the facade has been created by the constitutional institutions: the Parliament, the Courts, the councils, etc. They seemed to acquire an ever growing importance as the East European regimes have tried to present themselves as "people's democracies" and democratic, constitutional systems. These efforts, however, could not and did not want to alter the case: everything did and has had to happen by party instructions.

4. The important lesson of the above examples - and my fourth statement - is that **the existence of constitutionalism in itself cannot be a sufficient characterization of a democratic society or the justification of its democratic character.** The facade-like existence of constitutionalism (the constitution and the constitutional institutions, the constitutional procedures, etc.) has gradually accumulated social and civil discontent, and both the legal system as a whole and different parts of it - the juridical, executive, and legislative bodies - have become the target of ever growing criticism. The demands were growing for legal guarantees and independent regulations to create a working self-regulation of a democratic society. It became clear that the system needs to have well-defined axioms, needs to have a different constitution. This consideration, though it was well understood by the so-called dissidents of the communist regime, could surface in the political life only when the reform-idea gained legitimacy not only in the economic but in the political dimension.

The leadership tried to comprise the reform-idea into the economic life; for a variety of reasons which I cannot enumerate here, it had to accept the fact that the reform-process could not kept out of the political life. For quite long, the leadership tried to control the process; the very capabilities for control set up the criteria for what has been permitted; and this was the essence of the paternalistic approach of the communist

leadership. It was expressed in the 'acting for the nation' concept which also tried to legitimize the handling of the reforms from above - and which bore the characteristics of both Machiavellianism and messianism.

According to most analyses, the core issue of "acting for the nation" concept was to create a fair standard of living (the policy was called, after Khrushchev, the policy of "goulash communism"). I think it is a mistaken point and names an effect as the main cause. The primary issue here was a trade-off of a much greater significance; it was the **withdrawal of politics from private life.** It meant not to interfere into private lives by political means, not to politicize private spheres any more. This was a trade-off in the sense of pervasive communist party policy of the early fifties; and it created a relatively liberal lifestyle and a relative degree of personal freedom beyond the sphere of public policy. This trade-off is significant, because it changed also the official as well as private value system, including also values of a prosperous life or of being rich. (This shift was obvious in the debate on the so-called "refrigerator socialism", when the official ideology approved the right to a higher personal standard of living as a right conform with East European values. (There were other significant elements of the trade-off which I cannot analyze here; especially the withdrawal of politics from the microeconomic sphere.)

Depoliticizing private life has also meant to lessen the

totalitarian grasp on society as a whole - and here comes my 5. fifth statement - **without letting the subsystems of this society develop their own types of regulations and organizational principles,** that is develop an automatism in social and civil life. It is for this reason that even private citizens have potentially been subject to coercion at any time.

There are some interesting consequences of the reform process and trade-off in depoliticizing private life as a means to create domestic stability. In the first place it meant that the leadership abandoned the earlier concept which required a uniform thinking as a prerequisite of political stability. Accepting the fact that people may think differently, the leadership also accepted the fact that people don't have to publicly support the political system. Political participation was not a necessary component of political life and political structures. Only a very nominal participation was required, mostly in every fifth year at the general voting, because there was neither genuine political participation nor public political life in the sense of influencing decision making.

The decline of political participation had a harmful and a beneficial consequence. The harmful one was that the public has become uninterested. This, in my view, reflects a certain deprivation of political rights. The beneficial one was the confidence of the leadership which was not threatened by an active, hostile public, so there was a new possibility to ease

political repression and to accept the popular demand for political reforms.

The end result of the whole process was a real trade-off in human and political rights. This trade-off changed the system and made it a/ more acceptable on the West; b/ more willing to support a Helsinki-type of international agreement. Both changes, however, made rather clear that the depoliticized private life could not be organized in autonomous way and has been deprived of genuine forms of self-regulative organizations. This shortage became apparent during the recent changes in Hungary and boosted the process of legislative and, ultimately, constitutional changes in the fields of association and assembly rights.

The policy of depoliticizing microeconomic life has had a similar effect in the sense that microeconomics has also been deprived of efficient self-regulative means and organizational possibilities. The same applies here as to the depoliticized private life: because of the lack of a genuine economic regulation of its own, this sphere has also remained the subject of potential and actual command interference.

Recent developments and legislative changes (in the field of company and property rights) show a similar pattern to the changes in private life; and both fields are coming closer to Western social and economic standards by recent events in Hungary. They all make more and more relevant the demand for a

6. new constitution because, and this is my sixth statement, it has become quite obvious that the existing constitution is not suitable for the regulation and smooth operation of a modern, multiparty state. In order to prove this statement, I should have to present a short description of the century and half long history of Hungarian constitutionalism which is obviously beyond the possibilities of such a paper. But probably it is enough to refer to the 1949 Constitution of Hungary which still is the framework of our political life and which - as all the East European constitutions of the time - was an almost literally translation and adaptation of the Stalinist Soviet constitution. Beyond the similarity in structure and wording, the more serious effect of the adaptation of Soviet type political structures was the lethal grasp on self-regulating, autonomous private and political organizations and institutions. The communist party invaded all walks of political and private life, and uniformed the political systems of the East European countries. From this perspective it can be better understood why it was so significant when, after the revealing time of 1956, the communist party depoliticized private life.

At the moment, we are in the midst of a confused and desperate debate over the role, the function, the status of the constitution. In this debate the recurring underlying question is the following: Is it possible at all, in any constitutional change and with any kind of constitution, in our society to ensure a functioning self-regulating social automation? This type

of automation and self-regulation has come about in a historical process on the West; our problem is whether we can bring it about artificially. When I say 'artificially' I mean something which has not been produced by a social development exemplified in historical cases.

Probably it is possible to create a self-regulative, constitutional democracy artificially. There is at least one good recent historical example, and it is the Federal Republic of Germany where the constitution and the political system was established by an artificial, outside act, applying a foreign standard. Clearly, that is not the present Hungarian case, though the German case is quite similar - disregarding of both the content of the constitution and the method of application - to the 1949 situation in Hungary when a foreign standard was applied to the Hungarian political system by a voluntary act.

There are recent examples of transitions from dictatorship to democracy here in Europe, like the Portuguese and the Spanish case. There is, however, a significant difference between the Iberian and the Hungarian case. In both Iberian countries there has been operating an economic automatism (though with some differences in the level of development) which, of course, has not been codified by law. The legal and the political system was different from the economic one; their organizing principles differed. During the democratization the differing systems had to be harmonized. In Hungary there are no such automatism, that's

why the reforms are series of activity to produce self-regulative subsystems in our society. A self-regulative subsystem is **free of** hierarchical intervention, and ultimately should only be the subject of a constitutional regulation.

This is exactly the process in which the main question is raised: who should and could accomplish this task? **Who is licensed** to accomplish it? There is an obvious inherent contradiction in this process, and it is my seventh statement: we

7. **have to create a constitutional regulation of the society what typically is a task to accomplish by constitutional authorization.** In the absence of a legitim constitution, the political actors have to determine the sphere of **instances** which is authorized to do it.

The most obvious institution in a constitutional democracy to give authorization to any legislative action is the parliament or any equivalent body. The legal status of the Hungarian parliament, however, is a subject of fierce debates and a central issue of the political fights. Probably the most characteristic feature of the present political situation in Hungary is the **absence of any legitim legislative institution.** When I speak about legitim institution I refer to bodies elected in a free, secret election, or appointed by such institutions. Now, the general case in Eastern Europe has been up to now the lack of a genuinely free election which could give the legitim status to any representative body. There are only very few and very recent examples, like certain cases of delegate elections to the Supreme

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soviet in the Soviet Union and the latest Polish national election. The Soviet cases are not quite relevant because those freer elections have had no effects on the overall system and have not changed the general laws of a party state. The Polish case is the real important one, yet there is a significant difference compared to the Hungarian situation.

In Poland, with due respect to all merits, this was not a free election what is in the minds of those Hungarians who speak about a genuinely free election. This statement is not based on the fact that there were preset quotas what seems to be inapplicable to Hungary. It is based on the fact that all the procedural rules of the election and the legislative institutions participating in it lacked the legitimacy and had been elaborated or put in office in a party state in which constitutional facade has existed but the political process has been determined by a monopoly of power. **Legitimacy in this interpretation does not mean constitutionalism**, and the interpretation is based on the analysis that the constitution was a product of a dictatorial power, even if it was introduced by popular approval of a referendum. Any voting procedure which takes place in a dictatorship, in the shadow of coercion of any type, cannot be considered legitim according to this interpretation. And here I come back to my previous question: who should be licensed and, of course, how - to accomplish the **transition** to a fully legitim system?

Poland offers one possible solution. There has been a strong political force of opposition though it has not been organized as a political party. But it has acquired a very strong mass support; it was the first genuine working class mass movement in Eastern Europe for forty years. This movement, Solidarity, was not as influential in legal political fights as the much tinier Hungarian opposition which mostly lacks any mass support. This might have been the consequence of the lengthy years of martial law, but the result was obvious: the Polish parliamentary elections took place under the illegitim condition of a communist party state with the modification of the rules of the game of an oppositional mass movement. But this movement, especially in illegal opposition, could not change the rules of the political game, and could not set up the terms of a political transition. It, however, has had the strength to modify the rules in favour of its own terms. Now, as a result of a free election - free in the sense of popular participation and voting - which was not yet quite free because of the presence of preset quotas, there is now a legislative body in the centre of Polish political structure which has approved a non-communist run government and which, most probably, will have the freedom to change the constitutional framework and create a fully legitim constitutionalism.

The Hungarian way is different. The opposition fights from within the system, by popular pressure: it challenges the power structures and the monopoly of power of the communist party. The stake of this fight is to set up a framework which creates

satisfactory circumstances for a free election as the transition to a constitutional democracy. It seems to be possible because of the gradual political reforms have taken place in the past two years. The economic reforms, introduced first in 1968, have a pay-off now. Without the gradual changes and the cumulative effects of those reforms the issue of political reforms could hardly have surfaced in the political debates of the early eighties in Hungary. It goes without saying that any such political change anywhere in the Soviet bloc could take place because of the domestic political changes inside the Soviet Union. To mention a commonplace, without Gorbachev the oppositional political groupings could hardly gain legal status either in Poland or in Hungary.

Anyway, the outcome of the political reforms now is rather obvious in Hungary. The political reforms first were initiated by party members themselves, especially the professional-technocratic stratum of the party which first realized that it is almost impossible to introduce genuine economic reforms into the macroeconomic field without changes in the political structure. The old political structure and regulation has been the safeguard of a command economy; and to secure a transition to market-regulated or even to mixed economy it was compulsory to change the regulations and the laws which enacted those regulations. This very reform process ultimately divided the party, and forced the more conservative old guard out of power. This transition was not a sudden act, and it is still going on, but there was a very

symbolic turning point in the process: the communist Party Conference of May, 1988. That was the real ousting from power the old leader János Kádár, and that was the start of the organized reformist movement inside the party.

Having the favourable political conditions from outside, and having the more and more favourable political conditions inside, the first decisive move was the passing of the assembly and association bill in the Parliament last Fall. According to the new act it is legal to create private associations; there is a due legal regulation how to participate in political life through associations, and it is legal to form and enact political parties. In other words, it is possible to participate in the political life also in opposition parties. Though there is not yet drafted a so called party act - and according to many oppositional figures it should not be at all - which regulates in details the rights and duties of political parties, they participate in the renewed political life of the country.

The opposition has formed a coalition of its own, and it is the **Opposition Round-table.** It was formed to have better chances to influence the bargaining process in our political life. It became clear quite soon that the communist party wants to divide the oppositional forces and tried to set up different private deals with the different opposition parties in order to weaken their overall impact. There was and in certain cases still is a real chance for this because the opposition is divided and there

are too many controversial issues among themselves. At this point, however, they realized the significance of being united, and the events more or less justified their unified position. The real stake is the definition of the rules of the transition game. The 'transition game' term expresses the essence of the process in which the monopoly power of the communist party will be substituted by the pluralist power structure of a multiparty system. The stake is very high because the fight is going on how much power the communist party, which starts from the most advantageous position, can restrain, and how much power the opposition parties, which start from different handicapped positions, can gain.

In order to give a frame and rules to the power struggles, the communist party and the Opposition Round-table agreed to start negotiations over the rules of the game. The form of these negotiations is the **National Round-table**, and it comprises the communist party, the Opposition Round-table, and, as a result of serious fight and a compromise, the so called Third Side. The Third Side is a loose coalition of non-party organizations, like the Patriotic People's Front, the Trade Union, the League of Women, etc. Most of these organizations have been traditionally just subsidiaries of the communist party, and only recently they try to have a more independent policy. So ultimately that was a gain by the communists to include them; the rights of the Third Side, however, are not quite equal in real power terms with the communists or the Opposition Round-table.

The central effort of the talks at the National Round-table is to define the terms of the above mentioned political transition. The fear that the communist party will try to preset the conditions of both the transition and the aftermath, is very real. There was an effort to considerably accelerate the legislative work by the present Parliament which was elected in 1985, by the rules of the communist regime. If this parliament passes many of the State-prepared bills, the new acts could meaningfully prevent the opposition to be an equal participant of the future political struggles. The present Parliament is ruled by an approximately 75 percent majority of communist party members, it could not be structured according to parties in a one-party State; and most of the legislative actions are initiated by the government of the communist party. From this perspective, it is clear why the opposition emphasizes the statement that this Parliament is not legitimate, that the present government is not legitimate from not a formal, but an essential point of view. And an astonishing outcome of this bargaining process is that by the fact of sitting to the negotiating table, by the gradual acceptance of many proposals of the opposition, the communist party itself acknowledges the doubts raised about the legitimacy of its own power. This fact gives a tremendous informal strength to the opposition, and may be an element of the compound explanation why an oppositional institution without significant mass support can gain much more political concessions than the Polish mass movement Solidarity

could.

The real task of the National Round-table is twofold: first, it has to produce an agreement in the terms of the first free elections in forty years. Second, it has to produce a consensus in all major legislative proposals before they are submitted to parliamentary debate. While the former task is a genuine bargaining game which has come to an end now, and could produce a compromise result which is acceptable to all parties, the latter is more delicate. That is the debate which contains the issue of the constitution. And here I have arrived back to the paradox of the Hungarian situation.

Drafting the new text or the changes, amendments, modifications, or whatever term we select, the constitution is typically the task of the parliament. It can vote on it, or it can submit it to a national referendum, but definitely it has to approve the new form or any of the changes. Now, in the present political situation almost all political groups agree that we need a **new constitution** instead of amending the old one. But if we keep in mind all the objections against the legitimacy of the present Parliament, and the dominance of communist party members in it (who, by the still existing party rules can be instructed or at least pressured to represent communist party interests), it will be clear why the situation is paradoxical. We would need a legitim constitutional body to accomplish the task of drafting and approving the new constitution, but we do not have one. If

the present body tries to accomplish the task, the result would not be considered as legitim.

It is very difficult to find a way out of this paradoxical situation. The problem is aggravated by a sub-problem: what institution will secure the functioning of the political system during the period of the **interregnum**? At the moment there are suggestions for a presidential system which most probably will be introduced into our political system. According to the most common interpretations, the president would substitute the role of the parliament during the transition; but if he is appointed by the parliament, the legitimacy problem cannot be avoided; if he is directly elected even by a consensus-based set of rules, the licence of the president should be given by the present - and in the previous sense not legitim - parliament. The conclusion is that if we start from a paradoxical situation, the possible solutions will present an other paradox. It means - and this is my last statement - that **formal constitutionalism does not provide means to overcome the legitimacy problem in a transitional political system.** We need an initial political act and either a violent or a peaceful transition into a situation in which a kind of social contract can be concluded. The National Round-table seems to serve this purpose in Hungary. After the free election, after the assembly of the newly elected Parliament, constitutionalism will be reestablished. From that point on, the society will have the possibility to develop self-regulating automatism for social and political activity.

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IBERIAN CASE STUDY: THE CONSTITUTIONALISM OF REDEMOCRATIZATION

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I. *PRELIMINARY REMARKS.*

"Iberian Case" is a rather ambigous concept. Of course Spain and Portugal are geographically close. Of course both countries were subdued by dictatorships throughout the same periods of the present century. Of course they have experienced important processes of transition from dictatorship to democracy in basically pacific terms and in the same decade. Of course, they have both entered the European Economic Community at the same time.

But beyond these similarities, differences are very important. Firstly, because some historical events led to very strong collective feelings of distrust and even hostility. Portugal developed early as an independent political entity against the Spanish kingdom of Castilia and after a short period of political union under the Spanish king Philip II at the end of the XVI century it became definitively an independent country in the XVII century. Till then Spain has nourished the fears and the ideological bias of certain forms of Portuguese nationalism and has been seen as the only real threat to Portugal's independence, something like the foreign enemy that haunts and sustains all kinds of nationalism. In fact, even nowadays the relationships between Spain and Portugal are made both of friendship and mistrust: politically and culturally Spain tends to look more towards northern and central Europe and Latin America than towards Portugal and Portugal still fears the danger of Spanish hegemonism.

Secondly, because of sensible differences in social structure. Portugal has been till very recently a colonial power,

and at the same time a metropolitan agrarian society , with internal zones of underdevelopment and backwardeness. Spain has of course strong territorial inequalitites between developed and underdeveloped zones but its industrial economy and its tertiary sector have been and remain quite more developed.

Thirdly, because the development and the results of their respective transition processes to democracy have been quite different and so have been the resulting political and institutional structures, even if later developments tend to bring both nearer.

But at the same time it is true that the modern political history of both countries has a stounding set of parallelisms: the source of the first Portuguese Constitution(1822) is the first Spanish Constitution of 1808; the XIX century civil wars between absolutists and liberals are parallel processes;the dictatorship of general Primo de Rivera in Spain is parallel to the military dictatorship in Portugal before the "Estado Novo" of Oliveira Salazar ; lastly, the "revolution" of April 1974 in Portugal and the Constitution of 1976 are immediate precedents of the begining of the transition and the constitutional process in Spain (Jorge MIRANDA,in R.E.P.,1988, p. 576).

"Iberian Case" is,consequently, a reductive concept. Summing up parallelisms and differences we can speak of two processes of transition from dictatorship to democracy, close in space and time but quite different in their origins, their causes, their developments and their constitutional implementations.

With these previous remarks, I shall approach the subjet from a comparative perspective and focusing in these three topics: 1) origins; 2) developments;3)constitutional solutions and resulting institutional systems.

II. *THE ROOTS.*

In Portugal, transition to democracy began with a military coup (April 25th .1974). In Spain, transition began to develop as a very complex civilian process after the death of general Franco (November 20th.1975). Behind these two events there were two long dictatorships and two different historical developments.

The Portuguese dictatorship began in 1926 with the military coup of general Gomes de Costa but later, under the rule of general Carmona as President of the Republic and Oliveira Salazar as Prime Minister developed as a "civilian" dictatorship-- the "Estado Novo" --- largely inspired in the Catholic corporative system promoted by the Vatican in the 1930s and in the Italian fascism. It was, of course, a one-party system -- the "Uniao Nacional" -- and all civil and political rights were suppressed. But it was not an "industrialist" and "developmentist" dictatorship, but rather an "immobilizing" one. In fact, under Oliveira Salazar rule, Portugal remained an immobile country, both in its internal economical and social structures and in its colonial territories .

Portugal was itself a non developed country whose economy depended largely on the explotation of colonial resources by a monopolistic group of financial and commercial corporations, whose most paradigmatic example was the "Companhia Uniao Fabril"(CUF). These Portuguese ruling groups were themselves largely subordinated to British capital and in fact the Portuguese colonial empire was a subsystem of the British African empire. When political movements for self-determination and independence began in Africa and Great Britain and France moved to another system of relationships with ancient colonies as politically independent countries, Portugal remained anchored in old schemes of colonial domination and its answer to independence movements

in Angola, Mozambique, Guinea-Bissau and Cabo Verde was military repression and colonial war. The result was a deep financial and social crisis, coupled with the general crisis of the seventies in Western countries, an increasing feeling of uneasiness and rebellion in the colonial Army and finally the military defeat in Africa and the breakdown of national economy. This was the immediate cause of the military uprising of 1974.

The Portuguese colonial Army was the main protagonist of the fall of the dictatorship and this crucial fact leads to two other conclusions: first, that the Army itself had the capacity to develop in its own ranks a quest for democracy in contact with colonial realities; second, that the Portuguese people was too unorganized, too socially and politically scattered to be able to take the main initiative against the dictatorship. Both facts were decisive for the development of the transition process, a process in which the Army had a key position as a leading force.

In Spain the historical background and the actual development of the transition process were quite different. To begin with, if Portugal remained a colonial power till the recent seventies. Spain lost the remnants of its colonial empire in the last years of XIX century, after the humiliating war with the United States. Secondly, if Portugal became a Republic in 1910, the Spanish political system remained a centralist, militarist, authoritarian and clerical Monarchy, locked to political reforms and extremely hostile to liberal and left-wing movements, as well as to bourgeois nationalist movements. In fact, it became impossible to implement democratic reforms under Monarchy and every attempt to do so became a radical clash between Monarchy and Republic. This was the main dividing line in Spanish modern political history and after two insuccesful attempts to establish and stabilize a

Republic, the clash exploded in the bloodiest civil war of all the Spanish history in 1936.

In 1923, Spain knew the first military dictatorship, that of general Primo de Rivera, largely inspired in the first italian Fascim and not so much different from the Carmona-Salazar"Estado Novo" in Portugal. The fall of this dictatorship in 1930 opened the way to the Spanish Republic in 1931 . The Republic was a period of social and ideological turmoils, but arised great hopes and promised long awaited reforms in the social and political fields .In fact,it was the great opportunity to fight underdevelopment and to modernize Spain, politically and culturally . But the the rebellion of the Spanish Army,leaded by general Franco, put an end to all hopes and expectations and after the defeat of the Republic in 1939 a bloody repression inaugurated a forty years period of military dictatorship.

This long and ruthless dictatorship did not end as a result of a colonial crisis or of a military uprising, as in Portugal. It reached its end by the conjuction of several factors. The first was,obviously, the death of general Franco and the incapacity of the dictatorship to subsist without general Franco himself and to face the unresolved contradictions of the Spanish society, accumulated throughout the 1960s and the 1970s. The second, was the new conditions created in the Spanish society, forty years after the civil war and in a European context which made impossible the continuity of the non democratic institutions, practices and ideas imposed by the Franco regime after the war in a country politically and economically isolated. The third, was the painful but effective reconstruction of the democratic political and union vanguards destroyed by the repression after the civil war. The fourth that, notwithstanding this reconstruction, the anti-Franco opposition did not succeed to transform itself in a vast popular movement, able to defeat and overthrow the dictatcrship.

Consequently, the transition to democracy in Spain began and developed as a succesession of clashes and agreements between the "reformists" of the Franco regime itself -- who understood the ineluctabiliy of change and wanted to control it -- and the groups of the democratic opposition, progressively united in a quest for democratic change without limitations and exclusions.

The overall result was the achievement of democracy, the drafting and promulgation of the democratic Constitution of 1978, the restoration of democratic liberties and civil rights, the free actitivity of political parties and unions, the establishment of a federal-like system of political autonomies and the opening of the country to European community. But this result was strongly nuanced by the remaining and the continuity of the main institutions of the Franco's state. That means that the armed forces, the security forces, the judicial system, the public administration system, the public corporations and the privileges of the great private corporations and the Catholic Church remained untouched.

Consequently, the fundamental problem of the transition to democracy was to consolidate the new system, to strengthen its supports, to solve the great historical problemes inherited -- like the conflict between Monarchy and Republic or the conciliation between Spanish national identity and the pluralism of national and regional identities -- and, at the same time, to incorporate into the democratic system the institutions of the previous regime without traumas or new civil conflicts. This was the fundamental reason and the explanation of the consensus that marked and leaded all the Spanish transition process to democracy.

III. THE DEVELOPMENTS.

Oliveira Salazar ruled Portugal for thirty-six years. When he dead his successor ,Marcelo Caetano, essayed to keep a balance between light reformism from inside the system and the maintenance of the dictatorial rules . He failed and the change became ineluctable.

After the unsuccesful attempts of some military conservatives,like general Spinola, to lead and control the change,the military coup of 25 April 1974 installed in power a Junta of seven officers from the Armed Forces Movement (MFA). This movement was predominantly left-wing but balanced between radicals and moderates, all of them deeply concerned by their experience in the Portuguese colonies and so clearly sympathetic with anticolonialist movements.

The military coup restored political liberties and civil rights and political parties took the field, but the leadership remained strongly in the MFA. Some radical mesures were taken, as the dissolution of political police forces and the jailing of a great number of its members. The conservative and rightist forces,fully compromised with the fallen regime, were inorganized and so the party balance shifted clearly to the left, where the Communist Party was mostly influential and had close links with some of the military leaders. A unitarian provisional government was formed,under the direction of the MFA but with participation of political parties, among them the Socialists and the Communists. Communists appeared to be very strong in the new Unions and it was a major issue as with the restoration of democratic liberties throughout the country arised a great wave of political,social an economic demands.

In his book "Time and Chance", James Callaghan sums up this situation: "Initially these two groups (the MFA and the Communist

Party) were perhaps the only bodies sufficiently well organised to be able to step into the power vacuum. In a country starved of political, social and cultural freedom since the 1930s the coup was greeted enthusiastically". (1987, p.360).

The specific situation was, then, of a vacuum power, with a military radical leadership, great weakness of all political parties -- with the exception of the Communist Party -- and a large demand of radical changes and reforms in all the social fields, particularly a demand of agrarian reforms

But from the first general elections for a constituent Assembly it emerged a political frame that was different of the initial one and that despite some significant oscillations has remained stable : at left, a dominant Socialist Party , gathered around the leadership of Mario Soares and with contending trends in its ranks, and a hard-lined but minoritary Communist Party ; at center-right , a consistent P.P.D., later transformed in the Social-Democratic Party (P.S.D.), gathered around the leadership of Sa Carneiro and also with contending trends inside, ; at right the C.D.S. This party scheme has been only partially modified by the appearence and the failure of the PRD, headed by former President of the Republic, general Ramalho Eanes.

The transition process in Portugal has been characterized by the difficult relationships between the leading MFA and these political parties and the changing balance of power between all these forces in a society that, after the first period of radical demands and reforms, looked for new internal equilibriums towards moderation and stability. The drafting and the promulgation of the Portuguese Constitution of 1976 was the expression of the hopes and expectations and also of the balance of power of the first period. It is a Constitution marked by an overall socialist orientation, not only in the sense of general aims but also in concret goals, like that of collective property. But its most specific feature is the constitutional role of the Armed

Forces, which become something like the highest institution of guarantee and control, in a complex interaction with the Presidence of the Republic, the Government and the Parliament.

The main role of the Socialist Party was to ensure a "civil" development of this original impulsion. In 1976 , the Socialist Party won the majority -- but not an overall majority -- and his leader, Mario Soares, formed the first constitutional government, with general Eanes as President of the Republic. The provisional period was over, but the great problems of the portuguese society strongly emerged in all the fields and the Socialist Party was unable to retain its majority. Till then the building of Portuguese democracy has developed around three major issues:
1) The reduction of the military role in the constitutional system; 2) the definition of a workable system of political alliances betweeen the major parties; 3) the economic development of a country that was forced to change abruptly from the immobilty of the salazarist system to a new and extremely mobile competitive system, without the resources from the colonies and in the framework of the European Economic Community.

The problem of alliances has been a major one, as the Communist Party is excluded -- or excludes itself -- from any possible majority. The Socialist Party has shifted from minority governments to alliances with center parties and has payed a high price for it in terms of internal homogeneity and of electoral support. Finally, the center-right party, the P.S.D.., under the leadership of Anibal Cavaco Silva has won the absolute majority in the last general elections and for the first time since 1974 rules the country with a single party stable majority.

In Spain the transition to democracy did not begin with a military coup but with the ending of military rule. The death of general Franco put an end to his system, but there was not a real vacuum power. The King succeeded general Franco and confronted with the alternative to continue the franquist system or to advance towards democracy chose the latter way, with the help of all the political forces, those coming from franquism and those coming from underground opposition.

The end of franquism coincided with the worst economic crisis of recent Spanish history. And, most important of all, the building and the actual working of an eventual democratic system were conditioned by the problem of the inheritance of the state apparatus of Franco's regime.

The only way to cope with all this problems and solve them in the sense of democracy was to add forces and to establish a clear dividing line betweeen those who wanted democracy and those who wanted to return to dictatorship. This was a very complex problem, because every political force was due to make a difficult decision about this dividing line . That meant a decision about some of the hardest historical conflicts that remained unresolved, such as the conflict between Monarchy and Republic or the conflict about national identity or the problem of pacific separation between State and Church. The decision was also conditioned by memories of the recent past. The memory of the Civil War, for instance, was mantained to the end by the Franco regime as the basic source of its own legitimacy and his distinction between winners and losers, but it weighed on the collective conscience of the immense majority of Spaniards as a trauma not to repeat. Last but not least, the Spanish society of the 1970s was a new society, with new generations in the scene, a society that wanted to be rid of dictatorship but wanted to achieve democracy without any mayor conflicts, thats's to say, in peace. All the significant political forces understood these messages and all became aware that the

only way to go ahead, to establish democracy and consolidate it was the way of consensus.

But to achieve consensus was not an easy affair. The political forces that emerged after the Franco's death were very different. From inside the Franco's regime developed a reformist movement o more precisely some reformist movements. The first one, that' to say, the first that managed to take the head of the post-Franco government, was the group headed by the ancient Minister of Information Manuel Fraga Iribarne. He intended to develop a limited reform, including the Socialist Party but excluding the Communist Party and the rest of the left. This limited reform failed soon because it meant a limited democracy in which the "accepted" democratic forces would be compelled to complicity in the restrain of democratic rights. And it failed also because the emergent social movements overflowed soon the limits set by the government Arias-Fraga.

The second government of the new post-Franco Monarchy was headed by another ancient Minister of Franco, Adolfo Suárez. This second government was forced to go far ahead and Mr. Suárez himself understood that the only possibility to control the democratic process was to develop it without the limitations that caused the failure of the previous attempt. At the same time, the opposition forces succeeded in establishing a unique and unitarian platform, including all the significant groups, from Christian Democracy to Communists. This was the basis of the final agreement between the franquist reformists and the opposition. And as a result of this agreement general elections were held in 15 June 1977, with free participation of all the political parties.

The political constellation that emerged from these first general elections conditioned the following periods of the process. The party headed by Mr. Suárez -- the "Unión de Centro Democrático" (U.C.D.) , formed by franquist reformers, but also by christian-democrats, liberals and social-democrats -- was the

winner, but did not obtain the overall majority. Second, at close distance, was the Socialist Party -- the "Partido Socialista Obrero Español"(PSOE) --. Third, but at a considerable distance and so excluded from the possibility to become a government alternative, was the Communist Party. And fourth, the little group headed by Mr. Fraga Iribarne,"Alianza Popular". Finally some nationalist parties emerged with strong roots, specially in Catalonia and the Basque Country.

From this constellation of forces two evidences emerged: first,that the victory of the political forces that wanted democracy was overwhelming: in the new elected Parliament there was not a single partisan of the Franco's dictatorship. So the way was open to a Constituent process . Second, that no single political force was able to lead alone or to implement alone the constitutional reforms and the consolidation of the new democracy. The consequence was equally obvious: consensus was needed to draft the Constitution, to implement the reforms and to cope with the more urgent problems, specially the economic ones.

The Spanish Constitution of 1978 was drafted by a group of seven deputies elected by the first democratic Parliament ,the Congreso de los Diputados. Three of them represented the U.C.D., one the Socialist Party, one the Communist Party, one Alianza Popular and one the nationalist parties of Catalonia and the Basque Country. This group,popularly known as the "Founding Fathers", was charged of the material task of drafting the text of the Constitution but also, and mainly,it became the center of all the political compromises between the parties . The aim was to draft a Constitution that could be accepted by all the democratic forces and that,consequently,could be submitted to popular referendum with a positive vote recommendation by them all. And that result was attained. Lastly, as a complementary mesure, consensus extended to the economic field as a general agreement of the same political forces on reforms and inmediate measures ,known

as the "Pactos de la Moncloa" -- which was anyway far less effective.

The most important issue at stake was, obviously, the consolidation of the emerging democracy. But consolidation did not mean only to agree about Constitution and parlamentary institutions. It meant also the necessity to solve the most heavy historical problems that remained alive in 1977 and that were at the roots of the tragic experiences of the past, specially of the civil war and the two military dictatorships. Among these historical problems I shall mention the two most significants: the problem of Monarchy and the problem of national identity and nationalisms, already mentioned above.

In 1977 the Socialist Party, the Communist Party and all the left forces, as well as some nationalist groups, were republicans and opposed Monarchy. It was not an ideological bias, but the consequence of the historical role of a Monarchy that was belligerent against the left and against the peripherical nationalisms. The split between the Spanish political forces over the issue "Monarchy or Republic" was a radical division, both political and ideological, that turned even into a division over symbols -- the national flag and the national anthem, por instance.

But, as said before, the Spanish transition to democracy did not begin with a vacuum but with an already existing Monarchy, restored by general Franco and based in a legality that not only the great majority of citizens rejected but that the new democracy set out to modify.

On the other hand, it was obvious that in that initial moment, with weak democratic forces and with the major institutions of the Franco's regime still intact, a strong element of stabilization was necessary. And this could be only the Crown. The majority of the army, the security forces, the public servants and the judicial system accepted -- a lot of them reluctantly -- the democratic legitimacy and the democratic process only because the

King himself accepted it, not because of the leadership of new political parties and leaders. The issue "Monarchy or Republic" could have turned into a wrong dividing line inside the block of supporters of the transition process and could become a rallying cry for those who were against it. Finally, the Crown itself needed a new democratic legitimacy, since otherwise it would be compelled to perpetuate the legality of the Franco regime -- which was its own original legality -- and thus locking the door to democracy .

An agreement was necessary. For the Crown, to stand in the past would be to enter once again in a spiral of political confrontations that could only lead no another civil war. For the left, to stand in the past was to remain anchored in identity signs certainly deeped-rooted but at the same time inable to confront the new problems at stake. The constitutional compromise was the parliamentary Monarchy. The Crown and the Monarchy as a system obtained a new democratic legitimacy. The left obtained a system of democratic liberties, of territorial autonomies and of parliamentary institutions that till then it could only reach through the Republic and the overthrow of Monarchy. And when in 1982 the Socialist Party won the general elections with an overall majority, for the first time in Spanish history the left governed without problems under a Monarchy. This was a really historical compromise that solved a very difficult problem an allowed the democratic forces to gather in one side of the main dividing line against the partisans of dictatorship, without secondary dividing lines that would weakened the whole process of transition to democracy.

Something very similar can be said about the other main historical conflict of the modern Spanish history, the conflict on national identity. This was another bloody split between political forces, a split that confronted authoritarian centralism and the quest for autonomy of the most developed zones of Spain,

especially Catalonia and the Basque Country. When nationalism began to develop in both regions at the end of XIX Century, the answer of Monarchy and of the central ruling class was to order the army to fight nationalism in the name of Spanish national unity and of Spanish central nationalism. And so the army became the armed depository of the integrity of the Spanish nation and the centralist Monarchy against all internal opposition. The Republic of 1931 essayed to solve the problem opening the way to regional autonomies. But after the civil war and the defeat of the Republic, the clash became especially violent under Franco's dictatorship, which persecuted and supressed all the identity signs (institutions, languages, cultures) of Catalonia and the Basque Country and stressed the exclusiveness of Spanish national identity as the old Spanish nationalism linked with centralism and authoritarism.

In 1977 this was one of the most oustanding issues. It was not only a problem of political organization but also an ideological problem, because both in Catalonia and the Basque Country -- as well as in Galicia and other parts of Spain -- a very strong collective feeling of nationality had developed which was very difficult to integrate into the wider collective feeling of the Spanish nation, after such a strong phase of ultrarightist Spanish nationalism under the Franco regime.

An agreement, a new compromise was also necessary. And the compromise is stated in article 2 and the Title VIII of the new Constitution. Article 2 defines the concept of the Spanish nation. It states that Spain is a true united and indivisible nation. But it also states that this united nation is formed by "nationalities" and "regions", each one having a right to political autonomy, recognized and guaranteed by the Constitution itself, and that the link which keeps this new Spanish nation united is the link of "solidarity". From a theoretical point of view, article 2 seems and odd combination of heterogeneous

elements and the result is something like a "nation of nations". But article 2 is not a theoretical exercise but an attempt to find a political solution to one of the most serious and bloodiest conflicts of the Spanish political history. On this basis, the Constitution opens the way to a deep reorganization of the Spanish centralist state in a federal-like system of political autonomies.

These are perhaps the two main examples of the deep spirit of the Spanish transition to democracy. The same could be said about other important issues, namely the implementation of civil rights and political liberties, the separation between state and Catholic church, the abolition of death penalty, the full recognition of political pluralism, etc.

This was the work of consensus. The spirit of consensus prevailed in the first period of the transition, till the completion of the constituent works at the end of 1978. The second general elections of 1979 confirmed the political framework issued of the first ones. The U.C.D. was again the main political force, but was not able to attain overall majority. The new UCD government, leaded again by Mr. Suárez, chose to govern alone putting an end to consensus and the Socialist Party became the main challenger in a political confrontation that involved especially these two parties . The U.C.D. government, confronted with the great problems of the new democracy, that's to say, the implementation of democratic reforms in all the state institutions , the implementation of regional autonomies and the fight against the economic crisis and inflation, began to divide in internal opposed fractions and to crack down. After the dimission of Mr. Suárez and the failed military coup of general Milans del Bosch and colonel Tejero on 23 February 1981, the U.C.D. crisis was open. And it was deepened by the results of the the first local elections of 1979 as the left -- socialists and communists -- obtained the majority in the more important Spanish towns , especially Madrid and Barcelona.

The general elections of 28 October 1982 changed the political framework. The Socialist Party (PSOE)obtained more that ten milions of votes and the absolute majority in both Houses of Parliament, the Congress and the Senate. The U.C.D. disappeared, the Communist Party fell abruptly to only 5% and Alianza Popular, leaded by Mr. Fraga Iribarne became the main conservative force and the second group in Parliament. In Catalonia and the Basque countries, the nationalist parties confirmed their positions and in the following elections to their regional Parliaments became the majority forces.

This general framework was confirmed in the general elections of 1986. The Socialist Party retained its absolute majority, even with a fall in its total voting results, and a new party, the Centro Democratico y Social (C.D.S.), leaded by Mr. Suárez began to emerge as a center force.

Previsions about next developments are difficult. Spain has become a very dynamic country, changes are abrupt and deep, new generations take the field and Spain finds itself in a sort of mid-way between past and future : it has already the same problems of other more developed European countries but some of the problems inherited from the past are not fully solved, especially the problems of basic economic structures and of public administration. But the main political phantoms of the past are over and the main challenge of 1977 is fulfilled: democracy is a stable system and it works .

IV. *THE INSTITUTIONS.*

The differences in the processes of transition to democracy in Portugal and Spain led to substantial differences in both the constitutional and the political frameworks. But in the last years, the actual working of the institutions and of the political forces have led to increasing similitudes in both fields.

The Portuguese Constitution of 1976 sprang up from the political wake of the April 1974 uprising. It is a syncretic Constitution, but its overall inspiration is quite more radical than the Spanish Constitution. Some of the main principles of the Portuguese Constitution are the collective apropiation of the main production means and of land and natural resources , as well as the elimination of monopolistic corporations and of latifundia in the general perspective of "transition to socialism" (art.89,1). Another main feature is the constitutional role granted to the Armed Forces, through the "Council of the Revolution", one of the key institutions of the constitutional system.

But the constitutional revision of 1986 introduced a very important change in the internal logic of the first period. The feeling of "transition to socialism" has desappeared in fact despite a remaining mention to socialism in article 2; the role of the military and the "Council of the Revolution" has been extinguished and the whole constitutional system has evolved towards a closer parallelism with other systems in Western Europe.

The situation after the 1986 revision can be summarized as follows:

1. Portugal is a semi-presidential Republic or rather a mixed presidential-parliamentarian system. The President of the Republic -- for the first time a "civilian" President with the election of

the socialist leader Mr. Mario Soares in 1986 -- is elected directly by voters but he has not executive powers, even if he has a limited veto power and the possibility to dismiss the Government and to dissolve the Parliament or Assembly of the Republic. Due to his direct election the President has a very important political role as a stabilizing factor and as a mediator and this role has increased after the extinction of the military "Council of the Revolution", whose role counteracted in fact that of the President. It is interesting to note that in all the presidential elections held till now the majority has not coincided with the party majority in the Parliament. At present, with an overall majority in Parliament of the center-right P.S.D., the President was elected with the support of the left forces.

2. The real working of the system is that of a parliamentarian regime with a single chamber, the Assembly of the Republic, elected by direct popular vote and a proportional system. And as in all the modern parliamentarian systems, the gravity center has shifted to Government and party politics predominance, especially after the general election of 1987, which gave to a single party, the PSD the overall majority. The party system has evolved equally in the sense of an equilibrium not so far awayof the balance of political forces existing in the rest of Western countries and, more specifically, in Spain. Of course the balance is not the same in Portugal and Spain, but the party system becomes more and more similar.

3. The Portuguese constitutional structure is a centralized or unitarian one, in the sense that does not accept regional autonomies as a general system. But the article 6 of the Constitution enounces the principle of autonomy of the local governments and establishes two autonomous regions in the archipelagos of Açores and Madeira, each one with a regional Assembly and a regional Government, with a President appointed by the representative or Minister of the Republic in the islands.

Each autonomous region has its own Statute, drafted by the regional Assembly and approved by the central Parliament, the Assembly of the Republic.

The main difference between the Portuguese constitutional system and the Spanish one is, obviously, that Spain is a Monarchy. More precisely, Spain is a "parliamentarian Monarchy", in which the King reigns but does not rule. The King has not veto power, cannot dismiss the President of the Government nor any Minister, cannot dissolve the two chambers of the Parliament or Cortes Generales and even if he is the nominal Chief of the Armed Forces, he cannot dispose of them as only the Government is entitled to decide on military affairs .

In this sense, the Spanish system is a purer parliamentarian regime than the Portuguese one. The indisputed political leadership lies in Government and Parliament. The Parliament or Cortes Generales is formed by two chambers: the Congreso de los Diputados, elected by direct vote with a proportional system, and the Senado, elected partly by direct vote with a majority system (each province electing four Senators, regardless of population) and party by non-direct vote, as the Parliament of each autonomous region elects a number of Senators proportional to the respective population.

The structures and the actual working of the parliamentarian system are similar to those of other parliamentarian countries, with a specific regulation of the Governmment's control by Parliament in the "constructive" sense of the German Federal Republic system.

And as in other parliamentarian systems, the gravity point has shifted to Government and political parties, especially after the overall majority obtained by the Socialist Party in 1982.

Another main feature of the Spanish constitutional structure is the creation of the federal-like system of Autonomous Communities. At present 17 Autonomies haven been created, covering the full Spanish territory with the exception of the two North-African cities of Ceuta and Melilla. Each Autonomous Community has its own Constitution or Statute, its own Parliament, its own Government. The structure and the actual working of these autonomous institutions are parliamentarian, even if the institution of the President and that of the Primer Minister coincide in the same person: each Parliament is elected by direct vote through a proportional system, the President is elected by the Parliament and is responsible to it and the Statutes have been drafted at the initial stage by the representatives of the Autonomous Community in process of formation and finally aproved by the Cortes Generales. Among these 17 Autonomous Communities are some differences, concerning competences and financial resources. In this sense, Catalonia, the Basque Country, Galicia and Andalucia are autonomies of a higher level, but the logic of the system is that after a certain period all the existing Autonomous Communities will evolve to a similar degree of effective autonomy. Moreover, in those nationalities or regions in which exist specific languages, like Catalonia, the Basque Country, Galicia, Valencia and the Balearic Islands, these languages are co-official with the overall Spain's official language, the castilian or spanish.

From this general perspective, we can conclude that beyond these specific features and differences and beyond the historical conflicts and mistrusts it seems obvious that Portugal and Spain are evolving largely in the same path and the same direction and that this confluence will grow in the future as both countries are now integrated in the same process of European unity.

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The Spanish Case: Remarks on the General Theories of Nationalism

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ABSTRACT. We must escape ideological bias to develop a theory of regionalism from case studies. Late capitalism often produces regional and sub-national conflicts. Two issues are to be explained: the relationships of regional marginality to new economic developments and, in turn, their relationship to centralization and/or decentralization. The term "self-determination" is no longer clear: what is the unit for "self-determining" its future? To understand the question we must have an historical perspective on each case. In Spain, Catalan and Basque marginality is cultural rather than economic—and has been challenged by the powers of the central state, leading to crisis and military dictatorship. Later, democratization produced guarantees of autonomy for the region as a practical solution.

Introduction

The main theoretical issue in the analysis of national and regional problems is whether, from case studies we can reasonably develop general patterns for a theory of nationalism and regionalism, or whether a sequence of case analyses can only give us a heterogeneous account of different situations. The issue is especially problematic in the European political tradition, where, notwithstanding the theoretical line opened by Rokkan and Urwin (1982; 1983) and other political scientists, the national problems are mainly political, and the mainstream of theory still runs through the developments of the traditional "nationalities principle," in which the essentialist approaches to the concept of "nation" predominate. By "essentialist approaches," I mean those approaches made by nationalist authors who consider "nation" as a non-temporal entity, always identical in its essential singularity. One of the consequences is that the sociological or historical analysis can hardly be isolated from the political implications of every case study; and the social scientists or the historians are often requested to become political opinion makers, and to focus their analysis on a political and ideological bias. My own experience in Spain has led me to a very strong feeling against essentialism in this field. So I think that no case study is theoretically useful if we do not overcome this approach, this ideological bias, and if general categories and doctrinal approaches do not give way to historical and empirical perceptions.

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I do not intend to discuss here all the implications of this well-known theoretical problem, but only to invoke some developments of the Spanish case, which offers a rich complexity of interactive regional and national elements, both in the ideological and in the political fields. The so-called "national problem" has been one of the main issues in Spanish political history in the last two centuries, and one of the keys to the background of the two military dictatorships that Spain has known in the twentieth century. After ten years of constitutional democracy, the problem has not been fully resolved, and conflicts about national identities and symbols arise periodically, not only as outbursts of peripheral nationalism but also as political movements linked to terrorism—as in the well-known case of the Basque separatist organization, the Euzkadi Ta Alzcatasuna (ETA). Nor has democracy solved the problem of Spanish national feeling, as the ancient Spanish nationalism was connected to militarism, clericalism and centralism and the new democracy is challenged by the urgent need to implement, develop, spread and strengthen a new national feeling linked to democracy, to decentralization and to pluralism.

First, we must ask, what is the relationship between pluralism and national and regional diversity? This problem, of course, has different roots and meanings in western developed countries and in the underdeveloped ones, not only because of their different historical, social and political backgrounds, but also because the political and constitutional concept of pluralism does not have the same meaning in such heterogeneous situations. From this point of view, the problem reveals its complexity mostly in western developed countries, where the ancient theory of nationalities was developed mainly in nineteenth-century Europe through abrupt economic and social transformations and through increasingly bloody wars. Capitalist society has once again changed the established political frontiers; and, in the process, contributed to the problems of late capitalism—that is, the new patterns of economic, social, cultural and political centralization and, consequently, new forms of territorial marginality.

This is a process that deeply affects the actual working of traditional state institutions—mainly Jacobin inspired, i.e. centralized ones—and stresses the quest for new forms of political organization and institutional functioning. Social and political conflicts rooted in the new realities of late capitalism often take the form of national and regional conflicts. And they are often theorized about in terms of traditional nationalities or even—as can be seen in Spain's Basque country—in terms of imperialism and underdevelopment. I think it most important to identify these problems and to see if nationalism and regionalism are ideological forms or even ideological disguises of other problems that have arisen through the logic of late capitalist development; or if we are really confronted with a revival of the unsolved traditional problems of nationalities in developed countries.

It is evident that the problem concerns not only western developed countries. National and regional conflicts arise and develop also in Eastern Europe, which are supposed to be strongly unified by their political systems. The Yugoslav situation is paradigmatic; but we must also consider recent developments in the Soviet Union, Romania and Poland. Some of these relate to the last redefinition of state frontiers after the Second World War. The far-reaching political reforms announced in these countries reveal very strong contradictions and open the way to new prospects in political analysis.

To focus on Europe and other developed areas is not only a theoretical option but challenge. National and regional problems in underdeveloped countries are better

understood by political scientists, easier to comprehend in a general view, as their roots—the process of colonial emancipation—are more evident and the patterns of their nation-building processes are more uniform, despite their increasing complexity. By contrast, the explosion of national and regional problems in developed countries is still awaiting an agreed-upon theoretical explanation. Once that is settled, there are two major issues to be considered: first, the relationship between new economic developments and regional marginalities; and, second, the relationship between these new economic developments and the centralization or decentralization of political institutions and cultural patterns (the mass media, language, cultural values, etc.). This is a complex field, both because it is difficult to define and because it is rapidly changing. Things that seemed evident ten or fifteen years ago are not so evident now, as national minorities and regional diversities are affected by large processes of integration—like the European Economic Community—and by the strong homogenization of cultural patterns. Explanations based only on one set of factors, economic, political or cultural, are no longer sufficient to cover the overall realities.

This returns me to my first point: the relationship between case analysis and general theory. I was myself troubled by this problem when writing the book *Nationalities and Nationalisms in Spain* (1985). As I was developing my analysis, I found it necessary to avoid two theoretical temptations. The first was abstract analysis, mere conceptual discussions about, for example, the true meaning of "nation." The second was to avoid developing a general theory from the Spanish case.

It seems to me that political concepts like "nation," "region," and "self-determination," have different meanings in Spain and Central America, in Europe and in Africa. Nor do their meanings in nineteenth-century European history apply to present-day Europe. Self-determination, for example, is a general principle, established as such in United Nations' declarations. But to understand its real meaning we must descend to concrete cases, because the most important problem is not self-determination itself as a juridical and political principle, but to identify the specific subject of self-determination.

Let me provide an example. In a meeting held in Managua in June 1986 on the autonomy of the Atlantic coast of Nicaragua, self-determination was a widely discussed item, as some participants put forward the concept as the political basis for autonomy. The theoretical problem immediately became a political problem, because the consequences of one kind or another of practical implementation were obviously bound to be extremely different; and both deeply significant from a political point of view. The problem was not to assert the theoretical principle of self-determination, but to identify the juridical subject of this general right. Was it Nicaragua as a whole they were considering? Was it merely the Atlantic coast? According to the United Nations' definition, self-determination means the enforcement of national sovereignty against foreign pressure. Atlantic coast autonomy was seen as the way to strengthen national unity between the two parts of Nicaragua, the Pacific and the Atlantic coasts. However, as self-determination is linked with the possibility of political independence and sovereignty, self-determination for the Atlantic coast could lead to the splitting up of Nicaragua as a country. Thus, the answer of the Managua meeting was very clear: the juridical subject of self-determination was not the Atlantic coast, but Nicaragua as a whole. It was, obviously, a political decision, but this is the key to the issue. The problem is not self-determination as a political or a juridical concept, but it is to identify its subject—and that means a political decision which can be explained only through an historical and political case analysis.

In Spain, a strenuous and rather bitter discussion about self-determination is also developing, and all the nationalist parties in the Basque country and the majority of those in Catalonia place self-determination as a core principle of their political programs. Also, ETA terrorism has developed in the name of Basque self-determination. Here the problem is not one of theoretical concept nor abstract discussion, but the real meaning of self-determination in our historical perspective and in our constitutional system. I shall later return to this problem.

Of course, I am not opposed to general theories. What I wish to stress is my personal conviction that there is no single theory to explain national and regional realities and conflicts, as, for example, the theory based on economic marginality. We need careful examination of individual national and regional cases. Economic marginality can explain, perhaps, regional conflict in France's Brittany and Corsica, but not those in Spain's Catalonia and Basque country, since the latter are the most economically developed regions of Spain. Economic marginality is undoubtedly one of the causes of conflict in Northern Ireland, but it seems not to be possible to explain it fully if religious and cultural factors are not also taken into account.

Last, but not least, historical perspective is absolutely necessary, not only to understand the roots of every national and regional problem, but also to understand the continuity of institutions and of the feelings of the people involved. In my opinion, this is most important. National and regional problems in Spain, for example, can only be explained in all their complexity from an historical point of view. Only through history do political and economic factors take their full shape. Let us look at the problems of nationalities and regions in Spain in this context.

The Spanish Case

As mentioned above, the strongest national and regional conflicts in Spain have developed in the most economically developed areas—Catalonia and the Basque country. Therefore, the roots of the problem do not lie in economic marginality, but in political and cultural marginality.

The building of the Spanish state through the nineteenth and twentieth centuries was not the work of an industrial and commercial bourgeoisie, as in France, but of a ruling class made up mainly of great southern landowners, bureaucratic cliques and speculative financial groups. The Catalonian industrial bourgeoisie, based on light industry, never was a dominant part of the state ruling class, but a secondary partner. The Basque bourgeoisie developed late in the nineteenth century, through the boom in heavy industry (iron, coal, steel, and machinery) and through the rapid accumulation of banking capital. This Basque bourgeoisie became the core of the Spanish financial elite, but not of the political ruling class. Moreover, Catalonia became an economic and cultural area, unified by the powerful presence of a great urban center—Barcelona. By contrast, the Basque country lacked such a unifying urban center, and the industrial city of Bilbao became a kind of liberal island in a sea of traditionalist peasant holdings. Finally, the central ruling class, the "central oligarchy," as we usually say in Spain, was able to build a Jacobinic state, but was not able to unify the whole of Spanish civil society, as the French Jacobin ruling class had been able to do.

To develop a system of light industry like that of Catalonia—which depended on the internal Spanish market and on a very severe protectionism—one political condition was needed which the Catalan bourgeoisie was never able to attain: the

control of the central state. This was not exactly the problem of the Basque country, as there, the bourgeoisie already controlled banking capital. Catalan nationalism was thus the work of an industrial bourgeoisie, powerful enough to create a modern capitalist economy in a mainly agrarian country, but too weak to seize political power. Catalan nationalism developed as a political proposal for reform and decentralization of the Spanish Jacobinic state system. Basque nationalism, by contrast, was mainly the work of peasant and intermediate urban groups, and was rooted in traditionalism and Catholic orthodoxy. It was not so much interested in leading and reforming the Spanish state, as in becoming a separate part of Spain or even a separate state.

These two different aspirations were identified as a single political problem by the central ruling class, which would not accept compromise, and whose brutal response was to order the army—recently humiliated in the war against the United States for Cuba and the Philippines—to fight the nationalists. The army then became the armed depository of the integrity of the Spanish nation and of the monarchy against all internal opposition. Catalonia and the Basque country were treated as enemies of the state. Their institutions, cultures, and languages were suppressed, and all the Catalans and Basques, regardless of social status, were confronted with the same centralist adversary. Consequently, all political and social groups and classes in the two regions faced the same external enemy. And this clash became more and more violent and radical as the crisis of the monarchy opened the way to the military dictatorships of generals Primo de Rivera and Franco, which lasted through fifty years of the present century. I underline that the ideological basis of both military dictatorships was the same: the fight against the "reds," who wanted to destroy the monarchy, and the fight against the "separatists," who wanted to destroy the unity of the Spanish nation.

The clash was especially violent under Franco's dictatorship. In Catalonia, the underground struggle against Franco combined the quest for democracy with the quest for political autonomy, and was the work of all political groups, but mainly of the left-wing parties—the socialists and communists. In the Basque country, the fight against Franco took a more radical nationalist direction. The different roots of the two problems became once again evident. In Catalonia, all political groups achieved substantial consent to develop a democratic alternative. In the Basque country, radical nationalism gave way to political movements like ETA, which soon evolved into terrorist groups.

When the transition to democracy began to develop after Franco's death in 1975, the problem of Catalan and Basque autonomy was one of the main oustanding issues. But the problem was not only one of political organization, it was also ideological. In both Catalonia and the Basque country, a very strong collective feeling of nationality had developed which was very difficult to integrate into the wider collective feeling of the Spanish nation, especially after such a strong phase of ultra-rightist Spanish nationalism as existed during the Franco regime.

In the new Spanish Constitution of 1978 there is a rather odd article—article 2—in which the concept of the Spanish nation is defined. It states that Spain is a true, united and indivisible nation. But it also states that this united nation is formed by "nationalities" and "regions" that have a right to political autonomy, recognized and guaranteed by the Constitution itself; and that the link which keeps this nation united is the rather immaterial link of "solidarity." From a theoretical point of view, article two seems to be an odd combination of heterogeneous elements; and the result is

something like a "nation of nations." But article two is not a theoretical exercise, but an attempt to find a political solution to one of the most serious and bloodiest passages of Spanish political history. Consequently, article two is the political basis of a new organization of the traditional Spanish Jacobinic system in a federal-like system of political autonomies.

I should like here to underline another side of the problem. The Spanish Constitution does not limit itself to open political autonomy for Catalonia and the Basque country, but establishes political autonomy as a general system of state organization. Here we find the other dimension of our problem, that of pluralism. Political autonomy is not seen in the Spanish Constitution as only a way to pacify the historical conflict between centralism and Catalan and Basque nationalism, but also as a way to open the system to the plurality of regional realities and as a way to find a new equilibrium between the developed and underdeveloped regions of Spain. Today there are seventeen autonomous regions, each with its own parliament and government. Their development is unbalanced and the transition from centralized to decentralized state is revealing itself not only to be very difficult, but to be threatened even by unpredictable backward-looking movements, especially with regard to the new conditions imposed by Spain's entry into the European Economic Community. But the challenge is clear: the Spanish system of autonomous regions seeks to solve the problems posed by national diversities and, at the same time, to open the way to the full expression of national and regional pluralism.

Some Conclusions

This short description of the Spanish case brings me back to my first introductory statements. Economic marginality is certainly one of the roots—and so one of the theoretical explanations—of regional and national conflicts in developed countries, but it is not, by itself, a sufficient basis for a general theory of regionalism or of national plurality. Economic factors are, of course, basic to theoretical explanations, but they are many-sided, and must be considered in their concrete reality. Historical and political factors are most important, but also must be considered as concrete elements of a specific historical development and of a specific political system. Cultural factors can also develop in complex ways, both as a result of political conflict and of ideological confrontation (linguistic conflicts, for example). But even these must be considered in their specific reality. In Spain, for example, the clash between the use of Spanish and various minority languages, such as Catalan, Basque and Galician, is mainly political. But each has had a different development, depending on the structure, the background and the strength of each language and of the national collectivity supporting it. The situation of the Catalan language is, in this sense, far better than that of the Basque. The conflict generated by national symbols, such as flags and anthems, can also be very strong as has been, and still continues to be in Spain, because of the specific political and historical conditions of the respective national confrontations. And, at the same time, national symbols can become ideological weapons, nourishing nationalist movements in an historical and political context quite different from the original one.

In my opinion, this means that a many-sided analysis and careful examination of concrete cases are absolutely necessary to cope with the complexity of national and regional problems. From these we can reasonably expect to reach some general

explanations and, going back to my preliminary observation, this is possibly the closest we shall get to general theory in our field.

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SEMINARIO DE DERECHO POLITICO

3. Preliminary remarks
II. The model
III. The development
IV. The institutions.

I. "Iberian case"?

1. Historical differences and backgrounds.
2. Differences in social structures and political cultures
3. Differences in the actual development of the transition process to democracy.
4. Carry up: p. 2.

I have stressed the historical elements of explanation and I have focused more on transition problems than on institutional implications.

2/

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II. The root:

A) 1. Portugal as an [redacted] underdeveloped Portugal colonial power.

2. [redacted] The fall of the colonial.

3. The role of the Army.

B. Spain.

1. No colonial power.

2. Authoritarian Monarchy.

3. The Civil War and the Franco military dictatorship.

4. The role of the Army was [redacted] exactly the opposite of Portugal

5. Main characteristics of the Spanish transition to democracy

3/

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III. The development

A. Portugal

1. Vacuum power

p. 8 - 9

B. Spain

1. P. 10

The path was prepared by reforms inside the ex-Franquist Parliament and at the same time, with repetitions with opposition.

2. The drafting of the Constitution.

p. 12 - 13

The area: the dividing line.

3. Reference to the powers of Monarchy and autonomies

4. The new political framework after the general elections of 1982.

7/

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IV. The institutions

A. Introd:

1. The Constitution of 1976. (socialism, role of the "Council of the Revolution" (CNFA).

2. The revision of 1986: "transition" to socialism" and the role of the "Council of the Revolution" suppression. The return of an 1989 (footnote)

3. Main features.

p. 18-19

B. Spain

1. The "parliamentary Monarchy" (p. 20)

5/

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2. The parliamentary system
(f. 20)

3. The system of autonomies
(f. 21)

Conclusion

(f. 21)

Beyond the institutional and political differences ~~and~~ the political system tends to coincide. But one conclusion: the right and centre parties in Europe have adopted themselves to democracy because they were not compromised with dictatorship nor were the protagonists of change. In Spain not.

Jordi Solé Tura

IBERIAN CASE STUDY: THE CONSTITUTIONALISM OF REDEMOCRATIZATION.

A.C.L.S.
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BERLIN.

I. *PRELIMINARY REMARKS.*

"Iberian Case" is a rather ambigous concept. Of course Spain and Portugal are geographically close. Of course both countries were subdued by dictatorships throughout the same periods of the present century. Of course they have experienced important processes of transition from dictatorship to democracy in basically pacific terms and in the same decade.Of course, they have both entered the European Economic Community at the same time.

But beyond these similarities, differences are very important.Firstly, because some historical events led to very strong collective feelings of distrust and even hostility. Portugal developed early as an independent political entity against the Spanish kingdom of Castilia and after a short period of political union under the Spanish king Philip II at the end of the XVI century it became definitively an independent country in the XVII century. Till then Spain has nourished the fears and the ideological bias of certain forms of Portuguese nationalism and has been seen as the only real threat to Portugal's independence, something like the foreign enemy that haunts and sustains all kinds of nationalism. In fact,even nowadays the relationships between Spain and Portugal are made both of friendship and mistrust: politically and culturally Spain tends to look more towards northern and central Europe and Latin America than towards Portugal and Portugal still fears the danger of Spanish hegemonism.

Secondly, because of sensible differences in social structure.Portugal has been till very recently a colonial power,

and at the same time a metropolitan agrarian society , with internal zones of underdevelopment and backwardeness. Spain has of course strong territorial inequalitites between developed and underdeveloped zones but its industrial economy and its tertiary sector have been and remain quite more developed.

Thirdly, because the development and the results of their respective transition processes to democracy have been quite different and so have been the resulting political and institutional structures, even if later developments tend to bring both nearer.

But at the same time it is true that the modern political history of both countries has a stounding set of parallelisms: the source of the first Portuguese Constitution(1822) is the first Spanish Constitution of 1808; the XIX century civil wars between absolutists and liberals are parallel processes;the dictatorship of general Primo de Rivera in Spain is parallel to the military dictatorship in Portugal before the "Estado Novo" of Oliveira Salazar ; lastly, the "revolution" of April 1974 in Portugal and the Constitution of 1976 are immediate precedents of the begining of the transition and the constitutional process in Spain (Jorge MIRANDA,in R.E.P.,1988, p. 576).

"Iberian Case" is,consequently, a reductive concept. Summing up parallelisms and differences we can speak of two processes of transition from dictatorship to democracy, close in space and time but quite different in their origins, their causes, their developments and their constitutional implementations.

With these previous remarks, I shall approach the subjet from a comparative perspective and focusing in these three topics: 1) origins; 2) developments;3)constitutional solutions and resulting institutional systems.

II. *THE ROOTS.*

In Portugal, transition to democracy began with a military coup (April 25th .1974). In Spain, transition began to develop as a very complex civilian process after the death of general Franco (November 20th.1975). Behind these two events there were two long dictatorships and two different historical developments.

The Portuguese dictatorship began in 1926 with the military coup of general Gomes de Costa but later,under the rule of general Carmona as President of the Republic and Oliveira Salazar as Prime Minister developed as a "civilian" dictatorship-- the "Estado Novo" --- largely inspired in the Catholic corporative system promoted by the Vatican in the 1930s and in the Italian fascism. It was,of course, a one-party system -- the"Uniao Nacional" -- and all civil and political rights were suppressed. But it was not an "industrialist" and "developmentist" dictatorship,but rather an "immobilizing" one. In fact, under Oliveira Salazar rule, Portugal remained an immobile country, both in its internal economical and social structures and in its colonial territories .

Portugal was itself a non developed country whose economy depended largely on the explotation of colonial resources by a monopolistic group of financial and commercial corporations, whose most paradigmatic example was the "Companhia Uniao Fabril"(CUF). These Portuguese ruling groups were themselves largely subordinated to British capital and in fact the Portuguese colonial empire was a subsystem of the British African empire. When political movements for self-determination and independence began in Africa and Great Britain and France moved to another system of relationships with ancient colonies as politically independent countries, Portugal remained anchored in old schemes of colonial domination and its answer to independence movements

in Angola, Mozambique, Guinea-Bissau and Cabo Verde was military repression and colonial war. The result was a deep financial and social crisis, coupled with the general crisis of the seventies in Western countries, an increasing feeling of uneasiness and rebellion in the colonial Army and finally the military defeat in Africa and the breakdown of national economy. This was the immediate cause of the military uprising of 1974.

The Portuguese colonial Army was the main protagonist of the fall of the dictatorship and this crucial fact leads to two other conclusions: first, that the Army itself had the capacity to develop in its own ranks a quest for democracy in contact with colonial realities; second, that the Portuguese people was too unorganized, too socially and politically scattered to be able to take the main initiative against the dictatorship. Both facts were decisive for the development of the transition process, a process in which the Army had a key position as a leading force.

In Spain the historical background and the actual development of the transition process were quite different. To begin with, if Portugal remained a colonial power till the recent seventies. Spain lost the remnants of its colonial empire in the last years of XIX century, after the humiliating war with the United States. Secondly, if Portugal became a Republic in 1910, the Spanish political system remained a centralist, militarist, authoritarian and clerical Monarchy, locked to political reforms and extremely hostile to liberal and left-wing movements, as well as to bourgeois nationalist movements. In fact, it became impossible to implement democratic reforms under Monarchy and every attempt to do so became a radical clash between Monarchy and Republic. This was the main dividing line in Spanish modern political history and after two insuccesful attempts to establish and stabilize a

Republic, the clash exploded in the bloodiest civil war of all the Spanish history in 1936.

In 1923, Spain knew the first military dictatorship, that of general Primo de Rivera, largely inspired in the first italian Fascim and not so much different from the Carmona-Salazar"Estado Novo" in Portugal. The fall of this dictatorship in 1930 opened the way to the Spanish Republic in 1931 . The Republic was a period of social and ideological turmoils, but arised great hopes and promised long awaited reforms in the social and political fields .In fact,it was the great opportunity to fight underdevelopment and to modernize Spain, politically and culturally . But the the rebellion of the Spanish Army,leaded by general Franco, put an end to all hopes and expectations and after the defeat of the Republic in 1939 a bloody repression inaugurated a forty years period of military dictatorship.

This long and ruthless dictatorship did not end as a result of a colonial crisis or of a military uprising, as in Portugal. It reached its end by the conjuction of several factors. The first was,obviously, the death of general Franco and the incapacity of the dictatorship to subsist without general Franco himself and to face the unresolved contradictions of the Spanish society, accumulated throughout the 1960s and the 1970s. The second, was the new conditions created in the Spanish society, forty years after the civil war and in a European context which made impossible the continuity of the non democratic institutions, practices and ideas imposed by the Franco regime after the war in a country politically and economically isolated. The third, was the painful but effective reconstruction of the democratic political and union vanguards destroyed by the repression after the civil war. The fourth that, notwithstanding this reconstruction, the anti-Franco opposition did not succeed to transform itself in a vast popular movement, able to defeat and overthrow the dictatorship.

Consequently, the transition to democracy in Spain began and developed as a succesSsion of clashes and agreements between the "reformists" of the Franco regime itself -- who understood the ineluctabiliy of change and wanted to control it -- and the groups of the democratic opposition, progressively united in a quest for democratic change without limitations and exclusions.

The overall result was the achievement of democracy, the drafting and promulgation of the democratic Constitution of 1978, the restoration of democratic liberties and civil rights, the free actitivity of political parties and unions, the establishment of a federal-like system of political autonomies and the opening of the country to European community. But this result was strongly nuanced by the remaining and the continuity of the main institutions of the Franco's state. That means that the armed forces, the security forces, the judicial system, the public administration system, the public corporations and the privileges of the great private corporations and the Catholic Church remained untouched.

Consequently, the fundamental problem of the transition to democracy was to consolidate the new system, to strengthen its supports, to solve the great historical problemes inherited -- like the conflict between Monarchy and Republic or the conciliation between Spanish national identity and the pluralism of national and regional identities -- and, at the same time, to incorporate into the democratic system the institutions of the previous regime without traumas or new civil conflicts. This was the fundamental reason and the explanation of the consensus that marked and leaded all the Spanish transition process to democracy.

III. THE DEVELOPMENTS.

Oliveira Salazar ruled Portugal for thirty-six years. When he dead his successor ,Marcelo Caetano, essayed to keep a balance between light reformism from inside the system and the maintenance of the dictatorial rules . He failed and the change became ineluctable.

After the unsuccesful attempts of some military conservatives,like general Spinola, to lead and control the change,the military coup of 25 April 1974 installed in power a Junta of seven officers from the Armed Forces Movement (MFA). This movement was predominantly left-wing but balanced between radicals and moderates, all of them deeply concerned by their experience in the Portuguese colonies and so clearly sympathetic with anticolonialist movements.

The military coup restored political liberties and civil rights and political parties took the field, but the leadership remained strongly in the MFA. Some radical mesures were taken, as the dissolution of political police forces and the jailing of a great number of its members. The conservative and rightist forces,fully compromised with the fallen regime, were inorganized and so the party balance shifted clearly to the left, where the Communist Party was mostly influential and had close links with some of the military leaders. A unitarian provisional government was formed,under the direction of the MFA but with participation of political parties, among them the Socialists and the Communists. Communists appeared to be very strong in the new Unions and it was a major issue as with the restoration of democratic liberties throughout the country arised a great wave of political,social an economic demands.

In his book "Time and Chance", James Callaghan sums up this situation: "Initially these two groups (the MFA and the Communist

Party) were perhaps the only bodies sufficiently well organised to be able to step into the power vacuum. In a country starved of political, social and cultural freedom since the 1930s the coup was greeted enthusiastically". (1987, p.360).

The specific situation was, then, of a vacuum power, with a military radical leadership, great weakness of all political parties -- with the exception of the Communist Party -- and a large demand of radical changes and reforms in all the social fields, particularly a demand of agrarian reforms

But from the first general elections for a constituent Assembly it emerged a political frame that was different of the initial one and that despite some significant oscillations has remained stable : at left, a dominant Socialist Party , gathered around the leadership of Mario Soares and with contending trends in its ranks, and a hard-lined but minoritary Communist Party ; at center-right , a consistent P.P.D., later transformed in the Social-Democratic Party (P.S.D.), gathered around the leadership of Sa Carneiro and also with contending trends inside, ; at right the C.D.S. This party scheme has been only partially modified by the appearence and the failure of the PRD, headed by former President of the Republic, general Ramalho Eanes.

The transition process in Portugal has been characterized by the difficult relationships between the leading MFA and these political parties and the changing balance of power between all these forces in a society that, after the first period of radical demands and reforms, looked for new internal equilibriums towards moderation and stability. The drafting and the promulgation of the Portuguese Constitution of 1976 was the expression of the hopes and expectations and also of the balance of power of the first period. It is a Constitution marked by an overall socialist orientation, not only in the sense of general aims but also in concret goals, like that of collective property. But its most specific feature is the constitutional role of the Armed

Forces, which become something like the highest institution of guarantee and control, in a complex interaction with the Presidence of the Republic, the Government and the Parliament.

The main role of the Socialist Party was to ensure a "civil" development of this original impulsion. In 1976 , the Socialist Party won the majority -- but not an overall majority -- and his leader, Mario Soares, formed the first constitutional government, with general Eanes as President of the Republic. The provisional period was over, but the great problems of the portuguese society strongly emerged in all the fields and the Socialist Party was unable to retain its majority. Till then the building of Portuguese democracy has developed around three major issues: 1) The reduction of the military role in the constitutional system; 2) the definition of a workable system of political alliances betweeen the major parties; 3) the economic development of a country that was forced to change abruptly from the immobilty of the salazarist system to a new and extremely mobile competitive system, without the resources from the colonies and in the framework of the European Economic Community.

The problem of alliances has been a major one, as the Communist Party is excluded -- or excludes itself -- from any possible majority. The Socialist Party has shifted from minority governments to alliances with center parties and has payed a high price for it in terms of internal homogeneity and of electoral support. Finally, the center-right party, the P.S.D., under the leadership of Anibal Cavaco Silva has won the absolute majority in the last general elections and for the first time since 1974 rules the country with a single party stable majority.

In Spain the transition to democracy did not begin with a military coup but with the ending of military rule. The death of general Franco put an end to his system, but there was not a real vacuum power. The King succeeded general Franco and confronted with the alternative to continue the franquist system or to advance towards democracy chose the latter way, with the help of all the political forces, those coming from franquism and those coming from underground opposition.

The end of franquism coincided with the worst economic crisis of recent Spanish history. And, most important of all, the building and the actual working of an eventual democratic system were conditioned by the problem of the inheritance of the state apparatus of Franco's regime.

The only way to cope with all this problems and solve them in the sense of democracy was to add forces and to establish a clear dividing line betweeen those who wanted democracy and those who wanted to return to dictatorship. This was a very complex problem, because every political force was due to make a difficult decision about this dividing line . That meant a decision about some of the hardest historical conflicts that remained unresolved, such as the conflict between Monarchy and Republic or the conflict about national identity or the problem of pacific separation between State and Church. The decision was also conditioned by memories of the recent past. The memory of the Civil War, for instance, was mantained to the end by the Franco regime as the basic source of its own legitimacy and his distinction between winners and losers, but it weighed on the collective conscience of the immense majority of Spaniards as a trauma not to repeat. Last but not least, the Spanish society of the 1970s was a new society, with new generations in the scene, a society that wanted to be rid of dictatorship but wanted to achieve democracy without any mayor conflicts, thats's to say, in peace. All the significant political forces understood these messages and all became aware that the

only way to go ahead, to establish democracy and consolidate it was the way of consensus.

But to achieve consensus was not an easy affair. The political forces that emerged after the Franco's death were very different. From inside the Franco's regime developed a reformist movement o more precisely some reformist movements. The first one, that' to say, the first that managed to take the head of the post-Franco government, was the group headed by the ancient Minister of Information Manuel Fraga Iribarne. He intended to develop a limited reform, including the Socialist Party but excluding the Communist Party and the rest of the left. This limited reform failed soon because it meant a limited democracy in which the "accepted" democratic forces would be compelled to complicity in the restrain of democratic rights. And it failed also because the emergent social movements overflowed soon the limits set by the government Arias-Fraga.

The second government of the new post-Franco Monarchy was headed by another ancient Minister of Franco, Adolfo Suárez. This second government was forced to go far ahead and Mr. Suárez himself understood that the only possibility to control the democratic process was to develop it without the limitations that caused the failure of the previous attempt. At the same time, the opposition forces succeeded in establishing a unique and unitarian platform, including all the significant groups, from Christian Democracy to Communists. This was the basis of the final agreement between the franquist reformists and the opposition. And as a result of this agreement general elections were held in 15 June 1977, with free participation of all the political parties.

The political constellation that emerged from these first general elections conditioned the following periods of the process. The party headed by Mr. Suárez -- the "Unión de Centro Democrático" (U.C.D.) , formed by franquist reformers, but also by christian-democrats, liberals and social-democrats -- was the

winner, but did not obtain the overall majority. Second, at close distance, was the Socialist Party -- the "Partido Socialista Obrero Español"(PSOE) --. Third, but at a considerable distance and so excluded from the possibility to become a government alternative, was the Communist Party. And fourth, the little group headed by Mr. Fraga Iribarne,"Alianza Popular". Finally some nationalist parties emerged with strong roots, specially in Catalonia and the Basque Country.

From this constellation of forces two evidences emerged: first,that the victory of the political forces that wanted democracy was overwhelming: in the new elected Parliament there was not a single partisan of the Franco's dictatorship. So the way was open to a Constituent process . Second, that no single political force was able to lead alone or to implement alone the constitutional reforms and the consolidation of the new democracy. The consequence was equally obvious: consensus was needed to draft the Constitution, to implement the reforms and to cope with the more urgent problems, specially the economic ones.

The Spanish Constitution of 1978 was drafted by a group of seven deputies elected by the first democratic Parliament ,the Congreso de los Diputados. Three of them represented the U.C.D., one the Socialist Party, one the Communist Party, one Alianza Popular and one the nationalist parties of Catalonia and the Basque Country. This group,popularly known as the "Founding Fathers", was charged of the material task of drafting the text of the Constitution but also, and mainly,it became the center of all the political compromises between the parties . The aim was to draft a Constitution that could be accepted by all the democratic forces and that,consequently,could be submitted to popular referendum with a positive vote recommendation by them all. And that result was attained. Lastly, as a complementary mesure, consensus extended to the economic field as a general agreement of the same political forces on reforms and inmediate measures ,known

as the "Pactos de la Moncloa" -- which was anyway far less effective.

The most important issue at stake was, obviously, the consolidation of the emerging democracy. But consolidation did not mean only to agree about Constitution and parlamentary institutions. It meant also the necessity to solve the most heavy historical problems that remained alive in 1977 and that were at the roots of the tragic experiences of the past, specially of the civil war and the two military dictatorships. Among these historical problems I shall mention the two most significants: the problem of Monarchy and the problem of national identity and nationalisms, already mentioned above.

In 1977 the Socialist Party, the Communist Party and all the left forces, as well as some nationalist groups, were republicans and opposed Monarchy. It was not an ideological bias, but the consequence of the historical role of a Monarchy that was belligerent against the left and against the peripherical nationalisms. The split between the Spanish political forces over the issue "Monarchy or Republic" was a radical division, both political and ideological, that turned even into a division over symbols -- the national flag and the national anthem, por instance.

But, as said before, the Spanish transition to democracy did not begin with a vacuum but with an already existing Monarchy, restored by general Franco and based in a legality that not only the great majority of citizens rejected but that the new democracy set out to modify.

On the other hand, it was obvious that in that initial moment, with weak democratic forces and with the major institutions of the Franco's regime still intact, a strong element of stabilization was necessary. And this could be only the Crown. The majority of the army, the security forces, the public servants and the judicial system accepted -- a lot of them reluctantly -- the democratic legitimacy and the democratic process only because the

King himself accepted it, not because of the leadership of new political parties and leaders. The issue "Monarchy or Republic" could have turned into a wrong dividing line inside the block of supporters of the transition process and could become a rallying cry for those who were against it. Finally, the Crown itself needed a new democratic legitimacy, since otherwise it would be compelled to perpetuate the legality of the Franco regime -- which was its own original legality -- and thus locking the door to democracy .

An agreement was necessary. For the Crown, to stand in the past would be to enter once again in a spiral of political confrontations that could only lead no another civil war. For the left, to stand in the past was to remain anchored in identity signs certainly deeped-rooted but at the same time inable to confront the new problems at stake. The constitutional compromise was the parliamentary Monarchy. The Crown and the Monarchy as a system obtained a new democratic legitimacy. The left obtained a system of democratic liberties, of territorial autonomies and of parliamentary institutions that till then it could only reach through the Republic and the overthrow of Monarchy. And when in 1982 the Socialist Party won the general elections with an overall majority, for the first time in Spanish history the left governed without problems under a Monarchy. This was a really historical compromise that solved a very difficult problem an allowed the democratic forces to gather in one side of the main dividing line against the partisans of dictatorship, without secondary dividing lines that would weakened the whole process of transition to democracy.

Something very similar can be said about the other main historical conflict of the modern Spanish history, the conflict on national identity. This was another bloody split between political forces, a split that confronted authoritarian centralism and the quest for autonomy of the most developed zones of Spain,

especially Catalonia and the Basque Country. When nationalism began to develop in both regions at the end of XIX Century, the answer of Monarchy and of the central ruling class was to order the army to fight nationalism in the name of Spanish national unity and of Spanish central nationalism. And so the army became the armed depository of the integrity of the Spanish nation and the centralist Monarchy against all internal opposition. The Republic of 1931 essayed to solve the problem opening the way to regional autonomies. But after the civil war and the defeat of the Republic, the clash became especially violent under Franco's dictatorship, which persecuted and supressed all the identity signs (institutions, languages, cultures) of Catalonia and the Basque Country and stressed the exclusiveness of Spanish national identity as the old Spanish nationalism linked with centralism and authoritarism.

In 1977 this was one of the most oustanding issues. It was not only a problem of political organization but also an ideological problem, because both in Catalonia and the Basque Country -- as well as in Galicia and other parts of Spain -- a very strong collective feeling of nationality had developed which was very difficult to integrate into the wider collective feeling of the Spanish nation, after such a strong phase of ultrarightist Spanish nationalism under the Franco regime.

An agreement, a new compromise was also necessary. And the compromise is stated in article 2 and the Title VIII of the new Constitution. Article 2 defines the concept of the Spanish nation. It states that Spain is a true united and indivisible nation. But it also states that this united nation is formed by "nationalities" and "regions", each one having a right to political autonomy, recognized and guaranteed by the Constitution itself, and that the link which keeps this new Spanish nation united is the link of "solidarity". From a theoretical point of view, article 2 seems and odd combination of heterogeneous

elements and the result is something like a "nation of nations". But article 2 is not a theoretical exercise but an attempt to find a political solution to one of the most serious and bloodiest conflicts of the Spanish political history. On this basis, the Constitution opens the way to a deep reorganization of the Spanish centralist state in a federal-like system of political autonomies.

These are perhaps the two main examples of the deep spirit of the Spanish transition to democracy. The same could be said about other important issues, namely the implementation of civil rights and political liberties, the separation between state and Catholic church, the abolition of death penalty, the full recognition of political pluralism, etc.

This was the work of consensus. The spirit of consensus prevailed in the first period of the transition, till the completion of the constituent works at the end of 1978. The second general elections of 1979 confirmed the political framework issued of the first ones. The U.C.D. was again the main political force, but was not able to attain overall majority. The new UCD government, leaded again by Mr. Suárez, chose to govern alone putting an end to consensus and the Socialist Party became the main challenger in a political confrontation that involved especially these two parties . The U.C.D. government, confronted with the great problems of the new democracy, that's to say, the implementation of democratic reforms in all the state institutions , the implementation of regional autonomies and the fight against the economic crisis and inflation, began to divide in internal opposed fractions and to crack down. After the dimission of Mr. Suárez and the failed military coup of general Milans del Bosch and colonel Tejero on 23 February 1981, the U.C.D. crisis was open. And it was deepened by the results of the the first local elections of 1979 as the left -- socialists and communists -- obtained the majority in the more important Spanish towns , especially Madrid and Barcelona.

The general elections of 28 October 1982 changed the political framework. The Socialist Party (PSOE)obtained more that ten milions of votes and the absolute majority in both Houses of Parliament, the Congress and the Senate. The U.C.D. disappeared, the Communist Party fell abruptly to only 5% and Alianza Popular, leaded by Mr. Fraga Iribarne became the main conservative force and the second group in Parliament. In Catalonia and the Basque countries, the nationalist parties confirmed their positions and in the following elections to their regional Parliaments became the majority forces.

This general framework was confirmed in the general elections of 1986. The Socialist Party retained its absolute majority, even with a fall in its total voting results, and a new party, the Centro Democratico y Social (C.D.S.), leaded by Mr. Suárez began to emerge as a center force.

Previsions about next developments are difficult. Spain has become a very dynamic country, changes are abrupt and deep, new generations take the field and Spain finds itself in a sort of mid-way between past and future : it has already the same problems of other more developed European countries but some of the problems inherited from the past are not fully solved, especially the problems of basic economic structures and of public administration. But the main political phantoms of the past are over and the main challenge of 1977 is fulfilled: democracy is a stable system and it works .

IV. *THE INSTITUTIONS.*

The differences in the processes of transition to democracy in Portugal and Spain led to substantial differences in both the constitutional and the political frameworks. But in the last years, the actual working of the institutions and of the political forces have led to increasing similitudes in both fields.

The Portuguese Constitution of 1976 sprang up from the political wake of the April 1974 uprising. It is a syncretic Constitution, but its overall inspiration is quite more radical than the Spanish Constitution. Some of the main principles of the Portuguese Constitution are the collective apropiation of the main production means and of land and natural resources , as well as the elimination of monopolistic corporations and of latifundia in the general perspective of "transition to socialism" (art.89,1). Another main feature is the constitutional role granted to the Armed Forces, through the "Council of the Revolution", one of the key institutions of the constitutional system.

But the constitutional revision of 1986 introduced a very important change in the internal logic of the first period. The feeling of "transition to socialism" has desappeared in fact despite a remaining mention to socialism in article 2; the role of the military and the "Council of the Revolution" has been extinguished and the whole constitutional system has evolved towards a closer parallelism with other systems in Western Europe.

The situation after the 1986 revision can be summarized as follows:

1. Portugal is a semi-presidential Republic or rather a mixed presidential-parliamentarian system. The President of the Republic -- for the first time a "civilian" President with the election of

the socialist leader Mr. Mario Soares in 1986 -- is elected directly by voters but he has not executive powers, even if he has a limited veto power and the possibility to dismiss the Government and to dissolve the Parliament or Assembly of the Republic. Due to his direct election the President has a very important political role as a stabilizing factor and as a mediator and this role has increased after the extinction of the military "Council of the Revolution", whose role counteracted in fact that of the President. It is interesting to note that in all the presidential elections held till now the majority has not coincided with the party majority in the Parliament. At present, with an overall majority in Parliament of the center-right P.S.D., the President was elected with the support of the left forces.

2. The real working of the system is that of a parliamentarian regime with a single chamber, the Assembly of the Republic, elected by direct popular vote and a proportional system. And as in all the modern parliamentarian systems, the gravity center has shifted to Government and party politics predominance, especially after the general election of 1987, which gave to a single party, the PSD the overall majority. The party system has evolved equally in the sense of an equilibrium not so far awayof the balance of political forces existing in the rest of Western countries and, more specifically, in Spain. Of course the balance is not the same in Portugal and Spain, but the party system becomes more and more similar.

3. The Portuguese constitutional structure is a centralized or unitarian one, in the sense that does not accept regional autonomies as a general system. But the article 6 of the Constitution enounces the principle of autonomy of the local governments and establishes two autonomous regions in the archipelagos of Açores and Madeira, each one with a regional Assembly and a regional Government, with a President appointed by the representative or Minister of the Republic in the islands.

Each autonomous region has its own Statute, drafted by the regional Assembly and approved by the central Parliament, the Assembly of the Republic.

The main difference between the Portuguese constitutional system and the Spanish one is, obviously, that Spain is a Monarchy. More precisely, Spain is a "parliamentarian Monarchy", in which the King reigns but does not rule. The King has not veto power, cannot dismiss the President of the Government nor any Minister, cannot dissolve the two chambers of the Parliament or Cortes Generales and even if he is the nominal Chief of the Armed Forces, he cannot dispose of them as only the Government is entitled to decide on military affairs .

In this sense, the Spanish system is a purer parliamentarian regime than the Portuguese one. The indisputed political leadership lies in Government and Parliament. The Parliament or Cortes Generales is formed by two chambers: the Congreso de los Diputados, elected by direct vote with a proportional system, and the Senado, elected partly by direct vote with a majority system (each province electing four Senators, regardless of population) and party by non-direct vote, as the Parliament of each autonomous region elects a number of Senators proportional to the respective population.

The structures and the actual working of the parliamentarian system are similar to those of other parliamentarian countries, with a specific regulation of the Governmment's control by Parliament in the "constructive" sense of the German Federal Republic system.

And as in other parliamentarian systems, the gravity point has shifted to Government and political parties, especially after the overall majority obtained by the Socialist Party in 1982.

At present 17 Autonomies haven been created, covering the full Spanish territory with the exception of the two North-African cities of Ceuta and Melilla. Each Autonomous Community has its own Constitution or Statute, its own Parliament, its own Government. The structure and the actual working of these autonomous institutions are parliamentarian, even if the institution of the President and that of the Primer Minister coincide in the same person: each Parliament is elected by direct vote through a proportional system, the President is elected by the Parliament and is responsible to it and the Statutes have been drafted at the initial stage by the representatives of the Autonomous Community in process of formation and finally aproved by the Cortes Generales. Among these 17 Autonomous Communities are some differences, concerning competences and financial resources. In this sense, Catalonia, the Basque Country, Galicia and Andalucia are autonomies of a higher level, but the logic of the system is that after a certain period all the existing Autonomous Communities will evolve to a similar degree of effective autonomy. Moreover, in those nationalities or regions in which exist specific languages, like Catalonia, the Basque Country, Galicia, Valencia and the Balearic Islands, these languages are co-official with the overall Spain's official language, the castilian or spanish.

From this general perspective, we can conclude that beyond these specific features and differences and beyond the historical conflicts and mistrusts it seems obvious that Portugal and Spain are evolving largely in the same path and the same direction and that this confluence will grow in the future as both countries are now integrated in the same process of European unity.

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(1) As I am drafting this paper (end of May 1989) the Portuguese Assembly of the Republic is discussing a new reform of the 1976 Constitution in which all references to socialism desappear.

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Biographical Sketch

-Full Professor (Catedrático) of Constitutional Law at the Faculty of Law of the Barcelona University.

- Dean of the Faculty of Law of the Barcelona University(1985-1988).

-Member of the Spanish Parliament (Congreso de los Diputados) (1977 - 1982).

-Member of the Constitutional Comission that drafted the Spanish Constitution of 1978.

-Member of the Parliamentary Comission that drafted the Catalonia Statute of Autonomy of 1979.

-Deputy of the Catalonian autonomous Parliament in the Socialist Party list,from may 1988.

-Elected Senator in the Spanish Upper Chamber (Senado) in july 1988.

-Awarded with High Degree of Orden de Isabel la Católica by H.M the King of Spain for his contribution to the drafting of the Spanish Constitution.

-Awarded by H.M. the King with the Orden del Mérito Constitucional.

-Columnist in the Madrid journal "El Pais" and the Barcelona journal "El Periódico"

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ACLS

(b)

CONSTITUTIONALISM: THE EUROPEAN COMMUNITY AND STATE SOVEREIGNTY

By

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Synopsis

In the straight-jacket of 25 pages this paper attempts to describe, analyse and evaluate the emergence of the European Community as a Constitutional Polity and the impact on the sovereignty of its Member States.

Focussing on the EEC, I suggest a process of Transformation from international to constitutional entity in three phases.

In the first phase, taking place roughly between 1958 and 1973, and characterized as the Foundational Period of the Community, we observe two powerful conflicting trends: A remarkable increase on the legal plane of the constitutional dimensions of the Community (relationship between Community law and Member State Law) contrasted with a decline of integrative features on the political decision making plane. The first part describes the elements of this conflicting scenario, and then claims that the two phenomena are causally interconnected producing the basic political equilibrium of the Community.

The Second phase (1973 — mid 80s) sees the erosion of the principle of enumerated powers in the Community or, put differently, the emergence of a flexible liberal principle of enumeration which leaves the Community with the freedom to act in all spheres coming within the broad socio-economic objectives of the Community, even without explicit grant of competences. I attempt to show the constitutional developments which allow this aspect of the transformation and explain their emergence. This explanation is rooted in the theory of equilibrium posited for the Foundational Period.

The final phase, coincident with the Single European Act and the 1992 programme, is defined as a transitional phase experimenting with new mechanisms which rupture the Equilibrium, and the outcome of which is not yet clear.

I. Introduction

In 1951 France, Germany, Italy and the Benelux countries concluded the Treaty of Paris establishing the European Coal and Steel Community. Though lofty in its aspirations, and innovative in some of its institutional arrangements, this polity, and that which followed it in 1958 — the European Economic Community — was little more, and perceived as little more, than an avant garde international organization governed by the airy rules of public international law.

Close to forty years later, the Community is a transformed polity. To be sure, it now comprises twelve Member States with a population of 320 million citizens, constitutes the largest trading bloc in the World and operates in fields far removed from its originally conceived economic spheres.

But clearly at the heart of this transformation is the ECs self-perception as regards the core relationship between Community and Member States: Most tellingly, in a recent Judgment, the European Court of Justice spoke matter-of-factly of the Treaties as "the basic constitutional charter" of the Community. The Treaties have been 'constitutionalised'; the Community has become an entity whose closest referent is no longer an international organization but more dense non-unitary polities — the federal state. And its "operating system" is no longer governed by public international law, but by its new legal order — its basic constitutional charter and constitutional principles.

In this essay I shall chart the principal features of this new "operating system" in an historical-comparative framework; in other words I shall tell a story of evolution over time. I choose this method for a simple reason: It will enable me not only to describe but also to analyse and explain. Each facet of the new order will be presented as a "development" which needs systemic and historical analysis.

I shall focus in this analysis on what I consider the two key structural dimensions of constitutionalism in a non-unitary polity: 1. The vertical dimension examining the relationship between political power in the centre and periphery and between legal norms and policies of the centre and the periphery; and 2. The horizontal dimension examining the issue of division of material competences and usually alluded to in the context of the principle of enumerated powers. Clearly, in all that these structural dimensions exclude (content of policies, political actors other than states, parties, international relations) the emergent picture is partial. It does, nonetheless, reflect a central dimension of the evolution of the Community.

It is convenient for this presentation to divide the brief history of the Community into three phases. Each of these phases is characterized in my view by significant mutations in the process of constitutionalization of the Community and is consequently highly relevant to the theme of Member State sovereignty.

II. 1958 — 1973: The Foundational Period.

It is in this period that the Community assumed — in stark mutation from the original conception of the Treaty — its basic legal political characteristics.

In order to explain the essentials of the foundational period I would like to make recourse to an apparent paradox the solution to which will be my device of both describing and analyzing the Community system.

The Paradox

> If we were to ask a political scientist during the Foundational Period to compare the European system with the American system, the political scientist would have said: They are growing less and less alike. By contrast, if we were to ask a lawyer at the same time to compare the evolution of the European Community with the American experience, the

lawyer would give a diametrically opposite answer. In legal terms the Community was seen as becoming more and more like a federal or at least pre-federal state.

It is possible to phrase the paradox in non-comparative terms: From a legal normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European Integration moved powerfully ahead. From a political-decisional-processual point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration. It is not surprising that lawyers at the time were characterizing the Community as a quasi-federal legal order whereas political scientists were speculating about the "death of supranationalism".

In what follows I shall do two things: I shall first flesh out the developments that lead to these opposing perceptions from the different political and legal perspectives. I shall then try and unify them in one "grand design" arguing that the explanation to this apparent paradox which sees a causal interrelationship between the two conflicting developments is the key to understanding the basic structure of the Community in that phase, and in part till this day.

A. The "constitutionalization of the EEC Legal Structure.

Most non-lawyers if asked to pin-point the single most dramatic incident in the evolution of the European Community as a supranational legal order will probably identify the 1965-66 'empty chair' crisis which lead in its wake to the Luxembourg Accord whereby the Member States first reluctantly and then with growing enthusiasm and conviction asserted the right of every Member State to operate a de-facto veto on any Community proposal which contradicted a self-defined vital national interest. That is when "the rot began to set in".

For lawyers the real turning point in Community life occurred two years earlier in the period 1963-64. In that period, from the legal point of view, the Community underwent a real legal revolution. Some constitutionalists have suggested that no less than a veritable shift in the Community Grundnorm.

The legal revolution was instigated by a series of decisions of the European Community Court of Justice. The story is very well known and I may therefore allude only to the two most famous of these decisions. As is often the case with the life of the law they sprang for relatively trivial disputes.

The first concerned a dispute between a Dutch importer and the Netherlands Customs authorities. The importer, Van Gend en Loos contested the classification of a consignment of plastic imported from the Federal Republic under a new Benelux law which had the effect of increasing by one or two points the customs he had to pay. He contended that this law was contrary to Article 12 of the Treaty which imposed a standstill on the introduction of new customs.

Several Member States (not only the Netherlands) contested vigorously the propriety of the legal action. They claimed that Article 12 (and many articles like it) created an obligation on the Member States. That if Holland had violated this obligation it would be a matter to be dealt with either by the Member States themselves or by the Commission of the European Community but that in any even an individual like Van Gend en Loos had no say in this matter. The Court held for Van Gend en Loos and introduced the famous doctrine of Direct Effect: Clear and unconditional legal obligations of, or under, the Treaty of Rome, even if addressed to the Member States could bestow enforceable rights on individuals.

Do not underestimate the absolutely far reaching political and economic consequences of this decision. In its wake many more followed effectively holding that the large majority of Treaty articles creating the Customs Union had similar direct effect. This meant that each time a Member State introduces a law (or fails to introduce a law) which has the effect of disturbing the

operation of the Common Market, individuals may go to court and seek the disapplication of the offending measure. Moreover, where, for example in the field of taxation, it was discovered that Member States were imposing on importers taxes contrary to the Common Market rules, not only was the tax declared illegal but the authorities had to pay back all taxes illegally levied. To make things even "worse" the Court confirmed that Community Regulations could produce the same direct effect and even more radically that Community Directives — which on their face are directed to the Member States — could also give rise to individual claims.

By one judicial stroke the centre piece of the European legal — political structure received a status unknown on a similar scale in any other international organization, and individuals became the real de facto vigilante of the Community order. There have been numerous cases of this type over they year including fields such as free movement of workers, sex discrimination and the like.

The second case concerned a dispute between one Mr Costa and the Italian state electricity company ENEL. The dispute concerned an electricity bill of no less than $2.- (Two US Dollars). The facts need not concern us; the European Court used this case to pronounce the second of its fundamental constitutional principles. It simply wrote into the Treaties a Supremacy Clause which may be found in many federal state constitutions but was not to found in the Treaty of Rome. Community law, per the Court, whether the Treaty itself or every Regulation, Decision and Directive of the most menial character was to be held by national courts as supreme and overriding any conflicting national law, whether a ministerial decree or a fully fledged parliamentary enactment.

The most surprising aspect of this doctrine of supremacy was not its actual pronouncement by the European Court. It had simply followed its own logic in the Van Gend en Loos case. It was the acceptance of this doctrine by the overwhelming majority of supreme courts in the Member States. The only exceptions are the Conseil d'Etat in France (but not the Cour de Cassation) and the delicate problem of Britain which has no written constitution. In

Germany and Italy the supreme constitutional courts also accepted supremacy subject to a theoretically important but practically insignificant reservation concerning Community measure violating fundamental human rights. Recently, this reservation in Germany all but disappeared.

Unlike, however, federal states, the Community has no enforcement mechanisms. Decisions of the European Court of Justice are in a sense declaratory. Would it not be the case then that if a Member State was really unhappy with a Community measure and policy they would simply defy the European Court? That after all has been the lot of the International Court of Justice in the Hague.

It is possible, in very limited circumstances, for this to happen as the case of the French ban on British mutton imports proves. But empirically, this is has not happened, and the French saga (in part rooted in the exceptional refusal of the Conseil d'Etat to accept the doctrine of supremacy) is the exception that proves the rule - a rule of a high respect for the rule of law in the Community. How so?

Partly this is rooted in a general attitude to the rule of law in Western Democracies, partly to a measure of loyalty towards the EC to which I shall return later. But loyalty, to an extent was coerced. It is very difficult to defy the rule of law in the Community because of the sophisticated system of judicial review. I shall outline briefly its salient features.

B. The Community System of Judicial Review

As mentioned, the hierarchy of norms within the EEC is typical of a non-unitary system. The Higher Law of the Community is of course the Treaty itself. Both Community organs and the Member States may not violate in their legislative and administrative actions the Treaty. In addition however Member States may not violate Community Regulations, Directives and Decisions. Not surprisingly then the Community features a double- limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: 1. The measures of the

Community itself (acts of the Council and Commission) which are reviewable for conformity with the Treaties; and 2. Acts of the Member States which are reviewed for their conformity with Community law and policy including the above-mentioned secondary legislation.

Needless to say, in the context of our discussion of attempts by Member States to disregard those obligations which are not to their liking, the effectiveness of review of the second set of measures assumes critical importance. I shall focus here then only on that aspect of judicial review.

1. Judicial Review at the Community level.

Both the Commission of the EEC and individual Member States may, in accordance with Articles 169 -172 EEC, bring an action against a Member State for failure to fulfil its obligations under the Treaty. In general, failure to fulfil an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. The very existence of a non-optional and exclusive judicial forum for adjudication of these types of disputes sets the Community above many international organizations. The Role of the Commission is even more special. As noted by one commentator: "[u]nder traditional international law the enforcement of treaty obligations is a matter settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent Community body, the Commission , to invoke the compulsory jurisdiction of the European Court against a defaulting Member State".

At the same time the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring:

a. The political nature of the procedure

In the first place, the decision of the Commission and/or a Member State to bring an action against an alleged violation by another Member State will

often be influenced by other (extraneous) political considerations. The Commission might decide that it does not wish to threaten delicate on-going negotiations and Member States might not wish to precipitate and international crisis. Moreover,, the Commission, as required by the infringement procedure, will strive to reach a friendly settlement with the infringing Member State. This settlement might not necessarily fully remedy legally the infringement. Finally, the Commission might be particularly reluctant to bring an action against a violation committed by a national judicial decision.

b. The problem of monitoring Member State infringements

Given the vast number of Community measures it is simply impossible for the Commission to keep tags on all practices of the Member States with a view to scrutiny and possible judicial action. Despite the myth of a huge Brussels bureaucracy, the Commission, considering the fact that two thirds of its officials are translators of one sort or another, is an extremely lean and understaffed organization by comparison to any national bureaucracy of similar responsibilities.

c. The appropriateness of Article 169 for small violations

It is unrealistic to expect the Commission to put the entire legal machinery into full swing in the face of minor violations. Article 169 would seem more appropriate for dealing with flagrant violations of some political consequence.

d. The lack of real enforcement

Finally, although in most cases either the prospect or actual commencement of infringement proceedings are sufficient to terminate a violation and even more so an actual judgment by the Court condemning the violation, it should not be forgotten that these judgments are declaratory. There is no army to enforce them nor any real sanction in the event that a judgment is disregarded. The

record of compliance with decisions of the Court by Member States is remarkable. But there are a sprinkling of instances when judgments were disregarded which highlight this weakness.

2. Judicial Review at Member State Level

These weaknesses are to an extent remedied by judicial review which takes place within the judicial system of the Member States in collaboration with the European Court of Justice. Article 177 EEC provides inter alia that when a question concerning the interpretation of the Treaty is raised before a national court, the latter may — and if it is a court against whose decision there is no further judicial remedy then it must — suspend the national proceedings and make a request for a preliminary ruling on the correct interpretation of the Treaty, to the European Court of Justice in Luxembourg. Once this ruling is made it is remitted back to the national court which will give, on the basis of the ruling, the decision in the case before it. The national courts and the European Court are integrated thus into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. However, very often the factual situation in which Article 177 comes into play is when an individual litigant pleads in the national court that a rule or measure or national practice should not be applied because they are in violation of the Community obligations of the Member State. The attempts of Member States to practice selective membership by disregarding their obligations come thus regularly to be adjudicated before their own national courts. On remission to the European Court, the latter renders its interpretation of Community law within the factual context of the case before it. Theoretically a division exists whereby the European Court may not itself rule on the application of Community law. But as one scholar notes:

> It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline...it

provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.

What is important in the procedure, indeed crucial, is the fact that it is the national court which renders the final judgment. The main result of this procedure is the binding effect and enforcement value which such a decision has on a Member State — coming from its own courts — as opposed to a similar decision handed down in declaratory fashion by the European Court itself under the previously discussed 169 procedure.

This takes care of the most dramatic weakness of that procedure, the ability of a Member State, in extremis, to disregard the strictures of the European Court. Under the 177 procedure this is not possible. A Member State — in our Western democracies — cannot disobey its own courts.

The other weakness of the 169 procedure are also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions, small as well as big violations come to be adjudicated, and in terms of monitoring, the Community citizen becomes willy-nilly a decentralized agent for monitoring compliance by Member States with their treaty obligations.

To be sure the system is not complete. Not all cases of violation come before national courts, the success of the system depends of the collaboration between national courts and the European Court of Justice and in any event Member States may, and often have, utilized the delays of the system to gain time. But the overall effect cannot be denied: The combination of the "constitutionalization" and the system of judicial remedies, has to a large extend nationalized Community obligations and has introduced on the Community level the Habit of Obedience and the respect for the rule of law which traditionally is not associated with international obligations as any student of international organizations will know.

C. The Decline of the Supranational Process of Decision Making.

In the very same period that the constitutional order of the Community was being fashioned so dramatically, politically a different tale was unfolding. In what may almost be termed a "ruthless" process, Member States were taking control over all aspects of Community Decision Making in clear distortion of the provisions and intentions of the constituent Treaty. This is a story even better known, and my description can be highly cryptic.

We may divide the Community decision-making process into the following phases:

The Political Impetus for a Policy
The Technical Elaboration
The Formulation of a Formal Proposal
The Adoption of the Proposal
The Execution of the adopted Proposal

The original Treaty decision making process foresaw strong supra-national elements in this scheme. The Commission, the Community body par excellence had the virtual exclusive proposal making competence, essentially enabling it to determine the agenda of the Community. It was responsible for all phases of preparation of the proposal for formal adoption by the Council of Ministers (comprising the representatives of the Member States) and acting as the legislature of the Community. The process of adoption was also supranational especially in that in relation to most operational areas it foresaw decision by majority. Finally execution (by administrative regulation) was understood to be, again, the preserve of the Commission.

During the Foundational Period, in n each and every of these phases of decision making the Member States — often at the expense of the Commission — assumed a dominant and controlling say. The European Council (an Organ dehors the Treaties) was the body which assumed the role of giving impetus for the policy agenda of the Community. (The Commission retained its formal exclusive power of proposal, but was reduced to something more akin to a secretariat). Technical elaboration was to become infused with Member State influence in the

shape of a variety of groups of national experts and the like. In the Formulation of the Proposal the Commission was to commence a practice of conducting a first, unofficial, round of negotiations with COREPER the sub organ of Council. At the adoption stage we have already referred to the Luxembourg Accord which means that each Member State has a controlling say over proposals and their adoption. Even in the execution of policies, the Commission and Community are "burdened" with a vast range of management and other regulatory committees with representatives of the Member States who can control that process as well. (In passing we should note that Member State control means governmental- executive control. One net effect of this process has been the creation of the so called Democratic Deficit.

All this had the consequence of the so called Lourdeur of the Community process and is conceived by many as the source of much of the Community malaise in that period and up to the present.

How then do we explain these conflicting developments on the legal and political planes?

The traditional analysis of these developments goes as follows: In the face of a political crisis manifest already in the 60s, in the face of a decline in political will of the Member States to follow the decision-making processes of the Treaty and really go ahead with the European venture, the European Court of Justice stepped in to hold the construct together. Happily, the Supreme Courts in all Member States, and I skip over the few exceptions, accepted the new jurisprudence.

In this analysis the relationship is uni-directional. It conceives the integrating federal legal development as a response and reaction to disintegrating con-federal political development.

I want to propose a different perspective of the relationship — an additional analytical layer.

It might be true that the Court of Justice stepped in in the face of a political decline. But it would be wrong to consider the relationship in exclusively uni-directional terms. In my view the relationship is bi-directional and circular. There is also an influence — at least indirect — whereby the integrating legal developments impacted the disintegrating political ones.

To understand this reverse relationship, I will make reference to two other international organizations: the United Nations and the Council of Europe.

Let us think a bit about that strange body, the General Assembly of the United Nations. It is a remarkably supra-national body. On the one hand, we have hundreds of resolutions, year after year, with total consensus: an indication of cooperation and integration? on the other, we have also dozens and dozens of resolutions every year taken, lo and behold, by majority. And no one protests. Majority voting which in the Community has been resisted strenuously by the Member States in the United Nations' General Assembly is the order of the day. Why is that so? How does one explain this apparent paradox?

The answer is not difficult to guess: Resolutions of the United Nations do not count. They have no legal effect. They are not binding, and they cannot be implemented. It is both easy to accept a plethora of meaningless consensus resolutions as it is easy to vote "no" and accept a majority resolution. There might be some political embarrassment, but one gets used to that.

The Council of Europe, to a certain extent, with exception of the human rights apparatus, has a similar construction. Year after year the Council of Europe passes resolution after resolution, draft treaty after draft treaty in a seemingly effortless stream. So easy to adopt, nothing like the terrible lourdeur and locked decision-making in the Community. We never read of a decisional crisis in the Council of Europe. Why is that so?

Again, because resolutions and draft treaties of the Council of Europe do not as such bind the member states. They can always go home, think about them, decide to accept, reject, ratify or not ratify.

In other words we discover what is after all a common sense relationship between political decision-making and legal outcome. When the law is real, when it is hard, when it is binding, and when there are effective legal remedies to enforce it, decision-making suddenly becomes terribly important.

Why did the member states not allow Brussels to have effective majority voting? Because the outcome mattered! Because, decisions in Brussels -- regulations, decisions, directives bind in law. The rule of supremacy applies to them. And what is more, there are effective legal remedies to enforce them. And suddenly it becomes terribly important, in each national capital that the decision-making process in Brussels be controlled at every stage.

The last link in this analysis is simply to recall the process whereby the outcome of the political process came to matter. It was the legal process which established the doctrines of direct effect (even of directives), of supremacy, of pre-emption and implied powers. It was the legal process which constitutionalised the treaties and established a rule of law akin to domestic rather than international law.

The overall process of European integration benefitted immensely from these legal developments. Without them the Community would be no more than some regional GATT. But one must accept that these developments would inevitably lead the Member States to a much more cautious approach to decision making. The outcome mattered.

Let me give two little pieces of evidence for this alternative perspective. The first one is anecdotal, the second one is real.

The anecdotal one is simply to look at the dates. The famous constitutionalising decisions took place in 1963 and 1964. Those of you who

know Community Law of course, will recognize them. The Luxembourg crisis which introduced the Veto power took place a year later, in 1965. Now, I am not suggesting that someone at the Elysee Palace sat down and said: "oh look, the Court of Justice has decided on supremacy and direct effect, we have to have a Veto power!" But I am suggesting that absent the constituionalisation, decision making might not have mattered so much and perhaps it would not have been so important to precipitate a constitutional crisis. Remember, no one vacates a chair at the United Nations despite the great deal of majority decision making that takes place there.

The real piece of evidence is discerned in the so called first accession of the three new member states: Britain, Ireland, and Denmark. When they joined the Community, the constitutionalisation in essence, although it was to develop later, had already taken place. They knew - what the first member states did not know: they were walking into a Community with direct effect, with supremacy, with pre-emption, and with a very effective legal system, especially through Article 177 and the Preliminary Reference which I described above. Of course, in the campaigns for and against accession, these points were raised, and raised again in the British Referendum in 1975. The charge of the Anti-Marketeers was simple and effective and played on base national feelings. It was also largely true: they claimed that the new Member States were walking into a pre-federal community the laws of which took precedence over the sovereign will of national parliaments.

The reply of the governments — which in all cases were Pro-Marketeers is the crucial bit of evidence. All three governments, in their White Papers, stated, that although it was true that the Community was bound by a rule of supremacy they, the governments, had a Veto power which meant that nothing could get through the decisional process which governments opposed. This is the piece of empirical evidence that the constitutionalisation process, which the Court of Justice laudably took had a political cost - and an inevitable political cost.

Let me put it the other way round: I would say that the decline from federal structures, from majority voting and all the rest was the political background and condition which allowed the member states to digest the constitutionalisation. If there were no veto power is not clear to my mind if the Member States would have accepted with such equanimity what the European Court of Justice was doing. The reason they could accept this constitutionalisation was because they took real control of the decision-making process.

To put it in yet another way, what I am suggesting is a theory of equilibrium according to which the stability of the Community system — indeed its longevity — depended on this balance which allowed, on the one hand, a high measure of integration parralled only in federal states but without threatening the constituent Member States.

For the theme of State Sovereignty and Constitutionalism the implications are dramatic. We see that, at least in the Foundational Period, we have to reject a linear paradigm in which Sovereignty as between the Community and its Member States is a Zero-sum-game, according to which the increment for one is the loss for another. The political developments gave the Member States an increased power in an international arena which is unprecedented and yet subjected them also to a unprecedented common discipline. The Foundational Period signifies a polity in which the power of both Community and its Member States grew simultaneously.

III. 1973 - Mid 80s: The Erosion of the Principle of Enumerated Powers

The major development of the second phase concerned the question of competences. If one looks at the history of the United States, the legal history, or for that matter, to the history of some other federal states, including the Federal Republic, one of the key federal issues, which in early history came to be decided by the courts, is the question of competences: Who can do what, as between central organs and constituent units?

Doctrines of enumeration of power are the theoretical foundations given to this issue and politically in most federations this has been the source of deep and divisive clashes between center and periphery.

The European Community, is in its conception a system of enumerated powers, granted by the Member States to their creature. Like the Golem, this creature, especially in this second phase, saw a breakdown of the principles of enumeration towards a system which placed little constraints on new activities of the Community. In this period the Community experienced a massive expansion in its spheres of activity: environmental policy, consumer protection policy; international agreements in fields which were not foreseen originally in the Treaties and so on and so forth.

This is not unique: All federation are based on a system of enumeration. In some, like Canada, the principle of division of competences was considered sacred — likened to the watertight compartments of a ship — which had to be preserved even in the face of changed political-economic realities and amendable essentially by Constitutional amendment. In others, like the USA, one has seen a strong erosion of the principle of enumeration, leading commentators to speak, in this context, of the "death of federalism" and prompting others to speculate that a determined Congress could act in virtually any field.

Clearly the Community must be likened to this second model. Two questions must be dealt with here: What are the Constitutional developments which chart this adoption of a flexible attitude towards enumeration; How does one explain this constitutional choice.

A. A Flexible Attitude to Enumeration: The Constitutional Mechanisms

Unavoidably the following laconic presentation cannot do justice to the richness of these developments but merely give their basic flavour.

1. Interpretative Techniques: Effet Utile and Teleology.

Fundamental to the liberal approach to enumeration was the adoption by the Court of a "purposive" philosophy of interpretation which sought to interpret provisions of the Treaty in a manner consistent with the broad objectives of the Treaty. To some, this may be reminiscent of Chief Justice Marshall's dictum, in similar situations: It is a Constitution we are interpreting. This approach was already apparent in the earlier phase of integration; here it was to take a different meaning and significance.

2. The Doctrine of Implied Powers.

The first such significance may come under the rubric of implied powers. In a series of cases, covering several subject matters, though the most important is in the field of the external relations of the Community, the Court held that bestowal of competences in the sense of an area of activity and a policy in which the Community was empowered to act, implied the existence of the necessary powers to execute such policies. Thus, in the famous ERTA decision (already decided in 1971) the Court held that the existence of competence in the field of Transport policy, implied the existence of a concomitant Treaty Making power for the Community where this was necessary for the actuation of the relevant policy. The nexus between this and a teleological philosophy to interpretation is clear and obviates analysis.

3. Absorption.

A second area important for the erosion of enumeration emerges in a slightly different context. The leading case here, of 1974, is Casagrande. In that case the Court was faced with the following situation. Community legislation providing for the free movement of workers impinged in some of its operational parts on the educational laws in one of the German Laender. Interestingly, under the German Federal Constitution, the German federal government would be precluded under the principle of enumeration of German federalism, from adopting a similar German measure. Clearly a strict approach to enumeration

would have lead the Court to strike down, or at least limit, the reach of the Community measure. Instead, in a principled statement, the Court held that although the Community did not have competences in the field of education, to the extent that it was realizing other competences and these encroached on educational policy of the Member States, the latter had to yield. This principles was repeated in other fields.

4. Legislative Expansion — Article 235 of the Treaty

The final important mechanism (there were others) was done at the behest of the Member State with the tacit blessing of the Court. Article 235 of the Treaty provides

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Following a decision of the European Council of 1972 (in which Britain, Denmark and Ireland already participated) the Member States started using Article 235 as the legal basis for a wide ranging number of areas not provided in the Treaty. This of course was possible because of the wide interpretation given to the condition of "objectives of the Community" and a loose interpretation to "necessary" to be found in Article 235, an interpretation implicitly sanctioned by the Court.

I should state at this point, that none of the above should be taken as implicitly criticizing the Court for these constructions. Elsewhere, in the face of a harsh criticism of the Court, I have tried to show the principled nature of these decisions. But that is a matter which goes beyond the scope of the present paper.

The outcome of all developments was, however, that no constitutional limitations were posed on legislation coming within practically any activity

covered by a very broad notion of the socio-economic objectives of the Community. The Community in this phase came to realize fully Marshall's dictum in McCulloch v Maryland:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

In effect, the Court of Justice has not on any occasion in its jurisprudence of thousands of cases - struck down a Community measure passed by the Council on the grounds that it was ultra vires ratione materia. (The only possible exception is the Greens case, concerning action taken by the European Parliament — not the Council itself).

B. Evaluation of the Second Phase

But here we are faced with another paradox which may best be set in comparative terms. In the USA, and other federations, this type of jurisprudence was the source of huge federal strife. In the Community the story was almost benign. Why? How do we explain this deviance from the traditional federal experience in general and the American experience in particular ie a tradition where federal expansion of competences was hard fought and hard won.

The answer is rooted in our earlier analysis of the Foundational Period. The political process means that the member states themselves or rather, their governments control the decision-making process. They decide, by unanimity, whether to expand the competences. Sometimes they do it for reasons which are not altogether - how shall I put it - happy. If it is very difficult to pass something in a national parliament, it might be easier passing it in Brussels. But there is no federal clash in competences because the Member States, the same governments who govern the states, are the Community government.

Again, an example may liven the point. A few years ago, the Commission sued the Republic of Italy for failure - a traditional failure - to implement a directive. In this case, it was a directive in the field of environment.

Here was a classical case where Italy in defence, appearing before the Court, could have challenged the competences of the Community in this field, and at least try to argue the point. The Italian government states explicitly in that case: We do not plan to raise the question of competences. Why? The answer is simple: just a year or so earlier they themselves had voted for that measure. It would be a bit strange for them suddenly to come round and challenge its legal validity.

Our conclusion of the second phase is not unlike the conclusion of the first phase: What seems at first, from a strict legal point of view as a net loss of Member State power to the Community on the principle of enumeration turns out to reflect a much more complex story — one that is conditioned in effect by the very opposite conclusion. It is precisely the strength of the Member States within the Community system which explains, and above all permits, this development.

IV. The Single European Act, 1992 and Beyond

The 1980s saw several initiatives towards reform of the Community such as the Genscher-Colombo plan and the Stuttgart Solemn Declaration, the Spinelli Draft Treaty for European Union, the Dooge Committee Report and the like. The Culmination of these moves was the presentation by the Commission of the White Paper for achieving a Single Market by December 31, 1992 and the adoption of the Single European Act, which endorsed this plan and modified the Treaties in a variety of ways and which entered into force in 1987. The Community has moved into a third phase with some important implications for the theme of Constitutionalism.

This is not the place to describe in any detail the scope of the SEA or of the 1992 programme. I will try simply to highlight some points relevant to our discussion and then to evaluate them.

A. The Third Phase: Constitutionalism and Decision Making

The most important changes concern the decisional process. We may, for convenience, make use of the model suggested earlier on. The current phase is something of a Back to the Future. The White Paper and the SEA have in some considerable measure restored many of the supranational features of the original Treaty design.

By the very act of presenting the White Paper the Commission has reasserted itself, and been accepted, as the most important body setting the Community agenda, both in meta-political terms and in the technical legislative sense.

Likewise, the SEA, recognizes, though not fully, the role the Commission must play, in the post adoption executionary phase of Community policies. (See Article 10 SEA amending Article 145 EEC)

Most crucially, in the realization of most measures necessary for achieving the Single Market by 1992, the Council has agreed to move to majority voting. (See Article 100A and 8C EEC)

This, then, is the first major departure from the equilibrium established in the Foundational Period, the consequences of which are not easy to evaluate. Before we undertake such an analysis we must be careful not to over estimate the extent of the changes. Let me give an example.

The Single European Act establishes in Article 100a is a move to majority voting especially as concerns harmonization measures to ensure free movement of goods. At face value this appears to be a refutation of the abovementioned theory of equilibrium. I suggested after all that the price for having hard

law was an insistence by the Member States of some kind of veto on the decisional output.

In fact this provision of the Single European Act could be seen to prove rather than disprove the theory. For although the Member States accepted a move to majority voting, they also reintroduced an escape clause whereby individual Member States (under certain conditions, to be sure) would be able to invoke national exceptions in the context of harmonization measures! This could be seen as another manifestation of the equilibrium I discussed. The price for hardening the decisional process in this case has been a softening of the normative outcome. Many will wonder whether the Community and European integration have taken a step forward or backward in this regard.

We must also recall, that in a whole range of areas, including the crucial area of monetary and fiscal policy the Community still requires unanimous decision making.

But, even if this escape does exist, and even if important areas have been left outside the new decisional regime, one cannot deny the qualitative change in the climate of decision making in the Community. Negotiations now are under the shadow of the Vote rather than under the shadow of the Veto, and fierce battles now began to rage on the appropriate legal basis for different measures since some still provide for unanimity whereas others provide for majority vote. There would be no battle if majority voting was not a reality.

How then do we explain the willingness of the Member States to submit themselves, for the first time, to this truly new discipline, which, again for the first time, truly can be said to affect the manoeuvering ability of Member States in the Community?

I consider three factors of cardinal importance.

The first is the second enlargement of the Community. The decisional structures evolved in the Foundational Period were simply found increasingly

unpractical for a Community of 12. What worked reasonably well in a Community of six northern European States, much less well with the addition of another three with different outlooks (especially Britain and Denmark) was found simply impractical for quantitative and qualitative reasons in a Community of twelve including now something of an intra-Community North-South divide. Loudeur, Blocage and all the rest became to paralyse the Community too much. The decisional malaise simply could not be left alone.

The second factor, connected of course to the first, was the realization that in the core areas of world competition the failure to realize and further develop the idea of a single market was leaving Europe behind the traditional competitors in the Far East and across the Atlantic. And yet, short term considerations in this or that Member State prevented, because of the Veto etc, a realization of a European resurgence in response to these challenges.

Finally, time has done its thing. After three and more decades of integration under the Equilibrium model which gave the necessary guarantees to each Member State, a confidence has been built which enabled the Community to experiment with the Altneuland of the original Treaties.

The scenario for the future is unclear. But one thing seems to me certain: the current phase is transitional. Either the dislocations which will inevitably emerge by the hesitant but clear departure from the Equilibrium will turn out to be too much for at least some of the partners and one will see a new constitutional settlement of some sorts or an erosion of the provisions of the SEA. Alternatively, the experiment will work and then the time will be ripe for a true Institutional new settlement with something more ambitious then the current arrangements of the SEA which while being an improvement still leave the Community, in many crucial areas, hostage to the political conjunctures of one or more Member States.

B. The Third Phase: A Brief Comment on Parliamentarism

By way of conclusion, I would like to mention, all too briefly one final dimension of Community constitutionalism — the democratic paradigm.

Undeniably, the Community suffers from a democracy deficit, in the sense of the executive having the ability within the Brussels machinery to pass legislation with less parliamentary control than in the national setting. The Single European Act corrected this only very partially by the Cooperation procedure. Parliament has an enhanced voice, but not a decisive one. In looking to the future there are two basic possibilities in relation to the European Parliament.

Either you give it original decision-making power, which means they can decide things against the wishes of the governments of the member states. If you do that one must be conscious of the potential destabilising of the equilibrium between the normative, the legal juridical constitutional Europe, and the political inter-governmental decision-making process.

The second option is to give the European Parliament co-decision-making power, in the sense that the Council cannot pass anything which the European Parliament does not approve. (This has been achieved by the SEA in relation to a restricted class of international agreements and enlargement of the Community). I have sympathy with that proposition. Because I do believe there is a democracy deficit. And it is not so much because of the lack of formal accountability, which exists before national parliaments, the democracy deficit is because of the non-transparent nature of the decision-making process in Brussels. And probably the European Parliament is better posed to control what is going on there than national governments. But one should not underestimate the cost here. If our original complaint which prompted the call for change was <u>lourdeur</u>, <u>blocage</u>, heavy decision-making - created by the Council, by the Commission, by COREPER, by national groups of experts, by management committees — here, we are proposing to throw into that heavy process yet another cumbersome body: the European Parliament. <u>Lourdeur</u> would become even heavier and the ability of Community to act hindered again.

Again, the current phase, with the new Cooperation procedure for Parliament can be regarded as an experimental transition; A more decisive role will have to be faced as part of a general restructuring of Community institutions.

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EUROPEAN COURTS AND HUMAN RIGHTS

By

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Ludger Kühnhardt

European Courts and Human Rights (Brief summary)

The paper deals with the impact of the European Court of Human Rights and the European Court of Justice on the advancement of human rights in Europe. It puts the experiences of the European Court system into the perspective of their respective political framework, background and intent. It analyses the possibilities and limits of the human rights approaches launched by the Council of Europe on the one hand and the European Community on the other hand. It describes the instruments created through the European Convention for the Protection of Human Rights and Fundamental Freedoms and the results being achieved since the convention came into force.

The paper looks into the relationship between the approaches of the two courts and the human rights competence, ambition and impact of the overall institutions to which they pertain. It explores the potential to encourage the unification of Europe on the basis of the current human rights instruments which exist on the supra-national level and it describes the limits and lacunas of the existing approaches. The paper uses a perspective of political science in order to reflect on the topic and its potentiality, not at least in the light of the question as to whether the process towards a European constitution can be inspired and advanced with the catalystic force of the existing human rights instruments in Europe. The paper concludes with the assumption that the process of the advancement of human rights on the supra-national level and the search for European constitutionalism have to be related to each other in order to gain substantial results and progress.

Ludger Kühnhardt

European Courts and Human Rights

I. Outline

This is not a legal paper. The topic might create this expectation and most of the scholarly literature dealing with it uses a legal approach. "European Courts and Human Rights" - that opens a perspective which is related to European Law and its scholarly interpretation. But it also refers to Europe as a political concept and reality, and it is indeed of political relevance too. This paper will approach the topic from the point of view of political science and will analyse it in the context of its political character.

The paper will propose that human rights can have an unifying function for the political, intellectual and ethical integration of Europe. The existing supra-national court structure in Europe might encourage this development, but will remain insufficient if being reduced to a mere juridical-functional purpose or to a limited part of the continent. Human rights protection has relevance for the functional integration of Europe, but it ought to execute a higher quality through its contribution to the intellectual identity of the continent and to the search for a European constitution.

The paper will describe the political context of the European human rights emphasize. It will describe the historical roots of the human rights issue as part of the process towards the

integration of Europe, which started after World War II. It will describe and analyse the divergence developed since then due to the different approaches chosen by the Council of Europe on the one hand, and within the framework of the European Community on the other hand. The paper will terminate with an outlook on the possibility of relating the European court system in the field of human rights to the debate on an emerging European identity and on the search for a European constitution.

II. The integrating quality of human rights

Human rights are an expression of the ethos of freedom. They are part of the intellectual heritage of Europe. They have been a moral answer to the wants of freedom and their meta-political justification roots in natural law which considers them as prelegal inalienable moral claim-rights. In their classical notion - John Locke's "life, liberty, and property" - they refer to the relationship between a state and the individual. They are considered to be prelegal and yet they have to be realised and protected within the constitutional structure of nation-states. They were negatively "invented" as means of protecting the individual against its state. Today, their fulfillment has become the ultimate positive moral justification and legitimacy of democratic state power as such.

The human rights process is closely related to the course of constitutionalism in Europe and North America since the 18th century. During the 20th century, human rights have been internationalized and they have reached a universal character - at least as a moral program, less so as a global reality.(1)

Since the promulgation of the Universal Declaration of Human Rights through the United Nations on December 10, 1948, the global debate on human rights has become a feature of the international order and of global politics. The experiences have been ambivalent, not only with respect to the global standard of human rights protection and the diverging interpretation of the notion of human rights due to different cultures and ideologies. Also with respect to the political implications of human rights protection, assessments differ. One general conclusion seems to be consensual: wherever human rights are being violated, criticism against the particular political system - from within or through foreign voices - increases and tends to deligitimize the system. On the other hand, human rights protection has an unifying function for societies and states alike: it supports the acceptance of a constitutional system, if this can prove that it evidently serves the purpose of protecting human rights. This experience is shared by the liberal-pluralistic Western democracies.

Human rights protection can be seen in the light of theories of integration. Some theories of integration emphasize the role of values and ideals as a tool to build up understanding and consent as necessary prerequisites for the creation of a community and its institutions. Rudolf Smend, one of the theoreticians in this field, related the many expressions of values and willpower, of action and reaction, in other words: the permanent dynamisms of a society, to the legal values represented in the constitution and through its protection. The highest courts of a system - according to his theories - are supposed to fullfil the task of integrating the diverging, heterogenous processes and profils of social realities. The court will be able to do so only if consensual agreement can be reached on the ultimate values, and if strong authority and power of implementation is bestowed upon it.

It remains open to be argued whether human rights and legal processes to protect them can help to achieve a higher level of integration outside the structure of existing nation-states with all their many integrating forces to support this. The supra-national bodies in Europe - namely the Council of Europe and the European Community - have gained many experiences in the field of human rights protection and have encouraged many interpretations with respect to their impact on the integration of the continent. Three hypothesis might be drawn from this debate:

1. The system of human rights protection in Europe has contributed to the moral legitimacy and intellectual identity of the ambitions towards the supra-national integration of Europe;
2. The protection of human rights on a supra-national level depends strongly upon the independence, strenght and competence of the instruments which were established in order to support the rights of the individual;
3. The long-range process of human rights systems in their European dimension remains related to - if not dependent upon - the unresolved efforts to create a better constitutional legitimacy for the process of European integration and to the question of the geographical extension of Europe as a highly political question in the context of the East-West-conflict.

III. The human rights system of the Council of Europe

The first conceptual ideas about the supra-national, European role of human rights protection and its relevance for the process of regional integration date back to the European perspective of some of the resistance movements during World War II. Human rights protection served as a point of orientation for their actions and hopes, and simultaneously as a central element in their concepts for a European post-war order. Human

dignity and freedom, the respect for the individual and social responsibility towards the weaker segments of the society - these were some of the most fundamental human goals during and against the darkest years of the 20th century. The norms found their way into reality:

- during the first post-war conference of European Federalists, a program of action was promulgated in Hertenstein on September 21, 1946. The envisaged European Union was called upon to achieve a "Declaration of European Citizen Rights", based on the respect of fundamental human rights and freedoms;
- the first European Congress, held in The Hague between May 7 and May 10, 1948, demanded in its political resolution a "Charter of Human Rights" to be respected by the members of a forthcoming European Federation and the creation of a court being capable of imposing necessary sanctions in order to implement the ideals of the charter.

In November 1950, the 15 Foreign Ministers of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which came into force in 1953. In the meantime, the convention has been signed by 23 European states, recently by San Marino and Finland.

This convention has become the most relevant instrument of supra-national human rights protection in Europe and the most advanced and ambitious global instrument for the protection of the individual on a supra-national, regional level. This is mainly

due to the court system established by the convention and due to the right of any individual of any of the signatory states to sue against any breach of the convention in any of the signatory states or by any of the signatory states.(2)

The European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees, for the most part, civil and political rights: the right to life, liberty, and security; freedom from inhuman or degrading treatment, slavery, servitude, and forced labour; the right to a fair trial; freedom of conscience, of speech, and of assembly.

Section I of the convention spells out most of the basic civil and political rights contained in the Universal Declaration of Human Rights from 1948 - generally in more detailed form, because in the case of the convention they were to be binding in law.

The most important and original feature of the convention is the system it established for the protection of human rights. The convention created two organs to ensure the implementation and protection of the rights mentioned by the convention: the European Commission of Human Rights and the European Court of Human Rights in Strasbourg. The primary function of both organs is to deal with charges brought against the states who are party to the convention by other states or by individuals.

Under Article 24, any state who is party to the convention, may refer to the Commission any alleged breach of the provisions of the convention by any other member state. Under Article 25, the Commission may receive charges from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by any state who is signatory to the convention. This application depends upon the willingness of the state to recognize the competence of the Commission to receive such applications. Such declarations may be made for a specific period, and may be renewed. In the meantime, all states party to the convention - with the exeption of the latest members San Marino and Finland - have made such declarations, in most cases for a limited period of time. All states party to the convention but three (San Marino, Finland, and Turkey) have also recognized under Article 46 the compulsory jurisdiction of the European Court of Human Rights.

If an state or individual application is declared admissible by the Commission, the final decision on the question whether there has been a breach of the convention is taken by the European Court of Human Rights, if the case is referred to it, or else by the Committee of Ministers.

Under the control of the Secretary General of the Council of Europe, the convention institutes a certain form of the reporting procedure. Most important, however, are the innovations under Article 24 and Article 25 of the convention. This surpasses

the traditional standard of international law. A state presenting an application under Article 24 is not required to prove itself, even indirectly, a victim of the alleged violation of human rights. The general premise of the convention is that all states party to the convention have a collective interest in the maintenance of human rights. And the guarantees created by the convention is likewise a collective guarantee, not based on subjective rights or on reciprocity. This is an entirely novel category of human rights protection as compared to all other international or supra-national instruments which exist today for the protection of human rights.

Article 25, which allows for the direct right of action of any individual before an international organ against his own or another state, was an even greater and more revolutionary innovation. The individual has been elevated to the status of a subject of international law. This reflects the far-sighted and courageous quality of the founders of the European Convention for the Protection of Human Rights and Fundamental Freedoms and remains a noteworthy event in the history of international law and international relations. It hints at the fact that the breach between the two concepts of sovereignty - state sovereignty versus popular sovereignty - might be overcome wherever serious endeavours are taken to do so.

The function of the European Commission of Human Rights, as of the European Court of Human Rights, is "to ensure the observance of the agreements undertaken" by the signatory states (Article 19). The formular is very broad, but the functions of the Commission as well as of the Court are clearly defined and limited.

The tasks of the Commission are:

- to examine the admissibility of applications by individuals under Article 25 or states under Article 24;
- where the Commission finds an application admissible, to establish under Article 28 the facts of the case and, at the same time, to place itself at the disposal of the parties with the aim to reach a friendly settlement. If such a settlement can be reached, the case is closed;
- if a friendly settlement not being reached, to draw up a report on the facts and to state its opinion whether there has been a breach of the convention. The final decision whether there has been a breach or not is taken by the Committee of Ministers as a political body or - if the case is referred to it - by the European Court of Human Rights as an independent body.

Most applications - out of more than 12,000 since the European Convention for the Protection of Human Rights and Fundamental Freedoms was created - have been rejected by the Commission as inadmissible on various grounds which are being specified within the convention:

-that the complaint was incompatible with the content of the convention and the rights referred to by the convention;
-that domestic remedies have not been exhausted;
-that the complaint is "manifestly ill-founded" (Article 27(2)).

The final decision on a case which has been declared admissible by the Commission, and which has not resulted in a friendly settlement, is taken either by the European Court of Human Rights or by the Committee of Ministers. The Commission's report, which is transmitted to the Committee of Ministers, contains only its opinion as to whether the Commission found proof for a violation of human rights, and is not legally binding. Within three months of the transmission of the report to the Committee of Ministers, the case may be referred to the Court. If the case is referred to the Court, a new stage in the procedure begins. In the European Court of Human Rights, the Commission and the state concerned are represented, not however the individual applicant. This is one of the formal lacunas of the system of human rights protection under the auspices of the Council of Europe.

The judgement of the Court, if taken, is binding and final. If the case is not referred within three months to the Court, the final decision is taken by the Committee of Ministers, which normally endorses the Commission's opinion without any fresh investigation of the complexity of the case.

The impact of the judgements under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms is ambivalent. The convention does not provide for any sanctions in order to impose its decisions. It can, however, exert a political and public pressure of some importance. Publicity as a means of moral pressure forced the Greek Generals in 1967 to leave the Council of Europe. Only after returning to democratic rule, Greece re-entered the Council and its human rights instruments in 1974. In other cases - particularly with respect to human rights violations in Turkey - the system of the Council of Europe has proved to be insufficient as long as it will not structurally be able to overcome the forces of state sovereignty as the most important ultimate border line once it comes to imposing internationally acknowledged human rights standards.

The common human rights standard expressed in the convention reflects "that European states make up a culturally identifiable unit and their likemindedness has meant easier agreement on what are considered to be basic human rights."(3) This is the normative analysis, the overall impact of the human rights system of the Council of Europe on the national protection of human rights differs however. The convention is not national law in all member states - notable exceptions are Great Britain, the Skandinavian countries, France, and Switzerland. The Court established under the convention cannot be seen as an isolated element, but only as an integral part of the general approach and intention which the Council of Europe has chosen to pursue.

According to legal literature, the most important effect of the instruments and judgements of the convention are the self-binding consequences on the signatory states. The effects of the system under the European Convention for the Protection of Human Rights and Fundamental Freedoms are mainly indirect:

- its decisions have led to changes in the legal processes of a condemned member state;
- the convention and the decisions of its organs support a standardized interpretation of the ordre public and a harmonized interpretation of open legal terms and situations;
- the human rights problem has been debated on a new, higher constitutional and political level. This is particularly true in the case of Great Britain, where the convention has inspired a debate on whether the country should introduce a "Bill of Rights" - with no results so far.

The Greek as well as the Turkish case do show that the possibilities under the provisions of the convention are limited, if not hopeless, in order to prevent a country from violating human rights per se or to encourage it to return to democratic standards of rule by simple means of the convention's existence and good-will. In the final analysis, the ground must be laid within a given society and a given state to pursue a political course which is in accordance with the human rights standards set forth by the convention. The convention is a certain challenge to state sovereignty in the field of human rights protection, but sheds as much light on the ongoing existence, perseverance, if not arrogance of state sovereignty particularly in cases of conflict with the individual.

Some other questions have to be raised in connection with the possibilities and limits of the human rights system established under the Council of Europe: How far can the convention be considered the nucleus of an overall European human rights system ? Would the human rights standard of the convention be endangered if Eastern European countries, who are currently going through a remarkable process of domestic reforms, would apply for membership in the Council of Europe and hence in its human rights instruments ? Or would such a membership rather increase the possibilities for human rights advancement in Eastern Europe due to the pressure which the convention and its organs could exert on the respective country ?

The European Convention for the Protection of Human Rights and Fundamental Freedoms expresses the highest quality of integration reached so far in the context of the Council of Europe. In all other fields, the methods of the Council of Europe remain limited to inter-state coordination. Yet it has to be asked how far the knowledge about the provisions and the spirit of the convention has reached the individual citizen of Europe ?

Outside Europe, the provisions of the convention seem to be known at least to some people: the American Human Rights Convention of 1978 refers indirectly in its preambel to the European Convention for the Protection of Human Rights and Fundamental Freedoms by stressing the usefulness of regional approaches of human rights protection. They could be helpful to specify the idea of universal human rights.(4)

The European Convention for the Protection of Human Rights and Fundamental Freedoms can certainly live up tp this hope, mainly due to the fact that its standard of human rights protection has not been relativised or reduced as compared to the standard set forth in the Universal Declaration of Human Rights from 1948. Rather to the contrary, the convention has sharpened and tightened the United Nations definitions and notions of human rights. Thus, it serves the freedom of the individual, which cannot be said about some tendencies in the context of other regional instruments for human rights protection, notably in Africa, where the collective right to self-determination, peoples rights, are being put on an equal footing with individual rights, thus reducing the relevance of the latter in the context of the modern nation-state and its monopoly of power.

IV. The human rights dimension of the European Community

To compare the Council of Europe and the European Community with regard to their respective efforts for the protection of human rights leads to ambivalent results. On the one hand, the Council of Europe has framed far-sighted instruments for the protection of individual human rights, on the other hand it has not been able to create a version and vision for a political Europe. The Council remains more a club rather than a living experience for the citizens of Europe.

The European Community has a different record. It lacks a specific human rights perspective and program and yet it has developed into a stable, visible community which truly affects the life of the citizens within its member states. It has achieved a high level of economic integration and looks for means to strenghthen its political role and identity. Although the human rights dimension has played an important role during the direct post-war years as a point of orientation for the future course of European integration, the Rome Treaties of 1957, which gave birth to the European Community , do not refer to human rights in a specific sense. And yet it would be insufficient to conclude that the Rome Treaties do not hint at individual legal positions at all and reduce the concept of the European Community to a mere functional one.

Individual legal positions under the Community are, however, confined to the sphere of economic self-realisation. The "Four Freedoms" - today revitalised in the concept of the Common Market which shall be achieved by 1992 - can well be interpreted as indirect economic rights of the individual: freedom of labour and of capital, of services and of trade. However, they refer to the European Community citizen as a market citizen, not as a political citizen.(5)

The only institution of the European Community which can -independent of necessary political consensus among the member states - develop the community law by way of advancement of law

by court decisions is the European Court of Justice in Luxemburg. Already in 1963, the Court has stressed that the creation of the European Economic Community constitutes per se a new legal order in international law. In a limited sense states have revoked parts of their sovereignty in favour of the Community which - by way of its legal processes - should grant rights to the individual citizen of the member states. This self-interpretation of the Community's ethos refers unwittingly to the integration theories mentioned above. The primary legitimacy of the community derives from its competence to establish an efficient economic reality of integration, accepted by all its actors. The more fundamental source of legitimacy, however, depends upon the degree of loyalty which the citizens of the member states express towards the community. This loyalty will be as high as its normative quality will be perceived and realised by the individual. In other words: the European Community will achieve even higher appreciation and support, the clearer it can testify its role as protector of the rights of the individual by means of progress in the economic and political integration among the member states.

The European Community in search of basic rights - this formula was used in order to describe the requirements, but also the ambitions and activities of the community in this particular field of action. Various strategies have been suggested in order to advance with this task.

The most pragmatic solution favours human rights protection by the advancement of legal processes. The European Court of Justice is encourages to extend and to strengthen human rights protection through his decisions. The debate on this approach has been ample and diverse. It embraces highly optimistic as well as more sceptical voices.(6)

Since the late 1960s, the European Court of Justice consults basic rights as criteria of legality for the acts of the European Community. By doing so, the Court has in some sense compensated for the democratic deficit of the Community which is due to the fact that it lacks a constitutional basis and that its Parliament falls behind the national standards of democratic competence achieved in the individual member states.

Through its decisions, the European Court of Justice has executed protection against community acts that violate basic human rights, has provided general standards for the unification of the Community's legal order and has hopefully strengthened the identification of the citizens with the European Community.

The European Court of Justice however is limited to the field of economic and social rights. Its casuistic principle has made the Court a flexible institution, but has fallen short of establishing a more systematic and detailed human rights instrument, as compared to the European Convention for the Protection of Human Rights and Fundamental Freedoms under the Council of Europe.

In various cases, the European Court of Justice has referred to provisions under the European Convention. Critical observers argue however that only in four cases the Court declared the convention or a provision of it be of immediate assistance in the determination of the case. And only in one case it was the convention alone that had relevance for the Court's decision. "The development of fundamental rights within the Community has not therefore been dependent on the ECHR. It is suggested that the European Court could have developed fundamental rights to the same position as present purely relying on constitutional provisions of the Member States as guiddines."(7)

Beyond the casuistic approach used by the European Court of Justice, two further ways have been discussed in order to develop a broader human rights formula within and for the European Community:

- the creation of a European Bill of Rights;
- the accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The pursuit of the first suggestion would primarily serve a political and psychological course. Those who favour it argue, that a European Bill of Rights could help to further harmonize human rights standards in Europe and to strengthen the moral legitimacy of the European Community. At the same time, the implementation of this approach would provoke problems relating to the very democratic deficit of the European Community that

is deplored today: who would be able to claim competence and legitimacy for drafting such a Bill of Rights ? The European Parliament, the Commission in Bruxelles, the Court of Justice, or the Counsel of Ministers, representing the individual member states of the community ?

One advantage of a European Bill of Rights can be its potential ability to include liberal political rights and participatory rights alike. Such a Bill could anticipate and encourage the necessary process towards a European constitution. Given the fact that basic rights are the heart of any constitution, one might expect a revival of the debate on a European Bill of Rights in the course of an intensified discussion on ways of realising a European constitution. Under political perceptions, such a development is not all too likely in the foreseeable future.

Among the counter arguments against a Bill of Rights it was suggested that it be interpreted as a sign of mistrust against the European Convention for the Protection of Human Rights and Fundamental Freedoms and could dilute the efforts which are put into the human rights system of the Council of Europe. Why to develop a second set of human rights provisions if it could not be all to different from the first one and be even more limited in scope ? To differ only to differ ?

A more realistic, concrete debate has focused on the possible accession of the European Community to the European Convention. The Commission of the Community has proposed this accession in a memorandum back on April 4, 1979.(8) The European Parliament has debated the question several times in a positive, encouraging way. No result has been achieved so far and in some countries - most notable (no surprise) in Great Britain - fear was aired that the European Convention after being integrated into the binding EC system could interfere even more and hence too strongly into the domestic legal processes.

Even supporters of the accession ~~present~~ put forward sceptical or rather reserved aspects. For instance they reiterate that by all means the European Court of Justice must remain the only legitimate organ to interpret Community law, thus questioning the competence of the European Court of Human Rights. But one cannot have the cake and eat it.

The whole debate seems to be more confusing than helpful. In some sense, the democratic countries of Western Europe seem to have become victims of their success in the field of human rights protection and their intensive sensitivity for the issue of human rights that made them develpp various approaches and suggestions. They have created courts and committees and invented ways and means, but they are obviously not fully able to coordinate, let alone integrate all of them in a more convincing, harmonizing way.

This has evidently to do with the diverging realities of the different organs of European integration. To put it sharply: the Council of Europe has established interesting innovations in the field of human rights protection, yet it lacks the inner character to act as the nucleus for the advancement of a solid and plausible political architecture of the continent. Whether this might change in the forthcoming years remains to be seen. So far, the Council of Europe was not able to provide for a constitution of Europe that would include human rights provisions or even a Bill of Rights. In the past, the Council of Europe had even to suffer that some of its member states failed to live up to the standard of democratic freedoms and human rights provisions under the clearly expressed notion and hope of the Council. And yet it remains true that the human rights instruments it shaped remain of interest and importance for the cause of human rights in a global sense.

The European Community, on the other hand, has no human rights concept as such and carries the burden of a democratic deficit. However, it has proven to be stable as a community of stable democracies. Its parliament, as insufficient as it is compared to the democratic quality within the individual member states - pursues an active human rights policy, for example with regard to Eastern Europe or in its relation with the developing world.(9)

Thus we have to live with confusing, at least ambivalent realities, with a complex structure of human rights protection. Instead of complaining about its lack of clarity and cohesion,

one might well be advised to take this situation as an opportunity and an asset. This seems at least to be the position of the European Parliament. On January 19, 1989, it lauded the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Justice, and the constitutional processes within the various member states as the combined elements of a "European human rights system." This system, fully developed and applied, could - according to the European Parliament - support the development of other regional systems for the protection of human rights.(10)

Contrary to the system of the United Nations for the protection of human rights, regional endeavors can indeed provide for better means of protecting, provided they include truly binding provisions. The argument in favour of regional instruments for the protection of human rights is often supported with reference to the advantage of a better cultural and political adaptability. This however is a most delicate and ambigious argument. As long as it implies the reflection of consequences to be drawn out of regional experiences in the field of legal processes to protect human rights, it can serve its purpose. But once it encourages deviations from the international standard of human rights, it can easily lead to ethical relativism in the name of regional identity and cultural heterogeneity. This can certainly not serve the course of global human rights protection, but will inevitably create diverging standards of values and notions, of strategies and criteria to protect the dignity of the individual.(11)

V. European human rights protection and European constitutionalism

The experiences with respect to the protection of human rights under the European court system can be summarized as following:

- the degree of human rights protection in Europe depends in the first place on the quality and stability of a democratic nation-state. It is here, within the confines of the existing nation-states of Europe, that human rights will be tested as a living reality and may be challenged as protection of the individual against his state;
- human rights have become the ultimate moral criterion in order to judge and to justify the legitimacy of a political order. For their protection and implementation they do require juridical support and legal processes. In this sense, they depend upon independent courts which are bestowed upon with a mandat to protect them;
- the supra-national courts which exist in Europe do play a supporting role in the overall process of human rights protection among and within the democratic countries of Western Europe, but they cannot gain strenght and legitimacy out of themselves. They remain dependent in their functional relevance upon the institutions that have given birth to them, and their strenght and legitimacy can only be as strong as the strenght and legitimacy of their "mother institutions", i.e. the Council of Europe and the European Community;
- hence it is not the court system as such that is the key to stabilize human rights protection in Europe, but it is the degree as to which the court system is integrated into a supra-national

order of democratic legitimacy and functional efficiency.

The national experience in Europe and North America has been to relate organs of human rights protection to the constitutional set-up of the country. On the national level, the advancement of the constitutional order and of human rights protection have gone hand in hand until they reached a stage of political and juridical marriage. It is open to historical proof whether such an amalgamation of human rights processes and constitution-building can be achieved on the European level - and on which European level. The current European system of human rights protection is impressive but not necessarily due to the performance of the European Courts, may be not even due to Europe's current quality of institutional integration, but mainly due to the law implementing quality of the European democracies.

Against the sober political realism of the day, the paper will conclude with an optimistic, if not even visionary outlook. It suggests to reflect upon strategies to encourage rapidly the process towards a European constitution. This constitution could embrace human rights provisions as the ultimate expression of a European identity and integrational legitimacy. And it could provide for substantial legal processes to protect them, including a European constitutional court for whom the current European Court of Human Rights could serve as the nucleus.

Such a development could truly go beyond the current double standard established with the Council of Europe and the European Community and could bring about a qualitative leap forward for a supra-national European human rights system that will be both democratically legitimized and legally coherent.

Realism reminds us that there is still a long, long way to go if at all such a vision can become true. This is all the more a problem if we consider Europe to be bigger than the European Community or the Council of Europe. To look for an European identity and for a European constitution is one thing, but to look for the identity of Europe as a whole and for a constitution, a democratic constitution for the whole of Europe is another thing. Human rights can have a catalystic function for both dimensions, but given their moral claim, they are also the biggest obstacle to achieve these goals simultaneously as long as the borders of ideology, politics and strategy will not become truly permeable.

Notes:

(1) see for the historical development of human rights: Gerhard Ostreich, Die Idee der Menschenrechte in ihrer geschichtlichen Entwicklung, Berlin ^{3}1969; Louis Henkin, The rights of man today, Boulder, Col. 1978

(2) see: Francis G. Jacobs, The European Convention on human rights, Oxford 1975; Ralph Beddard, Human Rights and Europe. A study of the machinery of human rights protection of the Council of Europe, London ^{2}1980; Jochen Abr. Frowein/Werner Peukert, Europäische Menschenrechtskonvention, Kehl 1985; Klaus Dicke, Menschenrechte und europäische Integration, Kehl 1986; Franz Matscher/

Herbert Petzold, Protecting human rights: the European dimension, Köln 1988

(3) Beddard, note 2, page 1

(4) Jochen Abr. Frowein, Die Europäische und die Amerikanische Menschenrechtskonvention, in: Europäische Grundrechtezeitschrift, 7(1980), page 442 ff.

(5) A.Glenn Mower, jr., Human Rights in Western Europe: Progress and problems, in: International Affairs, Vol.52/1976, page 235 ff.; Hermann Mosler/Rudolf Bernhardt/Meinhard Hilf (ed.), Grundrechtsschutz in Europa, Berlin 1977; Jochen Abr. Frowein, Die Europäische Gemeinschaft auf der Suche nach Grundrechten, in: Robert Bieber et.al., Das Europa der zweiten Generation, Kehl 1981, page 727 ff.; Rudolf Hrbek, Menschenrechte in einem "souveränen" Europa, in: Johannes Schwartländer (ed.), Menschenrechte und Demokratie, Kehl 1981, page 41 ff.

(6) see: Meinhard Hilf, Der Gerichtshof der Europäischen Gemeinschaften als Integrationsfaktor, dargestellt anhand der Rechtssprechung zu den Grundrechten, in: Die Grundrechte in der Europäischen Gemeinschaft. Schriftenreihe des Arbeitskreises Europäische Integration, Baden-Baden 1978, page 23 ff.; Ingolf Pernice, Grundrechtsgehalte im europäischen Gemeinschaftsrecht. Ein Beitrag zum gemeinschaftsimmanenten Grundrechtsschutz durch den europäischen Gerichtshof, Baden-Baden 1979

(7) Nigel Foster, The European Court of Justice and the European Convention for the Protection of Human Rights, in: Human Rights Law Journal, Vol.8, 2-4/1987, page 271

(8) Memorandum betreffend den Beitritt der Europäischen Gemeinschaften zur Konvention über den Schutz der Menschenrechte und Grundfreiheiten, EG Kommission, Bulletin der Europäischen Gemeinschaften, Beilage 2/79, Luxemburg 1979

(9) see Dicke, note 2, page 202 ff.

(10) Europäisches Parlament, 1988-1989, Protokoll der Sitzung vom 18.Januar 1989, PV 52 II, PE 129.733 (European Parliament Document), Part II, page 26 f.

(11) Ludger Kühnhardt, Die Universalität der Menschenrechte. Studie zur ideengeschichtlichen Bestimmung eines politischen Schlüsselbegriffs, München 1987; Karl-Josef Partsch, Vor- und Nachteile einer Regionalisierung des internationalen Menschenrechtsschutzes, in: Europäische Grundrechtezeitschrift, 1(1989), page 1 ff.

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CONSTITUTIONALISM OF THE EUROPEAN COMMUNITY AND PUBLIC OPINION

By

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CONSTITUTIONALISM OF THE EUROPEAN COMMUNITY AND PUBLIC OPINION *

1. Origins of Public Opinion

Today's concept of public opinion began to arise in Western countries in the second half of the 17th century;[1] it was in these countries that development into a civil society was most advanced. To the same extent that market-oriented economic forms came about in European centers, a middle-class culture also started to develop. It gave rise to new forms of public communication, which radiated from coffee houses and salons. Just as in the market, participation in this communication process was based on the presumption of fundamental freedom and equality for all those involved.

Within the multifaceted, middle-class communication contexts, there arose opinions on the manner in which public affairs were to be dealt with, these being imparted and reflected by the rapidly propagating newspapers and magazines. These opinions laid claim to influence on everyday politics. Behind this was the notion that in the unrestricted contest among information and ideas, the most correct opinions would

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1 On the history of public opinion, see Wilhelm Bauer, Die öffentliche Meinung und ihre geschichtlichen Grundlagen, Tübingen 1914; Wilhelm Bauer, Die öffentliche Meinung in der Weltgeschichte, Wildpark-Potsdam 1930; Jürgen Habermas, Strukturwandel der Öffentlichkeit, Neuwied/Berlin 1962; Lucian Hölscher, Öffentlichkeit, in: Otto Brunner/Werner Conze/Reinhart Koselleck (eds.), Geschichtliche Grundbegriffe, Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, vol. 4, Stuttgart 1978, pp. 413-67; Terence H. Qualter, Opinion Control in the Democracies, London and Basingstoke 1985, pp. 1-29.

* Translated into English by Paul Aliferis, J.D.

prevail, which would necessarily also have to be recognized by the rulers.

As formulated by Hobbes and Locke, public opinion first became a factor in constitutional life in England, in that it was taken into consideration by Parliament and the government. In France public opinion gained influence on politics in the second half of the 18th century -- due largely to the teachings of Rousseau -- and was exploited, for example, by Minister of Finance Necker. At the close of the 18th century in Germany, demands were raised, with particular outspokenness by Kant, for the public discussion of all political affairs. In North America and in France, public opinion found itself in such contrast to existing conditions that it played an indispensable role in the independence movement of 1776 and the Revolution of 1789.

In the 19th and 20th centuries, the significance of public opinion for constitutional practice in all Western countries continued to rise unabated. The step-by-step democratization of the legislative and executive branches increasingly forced political representatives facing elections to make allowance for public opinion. The extension of governmental tasks expanded the interest in public affairs. The ability of the public to articulate itself became enlarged by way of new

forms of mass communications in the press, radio and television. New techniques for public-opinion polls made more and more complete the documentation of many aspects of public opinion.

2. Current Significance of Public Opinion in Western Constitutional States

Public opinion in Western constitutional states is today characterized by a high degree of differentiation, in which society's plurality is reflected.[2] In continuation of the 18th-century tradition, there is a general public opinion in which a wide audience participates. This expresses itself, for example, in everyday conversations, public-opinion polls, large conferences, discussion in associations and political parties, as well as in the various means of mass communications. Even when the press, radio and television aim at entertainment, they contribute in part to the formation of public opinion. In addition, public opinion is articulated in many specialized affairs, for instance, professional

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2 On the modern significance of public opinion: Walter Lippmann, Public Opinion, New York 1922; Harwood L. Childs, An Introduction to Public Opinion, fourth printing, New York/London 1949; A. Sauvy. L'Opinion publique, Paris 1956; O. Hood Phillips/Paul Jackson, Constitutional and Administrative Law, 6th ed., London 1978, p. 58; Ernst Fraenkel, Deutschland und die westlichen Demokratien, 7th ed., Stuttgart, etc. 1979, pp. 152-96; Georges Burdeau, Traité de Science Politique, tome III, vol. I, Paris 1982, pp. 99-126; Qualter, supra note 1; Michael Kloepfer, Öffentliche Meinung, Massenmedien, in: Josef Isensee/Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. II, Heidelberg 1987, pp. 171-205.

L Morris Janowitz/Paul M. Hirsch (eds.), Reader in Public Opinion and Mass Communication, Third Edition, New York/London 1981

conversations, conferences and journals. The claim is also raised here that influence is exercised on certain sectors of politics.

Public opinion is only in rare cases uniform. In general, various views are taken on a given problem. In the course of public discussion, the significance of individual positions can change. The more a commonly recognized public opinion crystallizes, the greater its chance of becoming politically effective.

The actual influence exercised by public opinion on politics varies according to the country, the time and the political constellation. The mass-communications media are simply unable to treat all problems with the same intensity. They often emphasize those topics that possess a high entertainment value, since this increases sales. Only few media undertakings are in an economic position to conduct their own, costly research. The extent to which a problem becomes a factor in the formation of public opinion frequently turns on mere coincidence or on the commitment of individual journalists.

By way of extensive public relations, governments are occasionally able to exert influence on public opinion. The original approach -- public opinion influencing the government -- has thus been turned around.

Despite these qualifications, public opinion in all Western constitutional states today plays an often decisive role in all sectors of politics. This is to be explained for two reasons:

First, all governmental activity is dependent on the cooperation and participation of those affected. The government can only operate efficiently when it receives support from the relevant corners of public opinion.

Second, the -- in many cases -- decisive significance of public opinion is based on the wide-ranging recognition of the principle of democracy. Both the legislative and the executive branches are regularly required to justify themselves before voters for the entire spectrum of governmental activity. Insofar as expressions of public opinion might be relevant for the next elections, politicians react to it very sensitively. The dependence of politics on public opinion

has particularly increased due to the refined methods of opinion pollings.

In practice, public opinion often exercises the role of arbitrator between the competing interests that are pursued in a pluralistic democracy. Attempts -- in and of themselves legitimate -- to implement particular interests must nevertheless demonstrate that they are legitimate in the eyes of the public. If they fail to show that they are justified, they often -- but not always -- are frustrated by the opposition of public opinion, which the government and majority groups in Parliament must take into consideration.

Formulated from the standpoint of constitutional theory, public opinion today gives rise to a plebiscitary qualification on the principle of democratic representation. Only a scant number of fundamental decisions are made in the relatively seldom elections. Between elections, public opinion continuously influences legislation and administrative activity in its very details. Independent of the last elections but with regard to the coming elections, public opinion today provides politics with additional democratic legitimation.

3. National Fragmentation of Public Opinion on the EC

Although the EC has common institutions as well as common policies, legislation, administration and case law, there is lacking an adequate common public opinion on the EC.[3] There are instead many, differing national public opinions on the EC.

In the mass media, EC problems are predominantly treated from the respective national perspectives. In essence the issue is the extent to which EC policies are beneficial or detrimental to a given country. Other countries' EC problems are mainly recognized insofar as they endanger the championing of a country's own interests in EC negotiations.

The mass media discuss the politics of the EC on a transnational basis relatively seldomly, e.g., with regard to its significance for the citizens of other member states or for the EC as a whole. The readiness of the public in a given country to adopt a Community-oriented outlook is inversely proportional to its size.

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3 Public opinion on the EC has thus far not been treated systematically in the literature. The following observations are based on selected readings of European newspapers and magazines and on conversations with European colleagues.

A decisive reason for the national fixation of public opinion on the EC lies in the fact that the mass media are produced only for individual countries. The newspapers and magazines directed at the general public have only a small circulation in neighboring countries, where they -- with few exceptions -- do not have any effect on the formation of public opinion. Although television to a larger extent crosses borders, it is insofar only perceived as entertainment. The formation of common European public opinion would be enhanced if the projected European daily newspaper The European, proposed by the English publisher Mr. Maxwell, were to be realized.[4]

All relevant issues of the EC are being intensively discussed in specialized fashion, in particular, in professional journals and conferences. But here as well, the perspectives of a country's own national interests predominate. The problems in other countries are treated more from the standpoint of competition than from the point of view of possible common interests. Professional communications are still organized in national settings; even the disciplines of comparative law and European law principally discourse in their own national frameworks. Under these circumstances, the formation of common EC public opinion is also only in its beginnings in professional publications.

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[4] See Rudolf Walter Leonhardt, Maxwell Maxismus, Die Zeit, Mar. 17, 1989, p. 96.

4. Public Opinion Polls on the EC

The impressions of the population on many problems in the EC are regularly ascertained under uniform criteria by opinion polls.[5] The EC Commission routinely orders such polls, publishing the results of these in its series Euro-Barometer.[6] Institutes for opinion research constantly conduct additional polls on EC problems for other clients.[7]

Using the example of the poll contained in the following table, the impressions on Europe will be analyzed:

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5 Survey of opinion polls can be found, e.g., in T. Herz, Europa in der öffentlichen Meinung, Bonn 1978; D.H. Handley, Public Opinion and European Integration: The Crisis of the Seventies, European Journal of Political Research 1981, pp. 335-364; Roland Sturm, Europa und öffentliche Meinung, in: Dieter Nohlen (ed.), Pipers Wörterbuch zur Politik, vol. 3, Munich/Zurich 1984, pp. 87-92; Elisabeth Noelle-Neumann/Gerhard Herdegen, Die öffentliche Meinung, in: Jahrbuch der Europäischen Integration 1987/88 (ed. by Werner Weidenfeld and Wolfgang Wessels), Bonn 1988, pp. 316-29 (corresponding reports in the yearbooks 1980-1986/87).

6 The series Euro-Barometer has since 1973 appeared biannually in several European languages in Brussels at the EC Commission.

7 For example, by the European polling institutes united under the rubric IRIS (International Research Institutes) or by the "Zentrum für Europäische Umfrageanalysen und Studien" (ZEUS) at the University of Mannheim.

This poll has as its topic the most important problem facing future constitutional development in Europe -- the establishment of a government responsible to Parliament. The approval of this project displays great differences in the twelve member states; for instance, the endorsement of a European government is roughly five times greater in Italy than in Denmark.

In the dimensions of the approval of a European government, prevailing moods in the populace are expressed that are typical for the results of many polls on EC problems. Several hypotheses will be developed in the following by attempting to explain the divergent approval of a European government with reference to the national characteristics of public opinion in the individual countries. All percent figures indicated relate to the share of supporters of the issue in the fall of 1988.

The extraordinarily strong affirmation of a European government in Italy (74%) results from the fact that the EC is viewed there as an instrument for resolving pressing problems that appear irresolvable at the national level. The second-highest level of affirmation, registered in Belgium (65%), is attributable to advantages accompanying the location in Belgium of the most important EC institutions.

Average to slightly below-average approval ratings are exhibited by the four poorest EC countries, namely, Portugal (59%), Ireland (55%), Spain (53%) and Greece (51%). These countries expect considerable advantages for their development from EC membership, although they occasionally have reservations with regard to the necessary adaptation processes.

A European government met with average approval ratings in four, wealthy core countries of the EC -- France (58%), the Netherlands (53%), West Germany (49%) and Luxembourg (48%). The high approval rating in France can be explained by the fact that EC is considered there to be a means for modernizing the economic and social structure. In the Netherlands, West Germany and Luxembourg, approval was lower due to the fear of impairment of social achievements.

Notably low was the support for a European government in Great Britain (32%) and Denmark (15%). This can be traced back in Great Britain to the reservations with regard to state interventionism by the EC Commission and to political and economic orientation toward areas external to Europe. In Denmark the extremely low approval is based on the fear of

the dismantling of welfare mechanisms, which are highly advanced there.

Most polls on the individual problems of the EC display a similar distribution of approval of EC politics. The significant discrepancies can be explained by the fact that in the daily consciousness of the populace, the EC is widely seen from the aspect of its use for one's own country. The study of opinion polls exhibits the same fragmentation of public opinion on the EC as is characteristic for the mass-communications media and professional publications.

5. Qualitative Features of Public Opinion on the EC

Analysis of mass-communications media and opinion polls shows that the public is not as well informed on EC problems as it is on national problems.[8] Many EC problems completely escape the notice of the public in the individual countries. Insofar as they are perceived, their complexity is not registered to the same degree as in EC institutions. These problems are instead discussed from the simplified point of view of the advantages and disadvantages for one's own country.

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8 For the corresponding polling results: Elisabeth Noelle-Neumann, Europa -- das unbekannte, ungeliebte Wesen? In der öffentlichen Meinung ist die Unterstützung lau, Frankfurter Allgemeine Zeitung, Dec. 13, 1988, p. 10.

Since the public is not as well informed with regard to the EC as would be indicated by the scope of the problems, it is extensively unable to develop any qualified criticism. Public opinion with respect to the EC is only critical when the protection of national interests is at issue.

Individual aspects of EC politics are approved to differing degrees by the public of all member states. These differences vary greatly with the country, the time and the political constellation. The public in some countries disapproves of certain EC projects. For example, the EC agricultural policy has more opponents than supporters in most EC countries.[9] In contrast, the Single Common Market, to be established by 1992, is supported by a majority in most member states.[10] Due to current developments, the stance on EC policies can change rapidly.

Despite these differences in details, public opinion on the EC displays one remarkable similarity in all member states: a diffuse, but nevertheless deeply embedded consent for EC principles predominates everywhere. The fundamental approval of the EC is reflected in the following polling results:

9 See Table A 14 in: Euro-Barometer, Nr. 30/1988.
10 See Table A 10 in: Euro-Barometer, Nr. 30/1988.

Table/Tableau A6 :

CHANGE IN PUBLIC SUPPORT FOR EUROPEAN UNIFICATION AND FOR THE EC, SPRING (S) 1988 AND AUTUMN (A) 1988 (%, by country) / Variation de l'opinion concernant l'intégration européenne et la Communauté, printemps (S) 1988 et automne (A) 1988 (%, par pays)

	B		DK		D		GR		E		F		IRL		I		L		NL		P		UK		EC 12	
	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A	S	A
Are you for or against efforts being made to unify Western Europe/ Vis-à-vis des efforts d'unification de l'Europe occidentale, vous êtes dans l'ensemble:																										
- for very much/très pour	25	25	9	15	27	27	32	44	38	36	29	34	22	24	32	37	34	32	26	27	35	42	20	16	28	30
- for to some extent/plutôt pour	48	58	34	38	43	51	32	34	36	43	55	52	42	53	51	53	42	46	50	54	33	38	40	45	45	49
- against to some extent/plutôt contre	6	8	24	28	14	11	9	6	5	4	6	6	11	7	7	3	10	10	10	8	5	2	18	15	10	8
- against very much/très contre	1	2	24	23	4	4	5	2	3	2	1	2	4	4	1	1	3	2	4	4	3	2	7	11	4	4
- no reply/sans réponse	20	7	9	5	13	8	21	14	19	16	9	7	22	14	10	6	11	9	10	8	24	24	15	12	13	10
Your country's membership of the EC is:/ L'appartenance de votre pays à la CE est:																										
- a good thing/une bonne chose	64	70	37	47	49	59	51	66	63	69	67	69	63	72	74	83	78	80	77	79	53	70	37	48	58	66
- neither good nor bad/une chose ni bonne ni mauvaise	22	23	28	26	33	26	24	17	18	18	23	22	20	17	20	12	10	15	16	12	26	14	29	27	25	21
- a bad thing/une mauvaise chose	5	4	29	24	11	9	11	8	7	4	7	6	11	8	4	2	7	3	4	3	4	2	29	21	11	8
- no reply/sans réponse	10	3	6	4	7	6	14	9	12	10	3	4	6	3	3	3	5	3	4	6	17	15	4	4	6	5
On balance, has your country benefited or not from being a member of the EC?/ Dans l'ensemble, votre pays a-t-il bénéficié ou non de son appartenance à la CE?																										
- benefited/bénéficié	58	64	51	54	53	55	56	67	24	27	56	58	74	79	73	75	68	67	63	68	58	69	39	47	52	56
- not benefited/pas bénéficié	15	18	32	33	31	28	20	15	58	57	23	24	16	14	14	12	15	15	16	13	15	9	47	40	30	28
- no reply/sans réponse	28	19	17	14	17	18	25	17	18	16	21	17	10	7	13	13	17	17	21	18	27	21	14	13	18	16
If you were to be told tomorrow that the EC had been scrapped, would you be:/ Si l'on annonçait demain l'abandon de la CE, éprouveriez-vous:																										
- very sorry/grands regrets	40	43	27	35	45	43	33	41	39	43	51	53	48	51	50	52	57	55	53	47	31	36	24	27	42	43
- indifferent/indifference	40	47	25	23	33	32	35	35	37	41	32	35	35	34	37	38	27	37	33	37	47	47	45	48	37	38
- relieved/vif soulagement	2	3	30	27	8	8	7	5	6	4	6	5	8	7	2	1	3	0	4	3	2	2	26	20	10	8
- no reply/sans réponse	18	8	17	15	14	18	25	20	17	13	11	7	9	7	10	10	13	8	10	14	20	15	5	5	12	11

From: Euro-Barometer, Nr.30/1988

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The answers reveal that in most countries, more than three-quarters of those polled are either positive or indifferent with regard to the EC (Questions 1, 2 and 4). In the fall of 1988, 56% of those polled saw benefits for their country in EC membership, while 28%, i.e., half as many, found no benefits in this (Question 3). At the same time, merely 8% considered their country's membership in the EC to be a bad thing (Question 2).

In no EC country did a relevant portion of the public demand withdrawal from or dissolution of the EC. Controversial is not the principle but rather the scope and speed of European integration. This general approval of the EC is based not just on the careful balancing of national interests; its decisive reason lies in the widespread conviction that in view of the worldwide internationalization of all areas of life, there are no alternatives to European integration and that in the long term more advantages than disadvantages are to be expected from this for all involved.

6. Significance of Public Opinion for EC Decision-Making Processes

Public opinion does not help to shape the EC in a manner that would correspond to its member states' constitutional prac-

tice of over 200 years.[11] Public opinion in the individual member states primarily plays a role in the EC to the extent that it influences the negotiating position of their governments. Lacking is, however, qualified pan-European public opinion that would directly influence EC decision-making processes.

The diffuse approval of the EC by public opinion in all member states makes it possible for the institutions of the EC to make decisions of great relevance in the absence of public discussion that would be customary in the member states. Public opinion in the member states provides EC institutions with a wide-ranging carte blanche, which they are entitled to use -- within the scope of procedural guarantees under the EC treaties -- at their own discretion. This power is only substantively limited by the fact that national interests must be balanced in a justifiable manner. If this is guaranteed, then the public in the member states also accepts partially adverse decisions for its own country.

Precisely because the public is poorly informed on the EC, it believes itself to be subservient to the Brussels bureaucracy and the Council of Ministers. It is generally unable to

[11] There have thus far been no systematic investigations on the significance of public opinion in the EC conducted from the standpoint of constitutional law or political science. The following remarks are based on observations by the author.

propose qualified alternatives to EC politics. Characteristic for the passive stance of the public with regard to the EC is that the initiatives on European integration never originate from public opinion but rather from EC institutions.

Public opinion in the member states predominantly accepts the results of the decision-making processes in the EC as a foregone conclusion. These results are deaf to all criticism since they are the product of complex balancing processes between innumerable interests. Such decision-making processes objectively seem to be unpredictable, not understandable for outsiders, and subsequently unrevisable.

With regard to the EC, the classical relationship between public opinion and public power has been turned around in part: EC institutions do not fear public opinion nearly so much as public opinion, the EC. The EC largely lacks the adjustment mechanism of public opinion, indispensable in all Western states, both for daily practice and for the long-term decisions of public institutions.

A counterweight in the form of influential public opinion would especially be worthwhile in those areas of EC politics

in which vested interests are pushed through to the detriment of the public as a whole -- e.g., in agricultural policy: although public opinion is predominantly critical of EC agricultural policy,[12] its influence only suffices for selective corrections in this area.

Formulated from the standpoint of constitutional theory, the absence of qualified public opinion enlarges the EC's democratic deficit. Precisely because the Council of Ministers and the Commission have only very indirect democratic legitimation, a corrective in the form of influential public opinion appears quite necessary. Public opinion in the EC has not yet developed to the extent that, under aspects of democratic theory, would be called for in view of the expansion of its institutions and competences.

7. Constitutional Reasons for the Deficits in EC Public Opinion

The reason for the inability of a satisfactory pan-European public opinion to develop initially is to be found in the constitutional conditions that have existed in the EC thus far.

12 See Table A 14 in: Euro-Barometer, Nr. 30/1988.

The processes for the formation of political decisions in the EC -- as compared with those in the member states -- are seemingly intransparent. For EC citizens and their media, the bureaucracy of the Commission is more impenetrable than the national administrative set-ups. In particular, the decision-making processes of the Council of Ministers in its many manifestations are widely closed to outsiders. The Council does not meet publicly. Its work is controlled by highly specialized professionals from the member states, whose activity centers on the balancing of immeasurable divergent national interests. The complexity of the compromises necessary in the Council's work is difficult to comprehend.

In addition, the deficits in EC public opinion are based on the fact that the responsibility for political decisions is not borne by individual persons and institutions. In the mass-communications media and other forms for expressing public opinion, today's political problems widely appear in a personalized form, in which the political process is depicted as the actions of individual persons. EC politics, on the other hand, is developed in protracted negotiations between Commission officials, national administrative authorities and national government representatives. Some framework conditions are established by the European Parliament. The result appears as a compromise without alternatives, for which no

one bears personal responsibility and for which, in particular, no one can be held responsible. Faced with a political decision-making process set up in such a way, the public must undoubtedly consider itself impotent.

Finally, a pan-European public opinion has thus far been unable to develop because of a lack of the crucial means of sanctioning in the form of elections. In the constitutional reality of the member states, public opinion is taken seriously, since it is expected that this will have effects on the future behavior of voters. The EC lacks a comparable lever on its institutions. The European Parliament, which is assembled by general elections, has only limited competences. As is demonstrated by the election battles for seats in the Parliament, aspects of internal, rather than pan-European, politics are decisive for the elections to the Parliament. The dominant figures in EC decision-making processes -- officials in the member states and in the Commission -- are not subject to any direct sanctions via election. The definitively decisive body -- the Council of Ministers -- is not in its entirety constituted or replaced by elections. As long as the common politics of the EC are not defined or sanctioned by common elections, a common, European public opinion will not be able to be developed.

8. Public Opinion and Political Culture in the EC

The decisive reason for the deficits in EC public opinion lies in the fact that a common, pan-European political culture is only in its beginnings.[13]

The political values, perspectives, forms of action and institutions in EC countries are still predominantly oriented toward the national framework. Private, professional and political communication is -- in contrast to, e.g., the comparably large U.S. -- usually limited to the state itself. Mainly due to language barriers, only limited familiarity with the social, economic and political problems of other countries is present. Conflicts in other member states are generally perceived as foreign and not as one's own.

The EC member states' political cultures, however, display remarkable similarities. They become particularly evident vis-à-vis many other political cultures outside the EC. The

[13] The notion of political culture has proved to be a fruitful concept for international comparisons. See Gabriel A. Almond/Sidney Verba, The Civic Culture -- Political Attitudes and Democracy in Five Nations, Princeton, New Jersey 1963; D. Kavanagh, Political Culture, London 1972; Walter A. Rosenbaum, Political Culture, London 1975; B. Badie, Culture et Politique, Paris 1983; Y. Schemeil, Les cultures politiques, in: M. Grawitz/J. Leca (eds.), Traité de Science Politique, Paris 1985, pp. 237-307; Dirk Berg-Schlosser/Jacob Schissler (eds.), Politische Kultur in Deutschland -- Bilanz und Perspektiven der Forschung, Politische Vierteljahresschrift, Sonderheft 18, Opladen 1987.

parallels in political cultures within the EC can be found in comparable political convictions and forms of organization, as well as in their constitutional and administrative institutions.[14]

Due to the relatively large homogeneity of national political cultures in the EC, the prerequisites are present for the development of a pan-European political culture.[15] Thus far, however, this exists only in subareas. In essence, common European political culture is still limited to the diffuse approval of the EC and to the readiness to accept EC decisions -- as long as the overall balance of advantages and disadvantages swings in favor of one's own country.

The practical significance of public opinion depends on many factors of political culture. On account of its informal character, the effectiveness of public opinion is restricted to its own political culture. Only when a common political culture comes about in Europe will common public opinion gain the significance in the EC that it has in the member states.

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14 Carl Otto Lenz, Gemeinsame Grundlagen und Grundwerte des Rechts der Europäischen Gemeinschaften, Zeitschrift für Rechtspolitik 1988, pp. 449-453.

15 See Werner Maihofer, Culture politique et identité européenne, in: Jürgen Schwarze/Henry G. Schremers (eds.), Structure and Dimensions of European Community Policy -- Structure et dimensions des politiques communautaires, Baden-Baden 1988, pp. 215-228.

9. Summary: Perspectives for Public Opinion in the EC

In all member states, there exists public opinion on EC problems. The great majority of the public supports the principles of European integration. The public in the member states is not as well informed on individual EC problems as it is on national issues. It mainly views the EC from the standpoint of whether EC membership is advantageous or detrimental for its country. The effectiveness of public opinion is restricted to the individual member state.

A pan-European public opinion is only in its beginnings in the EC. It has not yet developed to a level that would be commensurate with the great significance of the EC for all its citizens. Public opinion does not play the same role in EC decision-making processes as it does in the member states. With the backing of a diffuse approval of the EC principles, EC institutions are able to reach decisions without detailed participation by the public. EC institutions, democratically legitimated in only an indirect manner, are not controlled by qualified public opinion. The lack of pan-European public opinion serves to enlarge the democratic deficit in the EC.

The development of effective public opinion in the EC will be promoted when the decision-making processes of the EC become more transparent and when the responsible decision makers are put into office and sanctioned by direct elections. The most important prerequisite for the emergence of pan-European public opinion is the strengthening of pan-European political culture. The latter develops hand in hand with the increase in personal, cultural, economic and political communication. In this context, pan-European public opinion is able to develop that is in a position to follow critically the activities of the EC and thus to assist in actively shaping them -- in a manner corresponding to the member states' constitutional tradition of more than 200 years.

Alexander von Brünneck p. 10.

Table/Tableau A17 :
FOR OR AGAINST A EUROPEAN GOVERNMENT RESPONSIBLE TO THE EUROPEAN PARLIAMENT BY 1992 ? (%, by country)/Pour ou contre un Gouvernement Européen responsable devant le Parlement Européen en 1992 ? (%, par pays)
(Autumn 1987,Spring 1988, Autumn 1988/automne 1987, printemps 1988, automne 1988)

QUESTION : Are you for or against the formation by 1992 (*) of a European Government responsible to the Europan Parliament ?/Etes-vous pour ou contre la formation, d'ici 1992 (*), d'une union européenne avec un Gouvernement Européen responsable devant le Parlement Européen ?

	B	DK	D	GR	E	F	IRL	I	L	NL	P	UK	EC12
Autumn 1987/automne 1987													
For/pour	55	13	41	39	49	60	39	70	52	45	42	31	49
Against/contre	12	64	28	21	10	19	23	11	21	25	14	45	24
no reply/sans réponse	33	23	31	41	40	21	38	19	28	29	44	24	28
TOTAL	100	100	100	101	99	100	100	100	101	99	100	100	101
Spring 1988/printemps 1988													
For/pour	56	11	43	42	52	62	44	68	46	45	42	31	49
Against/contre	25	67	30	18	14	16	18	10	32	30	9	44	24
no reply/sans réponse	19	22	28	39	34	22	38	22	22	25	49	26	27
TOTAL	100	100	101	101	100	100	100	100	100	100	100	101	100
Autumn 1988/automne 1988													
For/pour	65	15	49	51	53	58	55	74	48	53	59	32	53
Against/contre	12	63	24	14	12	16	16	7	28	23	7	37	20
no reply/sans réponse	24	23	27	35	35	26	29	18	24	24	34	30	27
TOTAL	101	101	100	100	100	100	100	99	100	100	100	99	100

(*) The expression "by 1992" was only added in Autumn 1988/La précision "d'ici 1992" n'a été apportée qu'en automne 1988.

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CONSTITUTIONALISM AND SURVIVAL

By

RITA TULLBERG

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CONSTITUTIONALISM AND SURVIVAL
RITA TULLBERG

TABLE OF CONTENTS

1. INTRODUCTION Constitutionalism; Military alliances

2. NATIONAL EFFORTS TO ENSURE INTERNATIONAL SURVIVAL

(i) The peace movements: Friends; Jeremy Bentham; Free Traders; Socialists; Tensions; Constitutionalism; Federalists; Post-war activities
(ii) Economic and social survival: Colonialism; Post-war attitudes
(iii) The environment: Post-war activities; Cross-border pollution; Environmentalists

3. INTERNATIONAL EFFORTS TO ENSURE INTERNATIONAL SURVIVAL

(i) International institutions: 19th century international cooperation; Hague Conferences; Arbitration; League of Nations; United Nations; Aims
(ii) United Nations and peace-keeping: The IAEA; Arms control agreements; Bi-lateral and regional agreements; Peace-keeping operations; International Court of Justice
(iii) The United Nations and economic & social justice: UNCTAD; Human Rights; De-colonisation; Other programmes
(iv) The United Nations and the Environment: The United Nations Environmental Programme; Other international environmental agreements

4. NATIONAL EFFORTS TO ENSURE NATIONAL SURVIVAL

Vigilance; Nuclear-free ports; The arms trade; Military expenditure; Conscientious Objection; Human Rights; The environment

CONSTITUTIONALISM AND SURVIVAL

INTRODUCTION

Constitutionalism, as a school of thought, does not play a central role in modern peace and conflict research. The term 'constitutionalism' per se cannot be found in the World Encyclopaedia for Peace (1986), and in a very thorough survey of peace research (Newcombe, 1984), only one of 71 pages addresses the topic of constitutionalism as a policy proposal. Peace and conflict researchers with long memories remember constitutionalism as a subject under discussion in the 1960s; others relegate it to the middle and late nineteenth century.

However, if the term 'constitutionalism' is dropped in favour of 'world government', 'federalism' or even more broadly 'international law', it is clear that constitutionalism in the sense that nations commit themselves to following rules of behaviour agreed upon internationally lies at the heart of most policy proposals emanating from peace movements and from peace and conflict research. As examples of such proposals can be mentioned: multi-lateral disarmament; international verification procedures;, mediation and arbitration; confidence-building measures; the deployment of international peace-keeping forces; all of which require commitment to rules, treaties, conventions agreed at an international level. Constitutionalism has also a place in the the study of such national issues as conscientious objection, the export of weapons and the role of the military in society.

If constitutionalism is thought of as some-what old fashioned, 'survival' is a term which has not yet been given a great deal of attention by European peace and conflict researchers. Traditionally these researchers have their academic backgrounds in political science, international relations and, ocassionally, the natural sciences. They have concerned themselves primarily with the problems of national security as derived from armaments and military

alliances. In proposing alternative forms of security they have therefore concentrated on arms control and depolarisation, that is, the dilution of alliances.

As the danger of war in Europe recedes, there is a growing awareness among European and North American peace workers and researchers that security must be defined in global rather than national or regional terms, that the goal of security is not simply territorial and political independence, but economic and social freedom and dignity in a world free not only from military violence but also from economic, social and environmental aggression. This enhanced view of security is now frequently being referred to as **survival**.

There has long been an awareness of these non-military threats to security in the Third World: the exploitation of natural resources, the inequitable distribution of wealth both domestically and internationally; human rights abuses; colonialism; economic warfare; the dumping of hazardous waste; to give but a few examples. In Europe, it seems many peace and conflict researchers have been caught unawares; their research field (and funds) are being taken over by development economists and environmentalists.

This curious situation perhaps reflects the gulf which has arisen between the pragmatism of the peace movements and the more abstract, and much younger, field of peace and conflict research; between the cold war concerns of Europe and North America with its threat of nuclear war, and the struggle for independence, development and access to such basics as clean water and an adequate diet amongst the countries of the Third World. Researchers have been overly and at times exclusively concerned with the post-war division of Europe and the balance of world power between the super-powers, with bi-lateral agreements and power-block politics. It is therefore well worthwhile to recapitulate the much broader aspirations of the peace movement, where it will be shown that for almost two centuries, survival has been the goal and

constitutionalism a favourite method.

In the following paper, the subject of constitutionalism and survival will be looked at from three perspectives: 1. national efforts to ensure international survival; 2. international efforts to ensure international survival; and, 3. national efforts to ensure national survival. In each section, the three elements of survival - peace, economic and social justice and environmental issues will be examined. Since these three topics can include the whole of the condition of mankind, only certain areas can be covered due to the constraints of time, space and familiarity with the topics.

Constitutionalism At first sight, not all peace or survival movements fall within the description 'constitutionalist'. Indeed, constitutionalism and what is often referred to as 'Ghandianism' - civil disobedience - are sometimes seen as separate and even antagonistic alternatives to military security. Constitutionalism implies a willingness to abide by a set of agreed rules. Changes in the rules are made in an agreed and predetermined fashion. Constitutionalists normally place great emphasis on the rules themselves, as manifested in constitutions, laws, treaties, agreements etc., on reaching these agreements and on monitoring and enforcing compliance with them.

However, many people concerned with problems of survival are concerned primarily with this 'willingness to abide'. Rules alone are not sufficient; they must be justifiable in terms of some religious, philosophic or political ideology. A third group has taken a more extreme stance. They place little faith in laws and treaties, in the wisdom and disinterested decisions of statesmen, lawmakers and diplomats. They reserve for themselves the right to struggle for survival by extra-constitutional means, if necessary. These activists are an important advanced guard, often irritating, noisy, undiplomatic, foolhardy, never satisfied. Before one cause has finally been won at the diplomatic round-table, they are pricking our consciences with some new

and unpopular issue. It should be noted, however, that what all these groups in most cases are struggling for are changes in the constitutions governing national or international behaviour.

Military alliances Critics say the concept of global collective security cannot maintain peace - it is impractical and idealist. Peace can only be maintained by a balance of power built on military alliances and a high level of military preparedness. This is very much a developed countries' view of 'peace', which does not count the cost of maintaining a heavily-armed military institution; a cost which is so high that it has been found necessary to export militarism in order to take advantage of economies of scale. Military alliance as a guarantee for security is based on an outdated geopolitical view of the world which ignores global economic and social ills and deteriorating environmental conditions and their potential for causing friction between countries which can lead to war.

2. NATIONAL EFFORTS TO ENSURE INTERNATIONAL SURVIVAL

(i) The peace movements

In the nineteenth century, European advocates of disarmament and peaceful and friendly relations between nations were often persons who had initially committed themselves firmly to a religious or political ideology. People were supporters of peaceful solutions to conflicts either because they believed in the Christian teachings of loving one's neighbour, or because they held that peace was a prerequisite for trade and the growth of wealth (and, conversely, that free international trade would promote peace), or because their socialist principles had taught them of the international brotherhood of man.

Friends The first peace societies of the modern era in Europe and North America were probably those founded by members of the Society of Friends, or Quakers as they were known. Though not alone in their pacifist stance, Quakers are perhaps the best known of the religious groups in Europe and North America who hold that war is incompatible with the spirit and teaching of Christ and contrary to the will of God. Great emphasis has always been placed by Quakers on the importance of the experience of the divine presence and therefore on the individual, regardless of race, class, rank, wealth or sex. Quakers combined their fundamental pacifist stance with work for human rights and social reform - the abolition of the slave trade, prison reform, and for their 'benevolent capitalism' as expressed in schemes to improve the quality of life for workers in factories owned by Friends. In modern times, they are associated with many reforms, including the rights of conscientious objectors.

One of the first recorded meetings of a 'peace society' was held in New York in 1815 and organised by Friends. Another group met the following year in London. The idea of organised peace movements spread rather slowly - another was founded in Geneva in 1830 - but in the 1840s, there was a growth in popular support for the peaceful solution of international problems. Groups working for peace were founded in many countries and a number of international conferences took place. The fundamental principle uniting these groups was the belief that disputes between nations should could and be solved by some sort of international arbitration. Solving disputes by military means was rejected as a costly investment in men and machines in preparation for an aggressive war. This new-found interest in non-military solutions to international conflicts owed a great deal to Jeremy Bentham and the philosophic radicals and the economic writings of Adam Smith.

Jeremy Bentham Bentham attacked conventional opinions on law, morals, social and economic values and institutions, religion and politics, finding them to be built on tradition and the preservation of privilege rather than reason and the

favourable balance of pleasure over pain. Bentham regarded war as intensely irrational behaviour in which a few benefited at the cost of enormous pain and suffering for others. Coining the word 'international', he believed that nations acting rationally would see the advantage of adopting rational international laws and of creating international institutions. In particular, he recommended an international court to arbitrate peacefully on disputes between countries. He also hoped an international legislative body could be formed whose tasks would involve the securing of disarmament and the emancipation of the colonies, since colonial rivalry was a cause of war.

Free Traders The influential English movement was dominated by such 'Manchester Liberals' as Richard Cobden and John Bright. They saw peace between nations resulting from the elimination of the final remnants of mercantilist thought from economic policy. Disarmament and a permanent peace was to be brought about by free trade between nations. They preached the right for all people to lead their lives in freedom, with dignity and responsibility within a system of benevolent capitalism, free trade, democracy and religious freedom. Free trade would not only enlarge the total volume of trade but would also unify trading nations and prevent war. As a member of Parliament, Cobden also spoke against the economic burdens of war and preparation for war, in particular the colonial wars by which Britain sought to expand her empire.

Socialists The third main group which in the last century contributed to the development of the international peace movement were the socialists, socialists of the utopian, idealistic and scientific persuasions. International peace was here connected with justice and human rights, with free peoples democratically governed and not subject to foreign domination, and with class equality and the end of private property. The Socialist International, for example, gave its support to international solidarity, exposing wars as the work of capitalist exploitation and colonialism. Socialist groups were particularly strong on the continent.

Tensions in the peace movement Inevitably, these different backgrounds could lead to considerable tensions within the national movements and the umbrella international movements to which they were affiliated. 'Religious' peace activists were often indignant over the religious and sexual freedoms favoured by the free-trade liberals. Both groups, in their turn, were dismayed by the anti-clerical, anti-monarchist, anti-capitalist sentiments of the socialists. They were also divided on the need to criticise or condemn the systems of government found in other countries.

Whilst the issue of religion is of considerably less importance today, the other two conflicting views of the nature of internationalism have remained strong: how far should we interfere in the economic and political affairs of other nations? Moral and ideological problems have led many people to favour and adopt a strongly legalistic approach to the regulation of the behaviour of states, not only towards each other, but also towards their own citizens.

The peace movement and constitutionalism European peace movements in the latter half of the nineteenth century played an important part in raising awareness of the alternatives to military confrontation as the solution of international disputes. However, though peace and disarmament through international agreements and supra-national laws were indeed the ultimate goal, they were rather abstract and distant ones with which to inspire the movement's grass roots supporters. It was easier to campaign together on local issues. At the turn of the century, the Swedish Peace and Arbitration Society, for example, was heavily involved in resisting proposals for a major expansion of the Swedish armed forces, pressing for the peaceful dissolution of the union with Norway and for Swedish neutrality.

Peace movements at an international level presented a cacophony of voices arguing over different aspects of peaceful coexistence: its philosophical basis; its prerequisites; its political justification; its emotional appeal; the

abolition of armies contra the need to repel an aggressor and defend national independence. It is, however, possible to identify one unifying theme: the importance of arbitration in the settlement of disputes. For reasons explained in the next section, there had been a steady increase during the century in the number of arbitration clauses included in international agreements. If governments could be persuaded to trust arbitration procedures even in critical situation, a code of international law would gradually emerge and a unified international legal system. Peace activists saw this happening as part of a gradual, long-term process; in the meantime, it was understandable if nations continued to enlarge their armies and weapon arsenals. Faith in this evolutionary process was badly shaken by the outbreak of the first world war.

Nonetheless, the League of Nations, formed after the war, was based on the same view; that is, that an international legal system could maintain peace. As hopes for the League collapsed in the rearmament of the 1930s, some groups reached the conclusion that no legal system could control a set of competitive war machines.

These two serious misjudgements of the continuing attraction of the use of large-scale, organised aggression as a legitimate means of conducting international relations, led to a reversal of priorities. In the post-war era, the easing of tensions through arms limitation has become our primary goal. This process will be described in the section on the United Nations. However, some groups have continued to plan for an effective supra-national, world organisation which would eliminate armed conflicts principally through the rule of international law. The most prominant of these are the federalists.

World Federalists In many cases inspired by the American Constitution and Hamilton's Federalist Papers, federalist ideas had a small following during the 19th century, particularly in Anglo-Saxon circles. This was the age of nationalism, with the founding of a number of new nation states in Europe; federalism, as a theoretical alternative to nationalism, gained little popular support.

Viewing the failure of the League of Nations and the mounting militarism of the 1930s with considerable alarm, federalists developed more concrete political programmes to meet the challenge of the times. In a seminal lecture in 1935, federalist Lord Lothian (Philip Kerr) described a future in which justice rather than force would be the arbiter between nations. Pacifism was not enough 'because justice in the international sphere, as elsewhere, is futile without force to back it'. Patriotism was not enough 'because selfish force, force except as the servant of justice, is self-destructive in the international sphere as elsewhere.' Another work, Union Now by American, Clarence Streit, proposed a federal union of 15 democracies able to oppose continental militarism. Cooperation between nations was not enough; they needed some system of organic union, pooling their sovereignty for some purposes without losing national individuality.

Federalist hopes and ideas remained alive throughout the war and gained many new supporters in the following 25 years. They had little faith in the moral conversion of the world - 'the fabled dawn of morality and reason'. Emphasis should instead be given to organising global institutions which could make peace a reality. World government would be at the top of a pyramid consisting of tiers of different forms of local and national government. It would have a written constitution with separation of powers - legislative, judicial and executive. Its laws would apply to individuals and groups, as well as nations.

The United Nations, it was held, was a league of heavily armed sovereign nations, depending on member nations to maintain peace by unanimity and military cooperation, would fail to prevent war just as the League of Nations had failed. So while supporting the UN, they made detailed proposals for revision of the UN Charter.

In particular, they proposed reform of the voting system of the UN in ways which would limit the veto powers of the big powers; a strong United Nations peacekeeping reserve, ready to move into any trouble spot in the world; UN regional mediation services of qualified experts to arbitrate in regional disputes; acceptance by all nations of the compulsory jurisdiction of the World Court on international disputes; a UN sponsored international boycott of military supplies to both sides in regional conflicts. Other proposals include a World Criminal Court for trying international crimes and a World Court of Human Rights.

Their current programme places greater emphasis on the gradual evolution of international law and institutions, beginning at regional level. Less emphasis is place on the formal constitutional models; acceptance must first be gained on a broad front for the principles and premises of federalism. Global survival issues are recognised, as are other modern problems of an international character, such as terrorism and drug abuse but the thrust of federalist thinking is still concerned with how to guarantee international security through just and enforceable world laws.

(ii) Economic and social survival

Attitudes towards economic and social survival among peace activists can be examined by looking at their changing attitudes towards colonialism.

Colonialism In the mercantalist era, colonies were considered a source of

wealth yielding precious metal and stones, luxury consumer goods and agricultural raw materials, all produced by cheap or forced labour. According to mercantilist economic policy, colonial powers could maximise their wealth through strict control of output in the colonised country, even to the extent of enforcing mono-culture, so that the economy of the dependency was entirely complementary to that of the colonial power. Much of the colonial profit was due to the commercial monopoly enjoyed by the colonial power, whereby the colonised country was obliged to trade its agricultural goods cheaply and exclusively in exchange for manufactured goods from the colonial power. All foreign shipping was banned from the colonised country's ports.

These mercantilist theories were discredited in the era of free trade, and the race amongst the countries of Europe to colonise Africa and Asia was replaced by competition to bring them the 'benefits of trade'. The colonial race was revived in the latter half of the century, as faith in the universal benefits of free trade weakened. However, in the ideological mythology of the time, European colonisation was no longer motivated by greed but, as expressed in the English 'White Man's Burden' or the French 'mission civilisatrice', involved the extension of paternalistic guardianship over subject nations until their achievement of 'maturity' in a distant future.

Although criticism of colonialism was expressed in some quarters, the activities of missionaries in bringing the Christian religion and, in many cases, education and medicine to disadvantaged people created much confusion in the minds of many 19th century peace activists and a failure to see the economic exploitation and violation of cultural integrity which accompanied many of these charitable projects. Furthermore, some peace activists saw in the growth of empires a movement away from the divisiveness of national boundaries and towards larger national units which would eventually result in one world federation of nations at peace. For the less sanguine or naive, the scramble for colonies was identified as a potential source of conflict amongst European nations and a

serious interference with the rights of peoples to self-determination.

Post-war attitudes In the aftermath of the second world war, when it had become quite clear that colonial power struggles did cause wars, when the Christian churches and their missionaries had lost a lot of their status and when, by direct action and through work at the UN, colonised countries were able to make it clear to the ordinary people of Europe that they preferred independence to pseudo-federation with a 'mother country', peace movement opposition to colonialism became unamiguous.

It has not, however, been easy to reach the same degree of unanimity on the question of global economic justice, since political ideology has again dictated very different approaches to the issue. An additional problem has been that of support to national liberation movements which engage in military activities. Individual groups have formulated programmes which clearly identify neo-colonialism as a threat to global survival. Action, however, tends to be country or incident specific, with little evidence of mass international action on commonly identified problems.

(iii) The environment

Although there are certainly examples of early environmental concern, it is also the case that for much of the 19th and 20th centuries, factory chimneys spewing out evil-smelling black smoke have been regarded with some pride in Europe as evidence of a nation's wealth and industry. Concern and pressure for reform was centred on the problems of rapid urbanisation and industrial employment, after centuries of rural life. For example, the installation of indoor running water and a mains sewage system, or the organisation of garbage collection were huge environmental achievements in the mid-19th century, irrespective of the problems of waste water and refuse disposal they created. At a national level, efforts were concentrated on the social and working environment - slum housing; the

adulteration of food; dangerous jobs (for example, work in the mines or the making of phosophoric matches); public health; transport safety.

Post-war activities After the second world war, attention was focused primarily on large, local, stationary sources of pollution, ie industrial plants, power stations and heating plants, and their emissions into the air and water. The introduction of various technical measures yielded substantial effects for the local environment. Scrubbing flue-gases and changing over to low-sulphur oil may be cited as examples. "Clear-air Acts' controlled pollution from domestic heating systmes.

Cross-border pollution At the same time as the effects concentrated on the local environment were being reduced, it was observed that certain pollutants were dispersed over large areas. These 'cross-border pollutants' pose a growing problem. Their environmental effects are of a different character; concentrated local effects have increasingly been replaced by diffuse regional and even global environmental effects. The extreme cases are those of emissions of free carbon dioxides and freon gas which may have no local effects at all, but under certain conditions have a decisive impact on the earth's climate.

Measures adopted in one country to limit environmentally dangerous emissions may benefit other countries, at the same time as emissions in another country may neutralise the effects of environmental measures taken in the first country. This is one motive for international co-ordination of environmental policies. The second is the need to look for other solutions to environmental problems than those dictated by the currently accepted pollution norm, that of the polluter being made to bear the cost of pollution. This tends to confuse moral and economic principles. It may be more cost-effective for countries A, B, and C to pay country D to stop the emission of a pollutant, than for each of the countries individually to deal with their domestic problem. It may also be morally appropriate for countries A, B and C to aid country D in this fashion.

Environmentalists Environmental lobbies have also formed political parties and in some European countries have taken their places in the legislative assemblies. Here they have had the indirect effect of making the established parties adopt environmentalism into their programmes. In this way, a certain amount of environmentally-favourable legislation has been passed. Unfortunately, many 'Green' parties have found it necessary to make political decisions on issues unconnected with environmental matters and have become victims of the type of political strife which has weakened the voice of the peace movement since the last century - the need to place themselves somewhere on the red - blue, left - right political scale.

As in the peace movement, modern methods of communication currently permit intense environmentalist activity at an international level. Cross-border contact and coordinated action is well developed between many national groups and in international organisations such as Greenpeace. In particular, the ready and rapid exchange of scientific and technical information plays a central role in uniting environmental pressure groups, especially on a regional basis. With this combination of scientific research and grass root emotion, the environmental movement had an impact which the peace movement has rarely possessed. At a political level, however, regional or global solidarity on environmental matters is still weak, and little multi-lateral legislation has been accepted. The machinery of international control is still deficient or non-existent. International 'environamental aid' programmes are still in their infancy.

2. INTERNATIONAL EFFORTS TO ENSURE INTERNATIONAL SURVIVAL

While peace organisations may have been hindered by political differences and lack of resources from making a decisive impact on the course of international relations, countries were becoming familiar with the process of multilateral negotiation, reaching solutions and abiding by these decisions through transnational cooperation on technical matters.

(1) International institutions

19th century international cooperation The first examples in modern times of international control organisations in Europe were the river commissions. The Central Rhine Commission 1804 regulated river traffic on the Rhine between France and Germany, including the maintenance of navigational facilities and the hearing and adjudication of complaints of alleged violations of the Commission's rules. The Danube Commission of 1886 fulfilled similar functions. At an international level, the International Telegraph Union was founded in 1856 and and International Postal Union in 1874, followed by many others in the fields of commerce, technology, medicine and agriculture.

The common feature of these organisations was and still is some form of policy-making and decision-taking body, a council with executive powers to administer policy decisions, assisted by a secretariat, - the organisation's 'civil servants'. Sometimes a judicial body exists to decide in contentious administrative decisions. States agree to collaborate because it is essential to the pursuit of business and commerce and useful in protecting the lives, health and interests of their citizens.

The Hague conferences A by-product of these nineteenth century efforts of co-operation in technical and commercial matters were attempts to deal with problems of war and peace. Beginning in 1883, international conferences were held in the Hague dealing with matters of private and public international law.

Public international law was the subject of two peace conferences, 1899 and 1907, both called on the initiative of Czar Nicholas II. In a Peace Manifesto issued in 1898, the czar directed attention to recurrent economic crises which he believed were the result of money poured into military adventures, wars which had hindered economic development without promoting security. He gave an early description of what we now call the arms race, in which vaste sums of money were being used to refine weapons of destruction only to find them superseded by the invention of something even more devastating.

The first conference was attended by only 26 nations, largely from Europe but in 1907, 46 nations, including most of those in Latin America attended. No disarmament agreement was reached at either of the two conferences; but a number of interesting precedents were set. The principle of the sovereign equality of states was accepted and in this way, some of the monopoly of the European 'great powers' on matters of war and peace, as well as economic and colonial rivarly, was broken. Although a number of resolutions were passed and declarations of intent made, the solid results of the meetings were conventions on a number of issues relating to the 'rules of war' (of which the prohibitions on the use of 'dum-dum' bullets and asphyxiating gases are perhaps the best known.)

Arbitration A lasting result of the Hague meeting was the formation of an Permanent Court of Arbitration (the Hague Tribunal) to which nations could bring their disagreements for peaceful arbitration. A winner of the Nobel Peace prize, Elihu Root, himself the driving force in over 40 arbitration agreements between Europe, Latin America and Japan, felt that the 1899 Hague conference had established arbitration as a system, a recognised and customary procedure for settling disputes, rather than an exceptional expedient as it had been in earlier years. Parties to the Hague agreement were not, however, obliged to solve their problems through arbitration. Indeed, the emphasis placed on the rules of war may well have suggested that this was a legitimate way to solve disputes.

League of Nations The lessons of the 1914-18 war which involved most of Europe and directly or indirectly much of the world, were largely ignored by the European statesmen who met in Versailles to draw up the peace treaty. The USA and in particular President Woodrow Wilson felt that having contributed so significantly to the ending of the conflict, they had much to contribute to the peace. In simple terms, Wilson felt that New World Europe (USA) had a mission to save old World Europe from extinction. If Europeans can live in peace together in the USA, it was reasoned, why cannot the same institutions - federalism and democracy - create peace in Europe?

Wilson's peace programme, submitted to Congress in January 1919, contained 14 points. No. 14 refers to the creation of an association of nations ' for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small powers alike'. Wilson's determination and the pressure of public opinion led to the creation of the League of Nations as an integral part of the Versailles peace treaty.

The failure of the League to maintain peace has been attributed to a number of factors. A fundamental criticism is that the League had no separate existence apart from the will of its members and that this lack of will to maintain peace amongst its members led to its failure. There were technical reasons too: requirements of unanimity in both the Council and the Assembly; the failure in the Covenant to rule out entirely the use of force by member states against each other; the absence of effective arms control and limitation measures; the weakness of the provisions concerning economic sanctions against miscreant States. Non-participation by the USA undermined he authority of the League as did its association with the disastrous Treaty of Versailles. As John Maynard Keynes (1919) pointed out, by insisting that Germany be 'made to pay for the war', the European Allies were inviting the collapse of the international economic system (in the same way that governments and bankers are currently doing when they insist on the repayment of Third World debt).

The United Nations The horrors of the world war II, following so rapidly on those of world war I, created an international climate of opinion receptive to the ideas of international cooperation. In particular, it was accepted in many quarters that while fighting the war, it was crucially important to plan for the peace. Forty-six nations were represented at the United Nation's Conference on International Organisation held in San Francisco in April 1945 to draft and discuss the constitution - Charter - of the UN. Work proceeded very rapidly; the Charter was signed in June of the same year and ratified by 51 original signatories by the end of the year. The first General Assembly of the UN was held in January 1946.

The United Nations - aims The most prominent global organisation for the promotion of world-wide survival based on international peace and justice is the UN, together with its related agencies. * The aims of the UN, as set forth in its Charter are:

> to maintain international peace and security;
>
> to develop friendly relations among nations;
>
> to cooperate internationally in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms;
>
> to be a centre for harmonizing the actions of nations in attaining these common ends.

Membership is open to all peace-loving nations which accept the obligations of the Charter and, in the the judgement of the UN, are able and willing to carry out these obligations.

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* International Labour Organisation (ILO); Food and Agricultural Organisation (FAO); United Nations Educational, Scientific and Cultural Organisation (UNESCO); World Health Organisation (WHO); World Bank/International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); International Finance Corporation (IFC); International Monetary Fund (IMF); International Civil Aviation Organisation (ICAO); Universal Postal Union (UPO); International Telecommunications Union (ITU); World Meteorological Organisation (WMO); International Maritime Organisation (IMO); World Intellectual Property Organisation (WIPO); International Fund for Agricultural Development (IFAD); United Nations Industrial Development Organisation (UNIDO). The International Atomic Energy Agency (IAEA), established in 1957 'under the aegis of the UN', reports annually to the General Assembly and, as appropriate, to the Security Council and the Economic and Social Council. The General Agreement on Tariffs and Trade (GATT), is a multilateral agreement which lays down rules for international trade.

Writing in 1987, the Secretary-General Javier Perez de Cuellar, presented the following 'solid list of UN accomplishments':

> Peace-keeping forces sent into the field have contained hostilities. Peoples formerly under colonial rule have attained independence and full sovereignty. Refugees have been provided shelter and relief. More than 60 legal instruments have been adopted to promote respect for human rights. International law has been expanded and codified. Diseases have been wiped from the face of the earth.

Membership of the UN has tripled since the original 50 - in large part due to the process of decolonisation.

(ii) United Nations - Peace-keeping

The signatories of the UN Charter have solemnly declared their determination to live together in peace and to use their strength collectively in the maintenance of international peace and security.

The IAEA The UN has promoted specific measures in the pursuit of disarmament or the more modest, though perhaps more realistic goal, of arms control. From the outset, the existence of nuclear weapons made the search for a peaceful solution to conflicts particularly urgent. The first step was an Assembly resolution calling for the establishment of an UN Atomic Energy Commission which would promote the peaceful use of nuclear power, preside over the elimination of nuclear weapons and enforce a system of regulation and inspection. The scheme devised was such that following the abolition of nuclear weapons, an International Atomic Development Agency would be exclusively responsible for all atomic raw materials, atomic activities, R & D, and would license national atomic research for peaceful purposes. With the USA at the time the only country in possession of nuclear weapons, other competing world powers were not prepared to give up their dreams of nuclear power. The International Atomic Energy Agency (IAEA) was not established until 1957 and with a much reduced mandate. Its role is mainly advisory in relation to the peaceful uses of nuclear energy and it has a control function under the terms of the 1968 Non-Proliferation of Nuclear Weapons Treaty (NPT). Following the Chernobyl accident, it is hoped that the IAEA will play a central role in the rapid dissemination of information on nuclear accidents and the channeling of

technical information.

Arms control agreements Over the years a number of limited but important agreements have been reached on international arms control under the aegis of the UN. These have largely been concerned with no-go areas for nuclear weapon - nuclear weapon-free zones. More or less successful agreements have been reached on the prohibition of nuclear weapons in the Antarctic, Latin America, the Pacific, the seabed and outerspace, while partial test-ban and non-proliferation treaties have sought to limit the testing and acquisition of nuclear weapons. Other treaties have been concerned with chemical and biological warfare and environmental (climatic-change) weapons. (See list in Appendix 1.)

Bi-lateral and regional agreements While the UN clearly has a role to play in promoting world wide, long-term constitutional solutions to the problems of international aggression, it has accepted that more concrete results can sometimes be achieved in smaller and more specialised forums, meeting to discuss arms control issues between a limited number of countries whose security concerns have world-wide implications, or to discuss issues of regional concern. Recently we have seen that important advances can be achieved in one-to-one 'summit' meetings between the leaders of the most powerful military powers. Examples of important bi-lateral talks and agreements are the talks on strategic arms limitation and reduction, which led to agreements limiting anti-ballistic missiles and intermediate-range nuclear forces. Regional conferences of importance for Europe have dealt with European security and the mutual reduction of forces and aramaments. (See list in Appendix 2.)

However, the UN as a truly world-wide representative body has an important role to play in reminding the big actors of the effects which their policies have, not simply on other big actors, but on the world as a whole.

Peace-keeping operations The UN has played a more pragmatic role in meeting the problems of on-going conflicts or situations likely to escalate into war. Peace-keeping operations involve not only a UN non-fighting military presence but the UN also acts as a channel for communication and negotiation between warring parties. Another UN task is that of neutral observers monitoring agreements reached between warring parties.

International Court of Justice (ICJ) Article 1 of the UN Charter calls for the adjustment or settlement of international disputes by peaceful means in conformity with the principles of justice and international law. Among the methods of peaceful settlement the Charter specifies arabitration and judicial settlement and one of functions of the General Assembly is to encourage the progressive development of international law and its codification. The ICJ which was founded in 1946, though it has its roots in the Hague conventions, and is one of the six main bodies of the UN. Though its 15 members are selected by the General Assembly and the Security Council, it acts independently and should reach its decisions on the basis of international law without reference to international politics. Its decisions are binding only on the parties which have referred their case to the court, but it is recognised that its opinions are important statements on existing international law. It is not open to petition from private individuals.

The court has dealt with disappointingly few cases since its foundation - by 1987 the figure was approximately 50 plus cases and 18 advisory opinions - and the majority of these cases were submitted in the ealier years of the court's existence. Fewer than 50 per cent of contentious cases went to judgement. Court rulings have concerned questions of territorial rights, the law of the sea.in particular maritime boundaries and fishing rights, nuclear tests in the atmosphere and the taking of hostages. A number of decisions have concerned South Africa's presence in S.W.Africa (Namibia). Several recent

discussions have concerned violations of Nicaraguan sovereignty.

The work of the court has been criticised on a number of grounds. It is slow, expensive and very public (and it is usually the case that at least one of the parties would have preferred to settle a dispute by more discreet negotiation.) Moreover, all parties in a dispute must consent to the court's jurisdiction, yet the court has no powers to compel a would-be defendent to respond to a lawsuit filed by a plaintiff. International justice, unlike national justice, is optional. In some cases parties to an agreement or treaty have agreed to accept the court's jurisdiction before a dispute arises, but the record is not impressive (by 1985, about 160 bi- and tri-lateral treaties involving 64 states and 87 multilateral treaties include an International Court of Justice clause)

The International Law Commission established in 1947 undertakes studies to prepare draft codes on topics of international law, for example, the status of diplomats and the Law of Treaties. These are normally presented to an international conference of member countries at which the terms of an international convention are drawn up. Similarly, the UN Commission on International Trade Law, founded in 1966, studies and prepares uniform rules on such matters as international trade law, the promotion of wider participation in existing international conventions and the preparation of new conventions and other instruments relating to international trade law.

Attempts are being made to harmonise international legal action against terrorism and drugs in the interests of international peace and harmony - for example, the International Convention against the Taking of Hostages adopted by the General Assembly in 1979. Contracting States are obliged either to prosecute or extradite any person committing an act of hostage-taking, and to take measures to prevent hostage-taking. As yet there is no World Criminal Court or World Court of Human Rights as proposed by the federalists.

(iii) The United Nations and economic & social justice

Of a far less spectacular nature than the international agreements on arms limitations and the like, are the efforts made to fulfil the terms of Article 55 of UN Charter which calls upon the UN to promote such world-wide economic and social policies as will create the 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.' Clearly the UN has interpreted its role in respect of this Article as being a highly active and pragmatic one, with the UN funding and supplying experts to carry out programmes at a local level rather than the UN providing a forum in which international issues can be discussed by national representatives. It is not surprising that, in terms of money and manpower, programmes aimed at achieving economic and social progress in the developing countries populated by two thirds of the world's population, take the biggest share of the UN budget. (See Appendix 3.)

In many respects, it has proved far more difficult to persuade countries to support proposals for a 'New International Economic Order' (adopted by the General Assembly in 1974) or a Charter of Economic Rights and Duties (also 1974) than it has been to persuade them to accept some measure of arms limitation. That is, the constitutional approach to solving the problems of economic aggression has been far less successful than the constitutional approach to problems of military aggression.

The UN has tried, through a number of declarations, action programmes, development decades and the like, to bring the attention of the world community to the problems of underdevelopment and to instill in them a sense of common responsibility. No one would deny that these campaigns have had a certain success in raising the level of consciousness regarding the inequalities of the current world economic order, but few would claim that any significant progress has been made in changing behaviour. There has been a tendency for the more

fortunate nations to take back with one hand the economic assistance which they have just given with the other.

United Nations Conference on Trade and Development (UNCTAD) One of UNCTAD's principal functions is the negotiation and adoption of multilateral legal instruments in the field of international trade. Under its Intergrated Programme for Commodities, UNCTAD negotiates fixed term agreements on specific commodities, for example rubber, olive oil, cocoa and tin, to help developing countries whose export earnings are heavily dependent on equitable and stable prices for primary commodities. Other multilateral agreements concern shipping and the control of restricted practices. Transnational companies are also the subject of special attention; the UN assists governments in negotiating codes of conduct which define the rights and responsibilities of the parties involved.

However the work of the UN in the promotion of economic justice and development is hampered by the activities of two of its specialised agencies, the IMF and more recently, sections of the World Bank, in which the values of economic liberalism are invoked by the developed market economies to the detriment of a new economic order. Unlike the General Assembly, where each country has one vote, influence and voting power in the IMF is proportionate to countries' contributions to the Fund's financial resources. This in turn reflect the relative size of an individual country's economy in the world economy. Voting power is therefore dominated by the developed market economies who have at times chosen to manipulate the Fund's policies for their own political and economic ends.

Human Rights Preamble and Article 1 of UN Charter declare that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Universal Declaration of Human Rights adopted by the General Assembly in 1948 is an impressive list of the civil and political rights to

which all human beings are entitled. The legal instruments which bind states to abide by the terms of the Declaration are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. By June 1987, the former had been ratified or acceded to by 86 States and the latter by 90 States.

The Declaration of Human Rights does provide a valuable independent yardstick by which the actions of governments and their officers can be measured. Many national and international organisations - of which Amnesty International is one of the best known outside the work of the UN itself - work exclusively with human rights issues with respect to civil and political freedoms. The Economic, Social and Cultural Covenant is unfortunately much less well known. The many existing international organisations which might be expected to provide leadership in monitoring economic, social and cultural rights are so overwhelmed by the sheer size of the problem and the need to provide immediate relief, that it is almost impossible to carry out a much-needed watch-dog function.

De-colonisation The UN has played a central role in supporting the right of self-determination, by strongly encouraging decolonisation and by setting goals and standards for the attainment of independence. Since its foundation, more than 80 countries, formerly under colonial rule have joined the UN as independent States and in doing so have contributed greatly to the pressure within the General Assembly for total decolonisation. The complicated story of Namibian independence is a current example of UN work in this field.

Other programmes The UN runs a large number of programmes highlighting the social plight of many disadvantaged groups: world food problems, population assistance, assistance to children, refugees, women, disabled, youth, elderly, homeless, as well as fighting drug abuse, crime, treatment of offenders, racial discrimination, torture, and providing disaster relief.

(iv) The United Nations and the environment

The UN Environmental Programme UN involvment in environmental question was formally initiated by a decision taken by the General Assembly in 1968 that action was needed to limit the impairment of the human environment and to protect and improve man's natural surroundings. Following the first UN Conference on the Human Environment, held in Stockholm in 1972, the General Assembly established the UN Environmental Programme on the basis of the many recommendations adopted at the Stockholm conference. In 1985, an international Convention for the Protection of the Ozone Layer was signed. UN achievements at this level of international agreement have so far been slight, though much has been done to encourage the exchange of technical information and expertise between countries. It should, however, be remembered that the UN has worked continuously since its foundation to avert the ultimate environmental catastrophe, that of nuclear war.

Other international environmental agreements The first international agreement on what we now would classify as environmental issues concerned the regulation of whaling (1937 and 1946) These agreements were followed by a number of conventions protecting specific animals, such as Antarctic seals (1972), polar bears (1973), or, more generally, the International Convention on International Trade in Endangered Species of Wild Fowl and Fauna (1973).

Initial concern with the situation of the world's plants and animal populations was followed by an international reaction to a number of serious oil pollution incidents in which the transportation by sea of bulk oil and then by extension of many other goods potentially dangerous to man and his environment were brought under international control. More recently, the problems of air pollution have received considerable attention. For example, a Protocol (1985) to the 1979 Convention on Long-range Transboundary Air Pollution seeks to reduce sulphur emissions by 30 per cent. In the aftermath of the Chernobyl accident,

two Conventions have been agreed upon concerning early notification and cooperation in the event of a nuclear accident or radiological emergency.

4. National efforts to ensure national survival

Vigilance Although the issue of survival is clearly an international one, action and vigilance is still required on the home front to ensure that governments follow the letter and spirit of national and international laws and agreements and that government policy at the national and international level is adapted to the needs of global survival. A number of these issues can be mentioned briefly here.

Nuclear free ports A number of countries, including several in Europe, have declared that they do not accept port calls from naval vessels carrying nuclear weapons. Despite this, some of these governments, of which Sweden is an example, do not ask for guarantees from the nuclear powers that visiting ships are nuclear-weapon free. Central government overrides local authorities who try to enforce the restriction locally. Clearly governments must be held to their commitments.

The arms trade A similar, though more widespread problem, is government attitudes to the export of arms. In many European countries, the export of arms takes place under licence granted by a government body. Restrictions are often placed on the types of weapon that may be exported or their number and on the countries to which they may be sold or on their further sale. Typically, weapons may not, in many cases, be sold to countries involved in armed conflicts, internally or externally, or where the arms may be used to suppress human rights.

Not all European countries make public their arms export control legislation. Others do not publish the political guidelines which are needed to

allow for interpretation of the legislation; for example, lists of prohibited weapons or countries may not be made available. Full details of individual deals are seldom available.

These are serious obstacles for concerned citizens attempting to monitor government compliance with national legislation and international agreements, including UN arms embargoes. It is extremely difficult if not impossible for a private individual to penetrate the grey areas of the arms trade (that is, the trade that goes on with tacit government approval as opposed to the illegal black market trade). It is also important to gain insight into the financing of arms deals; cheap, government-guaranteed credits and questionable barter and countertrade deals can place a different light on the economic advantages of many export orders.

Military expenditure Special difficulties are involved in controlling the cost of the armed forces, since the state normally is the sole purchaser of their services, at the same time as the forces themselves supply much of the information concerning military needs. An articulate and well-informed body of activists is needed to examine critically military budgets and accounts and to offer cost-effective alternatives which genuinely promote global survival. Such a project presupposes public access to full and clear information on military spending and the right to full public debate on issues of overall military policy, both matters of civil rights determined in national constitutions.

Conscientious Objection The right to refuse military training and service is still regarded as a crime in many European countries, and subject to a prison sentence. In others where the possibility of weapon-free (unarmed) national service is available, permission is only given on a very limited basis or recruits are not informed that the alternative exists, or alternative service seriously undermines their future job prospects. Attitudes need to be changed and laws reformed so that no one in future is made to learn the ideology and

techniques of aggression against their will. The rights of conscientious objectors should be protected in the UN Declaration and the European Convention on Human Rights.

Human rights European Convention on Human Rights was drawn up by the Council of Europe in 1950 in recognition of the Universal Declaration of Human Rights two years previously. The European states declared their aim of achieving greater unity and believed that maintaining and expanding human rights and fundamental freedoms was one way of strengthing their common heritage of political traditions, ideals, freedoms and the rule of law. The legality of government decisions in the light of the Convention can be tested in the European Court of Human Rights.

While all 23 member states have ratified the Convention and the additional Protocols, not all of these states have recognised the right of individual petition.

The many applicants to the European Commission and the steady stream of cases through the Court witness to the importance of this institution. Concerned lawyers have a special responsibility to make the terms of the Convention and its Protocols and the working of the Commission known in their own countries. All European governments must be encouraged to ratify the Convention and recognise the right of individual petition.

The environment Public awareness on environmental issues has been greatly enhanced in recent years due to the work of many environmental activists. The movement has benefited greatly from interaction between activists and natural scientists, especially chemists and biologists, and can now speak with an authoritative voice on matters of environmental concern. The movement has an important role to play; as an early warning system, identifying new areas of environmental concern; pressing for relevant legislative reform; and, as a

monitoring organ, if no other independent organisation exist, seeing that existing national legislation and international agreements are followed.

In particular, the North-South aspects of pollution must be studied. Clearly developing countries must not be made the dumping grounds for our hazardous industrial waste; by its very nature, hazardous waste cannot be dumped anywhere before it is cleaned. The same applies to the export of cigarettes, medicines and pesticides which are banned as unsafe in the developed countries.

A more complicated issue is that of exporting old, and cheap, technology to less-developed countries. It is not entirely clear what right we have (if any) to expect the populations of, say, India or China to refrain from aspiring to the ownership of a cheap motor car or refrigerator because of the danger to the world's climate caused by burning fossil fuels and escaping freon gas. It seems likely that on the issue of the global environment, even the poorest Third World country will be in possession of some good bargaining chips. The task of negotiating global agreements on these matters among so many players will therefore demand unusually high levels of preparation, dedication, skill and expertise.

APPENDIX 1

Table 1. Status of the implementation of the major multilateral arms control agreements, as of 1 January 1989

	signed	in force	number of parties
1925 Geneva Protocol	1925	1928	115
Antarctic Treaty	1959	1961	38
Partial Test Ban Treaty	1963	1963	118
Outer Space Treaty	1967	1967	91
Treaty of Tlatelolco	1967	1968	23
Additional Protocol I			3
Additional Protocol II			5
Non-Proliferation Treaty	1968	1970	139
NPT safeguards agreements (non-nuclear weapon states)			80
Sea-Bed Treaty	1971	1971	82
Biological and Toxic Weapons (BW) Convention	1972	1975	111
Environmental modification (Enmod) Convention	1977	1978	55
'Inhumane Weapons' Convention	1981	1983	30
Treaty of Rarotonga	1985	1986	9
Protocol 1			0
Protocol 2			2
Protocol 3			2

From Ragnhild Ferm, 'Major multilateral arms control agreements' in SIPRI, SIPRI Yearbook 1989: World Armaments and Disarmament (OUP: Oxford, 1989), Annexe A, p. 478.

APPENDIX 2

Table 2 Bilateral and regional arms control talks and agreements

Bilateral

SALT	Strategic Arms Limitation Talks (1969-79) between the Soviet Union and the United States on the limitation of strategic nuclear forces.
START	Strategic Arms Reduction Talks (1982) between the Soviet Union and the United States. Suspended 1983; resumed as NST - Nuclear and Space Talks (1985-)
ABM	Anti-ballistic Missile Treaty (1972)
INF	Intermediate-range Nuclear Forces Treaty (1987)

Regional

CSCE	Conference on Security and Cooperation in Europe (Helsinki 1972-75); (Belgrade 1977-78); (Madrid 1980-83); (Vienna 1986-89). Participants were 33 European NATO, WTO and neutral and non-aligned states, plus Canada & USA.
MBFR	Mutual Balanced Force Reduction talks (Vienna 1973-1989). Participants were NATO and WTO countries.
CDE-I & II	Conferences on Confidence- and Security-Building Measures and Disarmament in Europe (I Stockholm 1984-86); (II Vienna 1989-). Part of the CSCE process.
CFE	Conventional Forces in Europe (1989-), on reductions of conventional forces in Europe. Participants are NATO and WTO countries. Also referred to as the Conventional Stability Talks (CST).

Budget of the United Nations

The regular programme budgetof the United Nations is approved by the General Assembly biennially The budget is submitted initially by the Secretary-General and reviewed by a 16-member expert committee—the **Advisory Committee on Administrative and Budgetary Questions**. The programmaic aspects are reviewed by the 21-member **Committee for Programme and Co-ordination**.

For the 1986-1987 biennium, the bucget appropriations, as revised in 1986, totalled $1,711,801,20), divided into 11 main categories of expenditures, as follows (in United States dollars):

I.	Over-all policy-making, drection and co-ordination	46,148,900
II.	Political and Security Council affairs, peace-keeping activitie:	94,625,400
III.	Political affairs, trusteeship and decolonization	30,677,700
IV.	Economic, social and humanitarian activities	477,410,900
V.	International justice and law	27,767,700
VI.	Public information	76,182,700
VII.	Common support services (administration and management; conference and library services)	649,546,400
VIII.	United Nations bond issu:	16,758,600
IX.	Staff assessment	261,259,800
X.	Capital expenditures (construction, alteration, improvement and major maintenance of premises)	30,823,100
XI.	Special grants (grant to UNITAR)	600,000

Revised income estimates for the biennium 1986-1987, other than assessments on Member States, totlled $304,745,100:

I.	Income from staff assessment	265,126,700
II.	Other income (general income and revenue-producing activities)	39,618,400

The main source of funds for the regular budget are the contributions of Member States, who are assessed on a scale specified by the Assembly on the recommendation of the 18-member **Committee on Contributions**. The fundamental criterion on which the scale of assessments is based is the real capacity to pay of Member States. The Assembly has fixed a maximum of 25 per cent of the budget for any one contributor and a minimum of 0.01 per cent. *(for scale of assessments of Member States, see* Appendices.*)*

The regular programme budget to which these assessments apply covers expenses relating to substantive programmes, programme support and administrative activities of the Organization both at Headquarters and around the globe. Outside the regular budget, Member States are also assessed, in accordance with a modified version of the basic scale, for the costs of the United Nations Interim Force in Lebanon and the United Nations Disengagement Observer Force in the Middle East.

Many other United Nations activities are financed mainly by voluntary contributions outside the regular budget. These programmes and funds include the United Nations Development Programme, the World Food Programme, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Relief and Works Agency for Palestine Refugees in the Near East, and the United Nations Fund for Population Activities.

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(10.)

IMPROVING ENVIRONMENT-RELATED DECISIONS THROUGH MODELS OF THE INTERACTIONS BETWEEN SCIENCES

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IMPROVING ENVIRONMENT-RELATED DECISIONS THROUGH MODELS OF THE INTERACTIONS BETWEEN SCIENCES

1. The need for improving the relationships among & between the natural sciences and the human & social sciences

The environmental crisis is also the offspring of a cognitive crisis. Inadequate models of the world in the mind of social actors make for poor environment-related decisions both at the micro- and macro-level. Though almost all human decisions are affecting the environment, we would restrain here the meaning of *environment-related decisions* to three major decisional fields:

(a) Decisions dealing with research lines or scientific projects which have environmental impact either directly, or through the technological systems they make possible.

(b) Decisions by industrial firms to design technological systems, including means of production, as well as to develop and commercialize products, that do have environmental impact (which means almost all of them).

(c) Decisions by public policy makers either meant to regulate actions of (a) and (b) types, or aiming to straightforward intervention upon environmental problems, or starting public works having environmental impact.

Whereas the world is an evolving system of systems, human actions in the fields listed above still take most often as reference points isolated space-time sections of them, ignoring whatever consequences may follow in neighbouring sections. Because of their presuppositional orientantion, actors perceive objects instead of processes, discrete components instead of relations

patterns. Tearing cognitively apart the world in this way results in actions risking to tear really the world apart.

It has recently become customary to blame this epistemological, presuppositional bias on the paradigm of modern science, with its strong manipulative and reductionistic orientation (see for instance Milbrath, 1985). This is a simplification that perhaps we cannot afford, even when it is mitigated by speaking of a *dominant* paradigm, not excluding the existence of others. As a matter of fact some sectors of science are reductionistic, but some are systemic or holistic. Some of them do ignore evolution, but the very knowledge we have today of evolution is a product of science. It can even be said that reductionism may be a a good approach in some lines of research and policy-making, though is has dreadful consequences in others. Contrarywise, though it is closer to the wisdom of the evolutionary paradigm, holism may be sometime a poor approach. Lastly, even many components of the New Environmental Paradigm do come out of contemporary science.

We can say therefore that the cognitive crisis fostering mistaken environment-related decisions is not quite rooted in an absolute lack of adequate models of the world, chargeable to a single scientific paradigm. It is rather to be seen in a lacking, fragmentary, or misplaced application of models which are somewhere available in the sciences, and of many paradigms behind them.

The roots of the cognitive crisis go deep in the natural science as well as in human & social sciences. Both groups are internally fragmented. Differences of world models, of presuppositions, of paradigms, of languages, of observer's models

make for difficult communications also within the two groups. Philosophers of science speak routinely about the *two* biologies (Thompson) or the *three* sociologies (Benton). However, the split is much larger *between* the two groups.

As far as environment-related decisions are concerned, a well-known biologist has framed the problem quite properly. Natural sciences are half blind. They have changed the world carrying with them only one half understanding of it, and now are met by increasing suspicion, or straightforward hostility, both because there is a mounting evidence that they don't truly understand the world, and because they themselves are little understood. On the other hand, human & social sciences are half mute. They are well equipped to understand the discontent of a civilization propelled forward too fast by natural sciences and their technological applications. But they do not possess either the power, or even the words, to steer this process (Riedl, 1985, p. 5).

From several points of view, that split is a condition harmful to the environment. Major problems in the planetary crisis we are facing are amenable not only to distorted relations and material conflicts between over-rich and over-poor countries - though nobody should undervalue their weight - but also to a way of thinking anchored in a much too narrow and rigid conception of both natural and artificial systems. Too often, by too many people, life and politics, economy and society are still conceived, and dealt with, as a random set of small, mechanical, self-enclosed entities.

To improve many kind of environment-related decisions we need to grow a new generation of scientists, scholars,

politicians, managers, and perhaps consumers, who come equipped from the very start of their careers with a personal and collective mind oriented to think of almost everything in terms of open, adapting, broad range, evolving complex systems. It doesn't matter if they are "physical" or "social", natural or artificial systems. Such a kind of mind can only be bred by a betterment, if not a revolution, in the current relationships among and between natural sciences and human & social sciences.

2. Relationships between sciences: communication, interdisciplinary cooperation, or interaction?

It is a matter of course that in order to ameliorate their relationships, natural sciences and human & social sciences should aim, first of all, to increase the communication flow between them - actually so scarce. But what we are really interested in is not so much the level and kind of information or mutual understanding that the human & social sciences presently have about the state of natural sciences, and viceversa. Rather, what we would like to know is whether something pointing toward a new cognitive approach to environmental problems has changed, or is likely to change, in the methodology, the worldview, the research tools, the language of one group of sciences, *because* of some exposition to the corresponding elements of the other group. To bring about these changes, communication is a necessary but not a sufficient means.

A different way of looking at the relationships between sciences is interdisciplinary cooperation. We know, for instance, that to humanize the design of advanced technological systems, project groups have been established that are composed of scientists, engineers, sociologists, psychologists. That is called the joint design of technology, organisation and human resources. Joint design is a form of purposively environment-related decision

- where the environment is made up of socio-technical systems enwrapping jobs. It is surely a better way to design technological systems, in comparison to the common situation wherein these systems are designed without any serious consideration of the human and social problems they are likely to raise. Then social scientists are called on, after-the-fact, to explain the "human consequences of technology".

From the perspective sketched in the former section the concept of interdisciplinary cooperation does have limitations, however. It is true that it includes the idea of a science adjusting its own proceedings to meet half-way the requirements of other sciences involved in a common project. But it does not include the idea of a science which is going to establish, change, or exchange some of its basic elements, or the relations between them, because of the reflexive confrontation with another science. In the concept of interdisciplinary cooperation each science appears as a fixed entity, conversing with other sciences without any deep effect on itself following from the conversation.

The contrary is implied by the concept of interaction. Asking in which ways the natural sciences on one side, and the human & social sciences on the other side, do interact with each other, means asking in which ways they define their own identity in front of the other group of sciences; what kind of exchanges is observable, or inferrable, between them; which are the prospects for inner changes in one group when the interaction with the other group follows some specific patterns. Thus the concept of interaction looks more promising than those of communication or interdisciplinary cooperation when one whishes to think effectively about ways of ameliorating the relationships between

the two groups of sciences, in order to improve the quality of environment-related decisions.

3. Towards a model for building interaction models

If one wants to understand and cognitively control the great variety of interactions which can be actually observed, or theoretically conceived, between natural and human & social sciences, the first thing to do is to avoid the unaware submittance to a model monopoly (Braten, 1988). In the last century or so, quite a number of scholars have suggested either explicit or implicit models, either empirical or normative ones of the interactions between the two groups of sciences. Whole scientific generatios have submitted themselves to the dominance of one or the other of those models, foreclosing any chance of dialogue with other models. If our goal is to re-establish and develop this dialogue, and together with it the dialogue between the natural sciences and the human & social sciences, we must reconstruct the most meaningful models of interaction between the natural sciences and the human & social sciences which are to be found in, or may be extracted from, the current literature. And that must be done in such a way that the chances of a conscious, purposeful choice of scientific tools belonging to the two groups of sciences are substantially increased. On this should be grounded better decision-making processes in several fields that are environmentally relevant.

Even a cursory overview of the matter is enough to show that the number of interaction models between sciences is going to be very large. This just means that we need a large quantity of conceptual ordering machines strong enough to introduce a fairly acceptable amount of intelligibility in the space of the

interactions between two very different group of sciences, as that space has been defined by very different traditions and lines of thought. These ordering machines should be comparable with each other - which means that even them have to be first generated by an ordering meta-machine; that is, by a model for building interaction models.

The conceptual machine I suggest to use for reconstructing interaction models between sciences is no less than five-layered. For developing this conceptual meta-machine I take as source models the hypertext systems, and the frame systems. Both are symbolic structures for representing knowledge in a computer. A hypertext is a computerized system that enables the user to navigate among large amounts of information modules, exploiting at his/her will the routes afforded by a network connecting in several ways all the modules (Conklin, 1987). A frame system - in a much smaller scale, a typical tool of artificial intelligence - can be looked at as a hypertext having a predefined, standard structure.

I would like to add that I have taken the hypertext systems and the frame systems as source models not only because this can be a helpful heuristic device to develop an ordering meta-machine in the field of interaction between sciences. I think that in a not too far future it will be possible to develop real hypertext- and frame systems to study, to better understand and to teach the interactions between natural and human & social sciences.

Our hypertextual frame system meant to generate interaction models between sciences would work this way:

(1) It would contain a general model of science developed as a special kind of hypertextual frame. This means to pinpoint the

main types of (empty) nodes that may be observed in any science; to establish structural links among them; to develop a parser able to take the written materials, the protocols of a science, and distributing them among the nodes (or openings) and the links of the hypertext (or frame). All in all, this part of the system would not properly look like as an hypertext, but, rather, as a tool for developing dissimilar orders of hypertexts. Let us call it a 5th order hypertext, or a hypertext-cum-frame generator. The empty model of a science would then be a 1st order hypertext, that is, a frame system waiting with its openings (such as facets or slots) for modules of information to fill them up.

(2) The above-said tool to generate interaction models would take the empty model of a science (whose description is hereby omitted); it would proceed to load it twice, that is, it would produce two empirical instances of the model, one loaded with the parameters of a natural science, the other loaded with the parameters of a human/social science. Each of the latter, loaded models would be a 2nd order hypertextual frame.

(3) Lastly, the tool would generate a 4rd order hypertext, that is, a hypertext-cum-frame comparator, having the capacity to match the two loaded models of sciences - both of them structured as hypertextual frames - and to analyze the exchanges between the different components of each science. Upon every application of this 4rd order hypertext, the final result would be a 3rd order hypertext, that is, a double/specular hypertextual frame or frame system, allowing the user to follow and control all these exchanges. The latter would precisely be an interaction model of the two sciences taken into account.

4. <u>Interaction models not neutral</u>

When one chooses an interaction model even merely with the goal to understand in an orderly and plausible way the relationships between a natural and a human or social science, he/she does, willy-nilly, several things at once. One expresses a value judgment about the respective degree of intellectual rationality exhibited by the two sciences. One ranks the two sciences according to some implicit or explicit criterion. One confers a degree of legitimation to a given language and a given technique for producing acceptable text, thus de-legitimating other language and techniques. One opens on behalf of himself or herself, or of his/her kin, the way to some strategy, while closing down a few others. Also, one suggests the means and values by which the younger disciples of the two sciences are to be judged by their majors. One increases or decreases his/her chances of getting public or private resources.

Most environment-related decisions, as defined at the beginning, are quite sensitive to variations of interaction models underlying them. Take for instance the decision to build, or not, a power plant, and, eventually, one of a kind in place of a different one. Policy makers endorsing the model based on the priority of physics (section 6) will give little weight to conservationists arguments remembering the danger of reasoning on eco-systems as they were collections of sparse rings, instead of being fine-textured nets extending in all directions. Should they endorse instead the rethorical model of sciences (not discussed here), the force of all the technical and economic arguments would fade away.

5. Different functions of interaction models

Actually, all interaction models can always be knowingly looked at from different angles; and, according to the angles they are looked from, they fulfill different functions. For an observer of the interactions between sciences, they are general ordering machines. Sometime the pratictioner of any science will choose one of them to describe what he/she believes to be the current status of his/her science and its relations with others. In both cases the models work like descriptions. But in the strategies of the social actors interacting on the scene of this or that science they can be used as prescriptions of what a science must be, and how its relationship with other sciences should be conceived and managed.

Those prescriptions can be very strong when applied to the field of a science's social reproduction, within the academy as well as in research institutions. The same models can be used to compete more successfully in the distribution of resources allocate to science by public and private agencies. Historically, a few interaction models have also been used by authoritarian states in order to foster the ideology's control over the scientific community.

To the purposes discussed here, interaction models can be used to improve the cognitive capabilities making up the background of decisions taken in many fields of broad environmental interest. Some interaction models could help to develop research lines, scientific theories and industrial practices better fit to comprehend and respect the intricacies of ecosystems, with their biological, psychological, social and cultural components. Other models would contribute to increase the practical rationality - as opposed to the instrumental - of policy

makers. The same models would help, on the whole, to profoundly transform the pattern of higher education, up to now grounded on the assumption that reality is truly organized as an inventory of university departments. Some of these possible uses of interaction models will be sketched in the last sections of this paper.

As told above, the number of interaction models brought about by the ordering meta-machine I am offering to discussion is too large to be fully presented within the space of this essay. Therefore, only a reduced set of them will be introduced in the next sections.

6. The interaction model grounded on the epistemological priority of physical sciences

The oldest, full-fledged interaction model between natural and human & social sciences is the one which assumes as a matter of fact that the highest form of cognitive rationality is that embodied in the physical sciences. In compliance with this model, the human and social sciences should just try to adopt, as far as they can, the world models, the instructions for producing legitimate observations, as well as the language and the interpretative methods, that have been developed by physicists. This model has found a thorough and most influential codification in the *System of Logic* by John Stuart Mill, more than a century ago: "The backward state of the Moral Sciences can only be remedied by applying to them the methods of Physical Sciences, duly extended and generalized". (Stuart Mill, 1872, p. XVI. For a full elaboration of this statement, see the whole of Book VI, p. 545 ff.).

A fundamental presupposition of this model is that the human & social sciences lay *backward*. When compared to physical sciences, their underdevelopment is clearly imputable to a

methodological deficit, *not* to a supposed specialty of nature of their subject-matter. The priority-of-physics model has been revised and refined by several different threads of logical positivism in the period running from the early thirties to the middle sixties (Ayer, 1959; E. Nagel, 1961; Hempel, 1965). In the human and social sciences it has been, in the same period, one of the dominant research approaches (Gallino, 1988). Since then it has been declared dead quite a number of times, but a closer look at what happens today in several human and social sciences would bring to a very different conclusion.

Under the shadow of this interaction model, the human sciences should first of all import, without any modification, the language and themes of the natural sciences. To the former as to the latter belongs a lexicon whose key words are: variables, dependent and independent; patterns of scientific explanation; causal laws and universals; experiment and control groups; abstractions and generalizations; statistical tests and degrees of significance; correlation coefficients, and so on. The techniques for producing plausible or acceptable texts should follow along the same lines.

A few minor arrangements have been provided in order to take into account some minor peculiarities of the human sciences, such as the possibility that what people think of their situations can make a difference to explain their behavior. Years ago Hempel went so far as to modify his well-known explanation scheme, formerly rigidly deductive, so that it could accept even statistical laws, believed to be fitter for the field of social phenomena. But the overall model has not changed at all, up to the present day.

He/she who thinks that this interaction model is on the way out, as we said, should check his/her belief against such facts as:

- the contents of methodology courses in sociology in Italy, in West Germany, in USA;

- the extremely powerful grip that psychometric-statistical psychology has won in the American academy, and lately even in Italy;

- the number of sociological general works in current use whose first chapter, or first volume, start with exposing "epistemological premises" of rather strict neo-positivistic brand (Giesen and Schmid, 1976; Wallace, 1988).

- the dominant position of econometrics and other mathematical branches of economics, whose effort to model themselves according to the physical sciences ideal has possibly no peer among the social sciences. In Italy, the dominance achieved by mathematically oriented economics has recently triggered a public pronouncement by leading economists. Key issue was: mathematical economics does not understand the problem of limits to growth, and its environmental and political implications, either.

7. <u>The programs for a unified science and their implications for the interaction between sciences</u>

Notwithstanding a remarkable number of forerunners and descendants, the very idea of a unified science appears first and foremost connected with the philosophical school of logical empiricism or positivism, inclusive of its european and american branchings. In the thirties that idea has taken the shape of a "Movement for Unified Science" (MUS), whose essays have found their way to the public through periodicals such as *Erkenntis*

(since 1931), the *Journal of Unified Science*, the collection *Einheitswissenschaft*, and, since 1938 in Chicago, through the twenty monographs of the *Encyclopedia of Unified Science*. As a real circle of scholars, the MUS was virtually dead at the end of WW II, but its basic idea held on.

Roughly reconstructed in our perspective, the hypertextual frame of science built by this philosophical movement would look this way, at least on the surface. The upper nodes are quite empty of world models, that is - in the MUS' language - metaphysical assumptions. Other nodes are filled in mainly by themes suggested by physics, such as the principle of causality rejecting any hints of action-at-a-distance. Lower nodes contain compound and basic models that differ by contents, as a function of the application domain, but which have been built and assembled by using set of instructions strictly analogous.

The whole frame is staunchly poised on the nodes of observational and formal languages. If anything, the MUS and his followers, down to contemporaries, thought of unifying the sciences thanks to the reduction of all cognitive problems to listings of sensory experiences, that is, empirical observations; and, first of all, through the unification of languages. The key motto of the whole movement could well be this statement worked out in *Erkenntis* as early as 1931: "For the construction of unified science a unified language, with its unified syntax, is required." (Neurath, 1931).

This particular program for a unified science means that there has to be only a legal kind of frame for all sciences. Putting face-to-face the frames representing, say, a branch of physics, and a branch of sociology, each frame would appear as

structurally mirrored by the other. Only the contents of observations, or of basic and compound models, would appear different; but they would have been generated by the same sets of instructions. The highest level of interaction between the two groups of sciences, bordering on nuclear fusion, would thus be reached.

On the side of the human & social sciences, one of the most influential supporters of the idea of a unified science has been the sociologist George A. Lundberg. To him, "natural" and "physical" were merely words by which we describe a relatively objective, intersubjective, type of adjustment to environmental phenomena. Viceversa, "social", "cultural", "mental", and "spiritual" describe situations to which we make *at present* a relative subjective and emotional type of adjustment; for instance, wars, revolutions, and crime. The trouble is that the latter terms, "instead of being regarded as describing a... type of adjustment, are likewise *attributed to data as inherent characteristics.* The result of this semantic confusion has been a most mischievous separation of fields of knowledge into the <<natural>> and <<physical>> on the one hand as against the <<social>> and <<cultural>> (mental, nonmaterial, spiritual) on the other." (Lundberg, 1939, p. 10. Emphasis in the text).

Ideas never die. Both the model of a unified science on physicalistic ground, and the model of human & social sciences mimicring the knowledge structure of physics, are still with us, on both sides of the two scientific cultures whose interaction we are trying to understand. Therefore they still deserve to be carefully discussed in any examination of the relationships between natural sciences and human & social sciences. Witness

this passage from a most recent book on literary theory: "What is meant by 'unification', then, is the possibility that some of the most basic principles of natural scientific research, as well as some of the physical and life sciences' specific findings, must play a fundamental role in the constitution of any genuine human science." (Livingston, 1988, p. 148).

8. Varieties of the transferability model

The two-ways transfer between natural and human & social sciences of world models, basic and compound models, instructions for doing as for interpreting observations, and languages, has a long history, with many fascinating chapters. One of the richest, and even the less understood by the community of contemporary natural and human scientists, is the chapter on evolutionism.

Evolutionism had its roots in the conceptions of mind, reason and moral behavior developed by the philosophy of nature - a human science, if any - in the seventeenth century and the first half of the eighteenth. The darwinian theory of evolution by natural selection would have been simply unthinkable without this background. After Darwin, and well through the XXth century, many varieties of evolutionism have been applied to social processes, both in anthropology (Darlington, 1969; Darcy Ribeiro, 1968) and sociology (Parsons, 1966, 1971). The criticism and defense of XIXth century and early XXth century social evolutionism are far from settling down (see Richards, 1987), but we are here more interested in what is happening today.

The present situation is fairly different. In the last couple of decades a sizable number of models or theories have been imported from the natural sciences to the human & social sciences,

much more than the other way around. Most of the import has been linguistic, and at a rather superficial level of the language involved. Less so as far as complete models, and the techniques for producing them, are concerned. At any rate the diffusion of such conceptual entities flowing from the so-called hard sciences toward the so-called soft ones has been very impressive.

At the top of the list one can find catastrophe theory; such concepts as discontinuity and chaotic transitions; the order-emerging-from-disorder idea; the concept of autopoiesis; the theory of dissipative structures; the related concepts of self-organization of non-equilibrium systems; the biological basis of social behavior, and several others. This linguistic-textual import from the natural to the human sciences has already stimulated the production of many papers dealing with the problems, the limitations and the adjustments implied by the transferability of scientific models to the analysis of social processes (Mayntz, 1988).

However, the troubles with the contemporary patterns of transferability are not minor ones. First of all the transfer seems to be just one way, from the natural to the human and social sciences. So far as I have been able to check, not a single model of some relevance in the human & social sciences has, so far, found a place in the works wherefrom the flow of imports mostly comes. What has happened is that in these works a chapter is frequently inserted somewhere to show how that brand new natural science theory or model could be beautifully applied, among other matters, even to social or psychological phenomena (Laborit, 1980; Thom, 1980, chap. 13); pretty often yielding results, I dare say, mildly disappointing for the proposed theory.

Another trouble is that the import is mostly of the linguistic variety. In the indexes of a number of contemporary sociological books, words such as "autopoiesis" or "self-organization" are by now more frequent than, say, "social classes" or "group dynamics", but the transfer stops there. No additional information, nor a different pattern of explanation, or a more esthetic text either is offered by the imported model. One can find, for instance, catastrophe theory applied to the collapse of social-economic formations with the purpose of improving on the marxist theory of the same phenomenon, but the result has been so far a more obscure and more akward version of the same thing (??, 19??).

When the import from the natural sciences is made of texts - i. e., arguments aiming to connect in a plausible way sets of observations and/or models not originally connected - rather than just linguistic forms, another difficulty shows up. The imported or transferred pieces of natural sciences models or texts look quite patently as alien bodies in the texture of the importing text, a bit like pages of completely different books mixed up and bound together in a messy printing shop. Notwithstanding its attractiveness as a strategic instrument apt to carve up new niches for new variants of conceptual entities, the transferability model surely is not outstanding because of the estethic properties of its products.

9. Varieties of the common ancestor model

The background idea of the common ancestor model can be described as follows. Both in the natural and in the human sciences, there are models and theories which can be interpreted as being special instances, or local applications, of much more

general models and theories. Should the latter be better known, they would permit to improve the quality of the descendants. In most cases the ancestorship is chronological, as real ancestorships should be.

In comparison to the transferability model, the relationships - and the interaction patterns which go with them - between natural and human & social sciences looks here very different. There are no conceptual migrations or flows of import-export between them. The relationships would be one of fairly close homology, as it happens with organisms, or parts of them, belonging to different species that came down not too long ago from a cladistic split of a more ancient species. Thank to the common ancestorship the interaction between the two kinds of entities should be facilitated, being as natural as the interaction, say, between two very close species of primates.

In the history and present condition of our two groups of sciences one can individuate several different varieties of the common ancestor model. Even here I shall be forced, because of space limits, to circumscribe the exploration to just a couple of meaningful cases. In both cases the common ancestor is the theory of evolution through natural selection.

9.1 The phylogenetic model

In one variety of the common ancestor model grounded in the theory of evolution, which I call the phylogenetic model, the mental processes underlying both the natural and the human sciences in their present condition are interpreted as being specializations of older biological processes, not only proto-human but even pre-human (Langer, 1967-1982). In some interpretations of this sub-model the split between natural

sciences and human sciences is believed to reflect an ancient split in the human brain's capacity to deal at once with different sets of causes, those "pushing" (efficient, material) and those "attracting" (design, goal) (Riedl, 1980, 1985). From this point of view, there is a physiological relationship between natural and human sciences that is built in the human brain, but which has been temporarily interrupted or darkened.

According to the phylogenetic model, "each living structure contains a stored knowledge, a sort of judgment upon the laws under which it exists. Together with identical replication, and therefore with reproduction, that carries the meaning of a preventive judgment upon the laws to which the next generation will be exposed. With the repetition of individual life conditions, it follows beside from it a persistence of pre-formed expectations and judgments... Through all this, it takes place in some sense a selection of rational world images, consisting in a system of pre-formed practical judgments about the segment of real world that happens to be relevant at the moment" (Riedl, 1981, pp. 108-109).

So, living systems have segmented perceptions of the real world. They make experience of the existence of natural forces; they also know that behavior has a direction, does have goals. The co-evolution of biology and culture has deepened the split. Thinking about first causes has given raise to natural sciences; the reflective consciousness of ultimate goal has brought about the human sciences (Riedl, 1985, pp. 5). The problem we are facing now is how to re-compose the split. In conformity with to the position so far sketched, one main road to reach that goal would be the study of the biology of cognition.

9.2 The evolutionary epistemology model

Notwithstanding some similarities, also depending on a common ancestor, the evolutionary epistemology model (EEM) must not be confused with the phylogenetic model (Vollmer, in Riedl and Wuketits, 1987); usually, it is. If properly understood, EEM cannot be seen at all as a transfer of the darwinian (or neo-darwinian) theory of evolution through natural selection to the human and social sciences. The issue could be better described in the following way. Darwin did not discover a biological theory that thereafter somebody thought to be transferable to the human sciences (this matter, of course, would belong to the transferability model). Rather, he discovered a general method for the study of all living systems, including the cultural ones.

From this viewpoint, Darwin happened to stumble, so to speak, within the field that was his own - the biological field - against a much more general theory of the evolution of any kind of information-processing and acting systems. Therefore we should not try to apply or transfer anything from biology. Instead, we should try to better understand the darwinian method, with the goal to cast more light on the meta-theory lying behind or above it.

Fundamentally, EEM states that "evolution - even in its biological aspects - is a knowledge process, and that the natural-selection paradigm for such knowledge increments can be generalized to other *epistemic* activities, such as learning, thought, and science." (Campbell, in Radnitzky and Bartley, p. 47). The advantages of this model for improving the interaction between the natural sciences and the human & social sciences should be self-evident. If, notwithstanding local adjustments, the same paradigm, together with a fair set of models and theories

compatible with it, can be used to describe and explain both the dynamics of the subject-matter of a science, *and* that of the models and theories describing and explaining *that* subject-matter; and if the process can be strictly analogous both in the natural sciences *and* in the human & social sciences, a powerful bridge - indeed, quite a number of bridges - would be permanently cast between the two groups of sciences. Most fields of environment-related decisions would benefit from this.

10. The cross-fertilization model

There is at least one domain where the interaction between natural and human sciences has brough about a real cross-fertilization among a fair lot of them. It is the domain of the cognitive sciences. In it have converged many threads of philosophy; psychology; computer science; computational theory; neurosciences; linguistics; anthropology, and Artificial Intelligence (Gardner, 1985). Most of these threads have been deeply modified by the interaction with the others of the list.

I believe it is substantially wrong - as it has been stated among others by Varela (1987) - to present the several research programs presently active in this domain as subsequent, progressive stages of scientific progress. The computational, the connectionist and the neural-darwinist programs are just different lines of researches, or differently oriented approaches, each of them going back at least half a century. The computational is a top-down approach. It tells the researcher, broadly speaking, start with cognitive processes, and see how deep you can go in the study of mind/brain processes. The connectionist and the neural-darwinist are bottom-up approaches. They say, start with the functioning of neurons, and see how far up you can go in

understanding the genesis of concepts and images. It can also be added that so long as much as 95% of all Artificial Intelligence programs are computational, and have been developed by devicing new languages for traditional hardware. Connectionists and neural darwinists, to the contrary, are working more on the hardware side, and their programs are still in the experimental laboratory stage.

So far, we have depicted a few very meaningful interaction models between sciences, though several others could easily join the list. Now, let us see to which uses they might be purposefully applied, in the perspective of environment-related decisions.

11. The purposeful uses of interaction models

This paper suggests two complementary hypothesis: (a) several kinds of interaction models between sciences are anyhow purposefully used, vocally or silently, in order to pursue varied goals in sciences' social and cultural life; (b) it is feasible to use with a higher degree of awareness many interaction models in order to improve the joint application of natural sciences and human & social sciences to environment-related decisions in research, industry and policy-making. Such an application cannot be separated from a cultural and organizational reform of the sciences; and to a novel structuration of the scientific curricula in higher education institutions. Let us spell more largely what all this might mean.

11.1 Choosing among interaction models for theory-building purposes

We started by asserting that interaction models are consciously and unconsciously used, or purposefully built, to serve several different goals. They can be developed as conceptual ordering machines. In many ways, they are believed in

both for descriptive or prescriptive purposes. They are also deliberately chosen, and eventually exploited, for strategic purposes, as well as instruments for decisions. One almost untried strategy regards the possibility of building improved scientific theories, both in natural sciences and in human & social sciences, or even cutting transversally through them, thanks to the adoption of new - at least, locally new - models of interaction between the two groups of sciences.

Several kinds of theoretical improvements are actually to be expected in both groups, so much as across them, from a focused intensification of trans-disciplinary exchanges. Just a few can be suggested here:

* More efficient theories could be developed, in terms of prediction, diagnosis, explanation, in fields (for instance, the socio-spatial distribution of major diseases), where some levels are presently covered by natural sciences (for instance biology), and other levels are covered from social sciences (for instance, economics, or geography), with a huge uncovered ground still lying bare between them.

* Broader synergetic theories could be developed, taking into account, in a fuller systemic perspective, a larger spectrum of events, "physical" as well as "human", "biological" as well as "social" and "cultural". Such a kind of synergetic theories are urgently needed for the design of intrinsically safe complex technological systems. We know that according to the New Environmental Paradigm these are systems that should not be planned and built. They are, anyway. So the problem of making them safer is going to be with us for a long time.

* It would be higher the chance, today only dimly dawning, to elaborate theories of complex socio-technical-economic systems, able to match development with a steady state geo-economy. Development here means growth in the standards of living with special regard to the now underprivileged masses of people – a problem of three continents and a half. A steady state geo-economy means reducing the destructive consumption of non renewable resources together with the weight imposed to the carrying capacity of the environment.

* Better theories could be developed for acting more rationally in selecting positions (that is, posing problems and taking sides), both for ethical reasons and as a presupposition for practical action (Radnitkzy and Bartley, 1988). In Italy, among other countries, the all-around lack of rationality in selecting positions has made so far a mess of the discussion about the energy problem, and has been choking for forty years any serious debate about a national strategy and the national priorities therefrom ensuing.

From the very beginning our argument has been that one pre-requisite of the theorethical improvements sketched just above would consist in closing at *several different levels and on different planes* the split between the natural sciences and human & social sciences. This cannot be possibly done by using just one interaction model. A few *coordinated* interaction models should be mobilized. Surely, both the phylogenetic model (PM) and the evolutionary epistemology model (EEM) should be used in order to clarify and modify on both sides, if necessary, presuppositions, world models, themes. At lower levels in the frame system of the sciences involved in a given interaction

pattern, both the transferability model and the cross-fertilization model could be useful for exchanging and re-working *source models*, perhaps more than (empty) basic or compound models.

The same models would also be profitable toward the goal of reducing the syntactic and semantic spread, or gap, between diverse proprietary languages. But the use of this lower-level models - that is, dealing with lower elements in the frame system of a science - should be carefully controlled for coherence and compatibility from the higher-level models, such as PM and EEM.

11.2 Choosing among interaction models for policy-making purposes

In the last few decades the insurgence of, and a novel sensitivity to, problems of planetary magnitude have stirred many people - but only a minority, so far, of policy-makers and scientists - to speak about the necessity to develop a new orientation in all sciences. One key word in the movements for scientific reform is science for survival through increased adaptation of socio-technical systems to the environment. The key problem is seen in the enlargement of the domain taken into account by any scientist when pursuing his/her lines of research. The spectrum of consequences anticipated must be substantially broadened. Steering large socio-technical systems with satisficing effectiveness, while minimizing the environmental impact, asks for more efficient theories of global systems.

In the former section we have seen that the purposeful uses of interaction models between sciences could open up new opportunities for improving in the aforesaid direction several species of scientific theories. In a policy-making perspective, other pre-requisites must be pulled into action. Most of them are

amenable to a self-critical, reflexive attitude in the field of finalization of scientific progress that policy-makers should try to assume. The policy-makers should know that the finalization of science to policy-making goals in an open society - a willful popperian quotation - must now be grounded in the development of wholly new species of concepts, models, and theories. The breeding ground for them can only be the integration of natural and social scientific research, overcoming the traditional demarcations between sciences (Schaefer, 1983, p. 266; Riedl, 1987, p. 154). A different approach would miss the goal, or would fall backward on some authoritarian politics imposed on traditional sciences.

What matters, also, is that policy-makers facing environment-related decisions become more fully conscious of the opportunities for interaction between traditionally separated sciences which are really open to the researchers. This, notwithstanding that the latter quite often do not see them, and sometimes do even hide them, because of their own reproductive or political problems. Without asking them to become specialists in the science of science, people responsible for policy-making in different fields of societal organization must be persuaded that choosing a model of interaction between natural sciences and human & social sciences, in place of another, can make a great difference in the quality of the policy they are pursuing. That awareness should become a standard element in the dialogue between policy-makers and scientists in all fields where they have to join forces *to see* which *are* the problems making for environmental damages. Solutions only come after.

11.3 Interaction models and the curriculum

Throughout the centuries, the conceptual split between the natural sciences and the human & social sciences has consolidated in a steadfastly fragmented academic organization. The material spaces and walls separating departments, faculties, laboratories wherein different sciences are developed, applied and taught, are thin air in comparison to the organizational and conceptual walls keeping them apart.

The explanation usually brought forth is that increasing specialization and the division of scientific labour makes that separation an unavoidable necessity. A first counter-explanation, of course, would be that the necessities of the division of scientific labour are quite often razionalizations of the battle for identity, reproduction, status and resources that each science is perennially waging. Be it as it is, the force of the necessary-division-of-scientific-labour explanation cannot be undervalued. At the same time, it cannot be denied that in the sky of the aforesaid explanation looms large the untenable presupposition that only an impossible running backward, toward less specialized and therefore less efficient scientific roles, would help in shrinking the separation between the sciences.

It must not be so. What is needed are common grounds; that is, knowledge structures sufficiently akin to allow the specialist using one of them to understand more easily the knowledge structures being used by another specialist, even though the contents of the two structures are quite unlike. When tens of researcher/years have to be spent in order to build a computerized system helping environment-related decision-making to become more intelligent, because the AI expert and the domain expert literally do not understand each other at several levels,

and on different planes, this does not happen because each of them is set too deep in his/her specialized knowings. It happens, rather, because each of them is too superficial in its general knowledge of the production and communication of knowings.

An increased understanding and control of knowledge structures on the part of younger scientists and scholars would also bring them to appreciate the fact that world models, presuppositions, themes, languages, basic and compound models, etc., do not have to be so tremendously unlike from science to science. It would show, also, that many kind of exchanges of such elements to and fro the frame systems of different sciences are less difficult, and less painstaking, than that is commonly believed.

This essay has been developed around the belief that the study of interaction models between natural sciences and human & social sciences, raising the understanding and control of such knowledge structures, would improve substantially the quality of environment-related decisions on the part of several kinds of social actors, in different, though inter-connected, decisional fields. Therefore, the study of interaction models between sciences should become a normal component of the curriculum both in high schools and the universities.

Such a kind of study would not suggest old recipes such as teaching literature to engineers, physics to psychologists, or organizing guided tours in the woods to discover the environment. Rather, it would help to develop a frame of mind, a mindscape, allowing more easily each specialist to find her or his way in order to establish an augmented transactional dialogue with any other; and, through it, to become more competent in making

decisions environmentally charged. It would also help many of them to discover on beforehand that most scientific, industrial and policy making decisions do have such a property.

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10.2

LABOR MIGRATIONS, REFUGEES, AND CONSTITUTIONALISM: CHALLENGES AND OPPORTUNITIES FOR A NEW EUROPE

By

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LABOR MIGRATIONS, REFUGEES, AND CONSTITUTIONALISM: CHALLENGES AND OPPORTUNITIES FOR A NEW EUROPE

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Europe is currently facing three distinct constitutional problems related to international migration, whose complexity is heightened by their interrelatedness. Most prominent is the one arising from the situation expressed in the titles of two recent books, Guests Come to Stay (Rogers, 1985), and Here for Good (Castles, 1985). What is to be done with respect to the masses of foreign residents who have accrued in each of the European countries as a consequence of the great labor migrations of the post-war boom decades? In most cases the migrations in question were originally designed to be temporary, and restricted to workers with specified characteristics; however, when the boom came to an end in the early 1970s, many managed to stay on. In the intervening decade and a half, this residue became the nucleus of settler families. Given the dominant constitutional tradition of jus sanguinis, whereby locally-born children of foreign parents are themselves foreign, and of restrictive access to naturalization, these processes have resulted in the formation in many European countries --with some significantly different arrangements in Britain and France-- of a constitutional limbo. Matters are exacerbated by the fact that those who dwell within it are generally more dark-skinned than their hosts, and for the most part differ significantly from the dominant culture. The main source of concern is that they have brought Islam back to Europe, a religion some believe to be incompatible with secular legitimacy. The difficulties of the present situation arise from the fact that the qualities that were imputed to the strangers, and which were thought to render them suitable as workers, are thought to be un-

suitable for membership in the receiving societies. The challenge and opportunity Europe faces in this respect is the transformation of what was originally a "stranger encounter" into an integrated liberal society.

The second major issue pertains to the admission of refugees. The matter is of constitutional significance not only because a number of European countries explicitly include the right of asylum in their constitution but, more important, because the admission of foreigners in need is now widely recognized as a fundamental obligation of régimes founded on rule of law, as indicated by their nearly universal adherence to the instruments that constitute the international refugee régime. This presented no problem so long as the refugees who knocked at the door were limited to a trickle of exiles, mostly from eastern Europe, southern Europe, and Latin America. However, in the 1970s Europe began to experience the impact of the ongoing refugee crisis in the developing world. Not only was there increased pressure on all affluent liberal countries to take in a share of "quota" refugees, but escalating numbers of self-propelled asylum-seekers came knocking at the door as well. Arriving at a time of economic retrenchment, these masses are also darker-skinned and culturally different. Moreover, by virtue of the circumstances that drove them to flight, few are likely to return to their country of origin. "Here for Good" also, the refugees are turning into problematic immigrants, posing some of the same challenges as the legacy of the labor migrations.

The third issue pertains to freedom of movement and of establishment in the Community as a whole. On the agenda for thirty years, albeit well down in the order of European priorities, this matter was brought to the fore with unprecedented urgency by the Single European Act concluded in February 1986, which inserted into the Treaty of Rome a new Art. 8A specifying that the market to be established by 31 December 1992 "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is

ensured." This entails the formation of a quasi-European nationality, and a concomitant relinquishing of what was hitherto viewed as a preserve of state sovereignty. The problematic aspects of freedom of movement arise not so much with regard to the elimination of intra-European boundaries, but in relation to the erection of a common external one. The formation of a quasi-European nationality has concomitantly imbued the category "non-European" with new negative significance. Most affected are the nationals of countries that were the source of recent immigration, including not only those within the limbo mentioned earlier, but others still in the countries of origin who wish to work or relocate in Europe. Accordingly, in the present paper I shall deal with the challenge posed by 1992 mostly in relation to the other two issues indicated.

Introduction*

I must begin with a demurrer: In the present climate of European opinion, to include migration issues as the final topic on a day devoted to the theme of "Constitutionalism and Survival" provides --I trust inadvertently-- fuel for the extremist fires that are smoldering throughout the region. Let me therefore insist at the outset that nowhere in the world of affluent liberal societies are the challenges emanating from this quarter so threatening.

Europe is currently facing three distinct constitutional problems related to international migration, whose complexity is heightened by their interrelatedness. Most prominent is the one arising from the situation expressed in the titles of two recent books, Guests Come to Stay (Rogers, 1985), and Here for Good (Castles, 1985). What is to be done with respect to the masses of foreign residents who have accrued in each of the European countries as a consequence of the great labor migrations of the post-war boom decades? As will be detailed later, in most cases the migrations in question were originally designed to be temporary, and restricted to workers with specified characteristics; however, when the boom came to an end in the early 1970s, many managed to stay on. In the intervening decade and a half, this residue became the nucleus of settler families.

Given the dominant constitutional tradition of jus sanguinis, whereby locally-born children of foreign parents are themselves foreign, and of restrictive access to naturalization, these processes have resulted in the formation in many European countries of a constitutional limbo. Matters are exacerbated by the fact that those who dwell within it are generally more dark-skinned than their hosts, and for the most part differ significantly from the dominant culture. The main source of concern is that they have brought Islam back to Europe, a religion some believe to be incompatible with secular legitimacy.

The second major issue pertains to the admission of refugees.[1] The matter is of constitutional significance not only because a number of European countries explicitly include the right of asylum in their constitution but, more important, because the admission of foreigners in need is now widely recognized as a fundamental obligation of régimes founded on rule of law, as indicated by their nearly universal adherence to the instruments that constitute the international refugee régime (Goodwin-Gill, 1983). This presented no problem so long as the refugees who knocked at the door were limited to a trickle of exiles, mostly from eastern Europe, southern Europe, and Latin America. However, in the 1970s Europe began to experience the impact of the ongoing refugee crisis in the developing world. Not only was there increased pressure on all affluent liberal countries to take in a share of "quota" refugees, but escalating numbers of self-propelled asylum-seekers came knocking at the door as well. Arriving at a time of economic retrenchment, these masses are also darker-skinned and culturally different. Moreover, by virtue of the circumstances that drove them to flight, few are likely to return to their country of origin. "Here for Good" also, the refugees are turning into problematic immigrants.

The third issue pertains to freedom of movement and of establishment in the Community as a whole. On the agenda for thirty years, albeit well down in the order of European priorities, this matter was brought to the fore with unprecedented urgency by the Single European Act concluded in February 1986, which inserted into the Treaty of Rome a new Art. 8A specifying that the market to be established by 31 December 1992 "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." As they take steps to achieve the agreed-upon objective, states are becoming aware that this entails the formation of a quasi-European nationality, and a concomitant relinquishing of what was hitherto viewed as a preserve of state sovereignty.

This awesome constitutional development is attributable in large part to the same dynamic as that which brought about the mass migrations and the consequent increase in the heterogeneity of European societies. Indeed, the two processes were initially conflated, since Arts. 48 and 49 were included into the Treaty of Rome to promote the free movement of workers among the original Six. A number of commentators have suggested use of "workers" rather than "nationals" or some other more general term reflected a limitatively "economic" objective (e.g., Plender, 1976: 40). The inclusion of a clause preventing discrimination based on nationality in matters of employment, which became the source of a broadening of the treaty's provisons, was designed as a concession to Italy, then the main exporter of labor to the more developed members (Papademetriou, 1985).

The principle was designed to become fully operational by the end of the transitional period (1968). At that time, the Council issued "proposals of an essentially irreversible character, which had probably not been contemplated by the signatories of the Rome Treaty --except possibly by some of the most idealistic proponents of the idea of a United States of Europe" (Papademetriou, 1985: 4). These pertained to a number of matters on which the Treaty itself had been silent, particularly the principle of family reunion, and of preferential treatment of member state nationals vs. nationals from outside the EC. In the eyes of the then Vice-President of the Commission, the 1968 decisions invested Arts. 48 and 49 with constitutional significance, and established "an incipient form . . . of European citizenship" (Plender, 1976: 40).[2]

Two decades later, "incipient" it still is. But movement in that direction was reinforced by subsequent legislation and regulatory action, confirmed by Court interpretations and by distinctive but parallel developments within the Council of Europe, such as the European Convention on Establishment initiated in 1955. The wording of the Single Act, which refers to "persons" rather than

"workers," prompted even a hitherto skeptical commentator to observe that more than workers were now to be included (Plender, 1988: 26; for a detailed account, see ibid., 193-225, as well as Lillich, 1984).

The problematic aspects of freedom of movement arise not so much with regard to the elimination of intra-European boundaries, but in relation to the erection of a common external one. The formation of a quasi-European nationality has concomitantly imbued the category "non-European" with new negative significance. Most affected are the nationals of countries that were the source of recent immigration, including not only those within the limbo mentioned earlier, but others still in the countries of origin who wish to work or relocate in Europe. Accordingly, in the present paper I shall deal with the challenge posed by 1992 mostly in relation to the other two issues indicated.

* * *

As general background, it should be noted that, in contrast with the situation in the European-origin overseas settler societies, "immigration" properly speaking is <u>not</u> at issue in Europe today. Whereas in the United States, for example, the Congress is currently (1989) once again debating how many applicants to admit annually, and how to allocate entries among various categories, in Europe --be this defined on basis of membership in the Community or in the Council-- a negative consensus prevails: there is no longer to be any immigration at all, <u>except</u> for a trickle of family reunion and of successful asylum claimants. Indeed, it might be suggested that this negative consensus prevailed implicitly all along. It was <u>implicit</u> precisely because it was out of the question for things to be otherwise: no European country, with the singular exception of France, deliberately considered contemplated admitting foreigners for purposes of settlement. And this in turn is a constituent element of the current problem.

Writing in the late 1940s, Hannah Arendt emphasized in The Origins of Totalitarianism (1951) that in keeping with the secular drift of the traditional Western doctrinal of human rights toward that of nationally guaranteed rights, in the sphere of international law, "theoretically sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion." (Arendt, 1973: 278). Deeply anchored in the constitutional culture of European states --albeit in substantially modified form in France-- is the notion that the political community consists of a bounded but continuous body of population, which has reproduced itself by natural means from times immemorial and will continue to do so into the indefinite future. This element of culture is sustained by both history and myth. Overall, the emergence of the national state as the major form of political organization in the west half a millenium ago fostered the cultural homogeneization of the populations living under the jurisdiction of each state, and a concomitant emphasis on differences between each of these nationalities and its neighbors (Zolberg, 1988e). Subjects --later citizens-- were taught that they were "born together," bound by ties of fictive kinship in the name of which they might be called upon to engage in the "supreme sacrifice," as nearly one-fifth of French, German, and Russian adult males did with hardly any resistance early in this century. It is in relation to these identities that the nationals of other states are strangers, even if they speak the same language and share the same religion.

A concomitant of this conceptualization is that mankind consists of mutually exclusive groups with respect to the maximization of major values such as security from violence, material welfare, social equality, and political freedom. Each of the groups is bound by a vast network of exchanges between rulers and ruled, owners of capital and workers, with a sense of continuity across generations and obligations toward those who will come later. The generational element is fundamental, because it is the duration of the group well

beyond the span of human life which gives it a special reality as something more than a temporary association. In this manner the group is endowed with some of the characteristics of an organism, amounting to "life," as human beings have done from time immemorial done with the family. This is the implicit principle underlying the transmission of nationality by way of descent --i.e., jus sanguinis-- which prevails throughout the area of Roman law tradition.

The mythical nature of the bases of group solidarity are nowhere better revealed than by the term for the mechanism whereby strangers can become members: it is "naturalization," the equivalent at the level of the political community of "adoption" at the level of the family, whereby a non-kin is transformed into kin.[3] Naturalization in Europe remained a privilege, granted by the sovereign in the light of its own interests, by way of elaborate and therefore costly procedures.

Until recent changes in Sweden, the major exception to the continental European pattern was France, which a century ago deliberately encouraged immigration, reduced the waiting period for naturalization to a mere five years, and routinized the administrative procedures involved; moreover, a substantial element of just soli was introduced into nationality law, in that children born in France of foreign parents automatically became French citizens when reaching their majority. This distinctive orientation is unoubtedly grounded in the conception of nationhood and citizenship elaborated in the course of the revolution whose bicentennial we are commemorating (Brubaker, 1987a). However, there is no gainsaying that it was in the face of population stability at a time when Germany's population was rapidly expanding, occasioning an acute relative decline of its pool of military manpower, that the French state implemented a hitherto ignored revolutionary tradition.

Notwithstanding their standing as emanations of the most intimate particularism of each of Europe's peoples, these socially constructed representations of reality, in which the constitutional apparatus with which each of Europe's national states faces the contemporary challenges is embedded, were shaped by their common experience of development in a conflictual international arena (Tilly, 1975b). In this perspective, the apparatus in question can be seen as a protective carapace, designed primarily to promote national security.

With respect to security more generally, after half a century of tragic misconceptions, Europeans have undertaken to fashion a more reliable international system, grounded in the realities of growing material interdependence, and on respect for human rights. Concomitantly, these developments have undermined the uninhibited exercise of sovereignty noted by Arendt in the sphere with which we are concerned. A mere forty years after her observations, the prudent author of a leading work in international migration law wrote in his introduction, significantly subtitled "Sovereignty and Interdependence," that "The emphasis on States' freedom of action, which is found in the old textbooks, appears misplaced in the conditions of contemporary international relations" (Plender, 1988: 1).

"The times they are a-changing," after all: the issues we are examining are not merely problems but also opportunities.

1. Wanted but not Welcome[4]

The most salient issue Europe faces today arises from the consequences of past labor policy, whereby millions of workers were deliberately imported or admitted as self-propelled seekers of jobs during the boom decades preceding 1973, with the explicit provision that their residence was temporary and usually con-

ditional on employment in specific jobs. Their status was expressed euphemistically in the German term gastarbeiter, but is better characterized by the ancient term "helots," ironically revived by R.Cohen in this context (1987).

The underpinnings of this policy can be understood within the framework set forth by Karl Polanyi (1957; orig. pub. 1944) in his seminal work on the collapse of nineteenth-century European civilization. Hitherto, markets were accessories of economic life, embedded in general social relations; but with the rise of industrial capitalism, "no arrangement or behavior should be allowed to exist that might prevent the actual functioning of the market mechanism on the lines of the commodity fiction" applied to labor, land, and money (73). Polanyi characterized this as a "stark utopia" in that "To allow the market mechanism to be the sole director of the fate of human beings and their natural environment . . . would result in the demolition of society" (ibid.) His analysis proceeds dialectically. Institutionalization of the self-regulating market in the early nineteenth century and its extension to the international level by way of the gold standard brought to Europeans undreamed material welfare, provided the underpinnings for the liberal state, and fostered among the region's bellicist states an unprecedented century of peace. But in the face of the major cyclical downturn of the 1880s, each of the national societies concerned sought to protect its domestic economy from the disruptions generated at the level of the international economy; the resulting generalized protectionism further exacerbated international tensions, erupting in war; war and its consequences further undermined the viability of the international economy; and the Great Depression triggered an even more tragic cycle of state actions at the domestic and international levels.

One of the most notable effects of the commodification of land and labor was the massive uprooting of rural populations, and the consequent onset of vast migrations in search of work, both within and between countries. The most spec-

tacular manifestations of this were of course the great movements overseas. However, these processes also produced considerable intra-European migrations from less to more developed regions, both within and between countries. British industrialization relied heavily on Irish labor, which constituted about one-third of Manchester's proletariat when Engels conducted his seminal study; and Marx provided an acute analysis of the major advantages this afforded to British capitalists. France drew heavily from Italy and Belgium, later Poland and Spain; Imperial Germany made considerable use of Poles, initially as agricultural labor for the East Prussian junker estates, but later as industrial labor in the Ruhr as well; and Switzerland relied even more heavily on foreign workers, mostly Italian, as a structural component of its industrialization.

The protectionism of the 1880s prompted states to develop greater capacity for controlling their borders; and the subsequent exacerbation of class conflict and international political tensions fostered widespread concern among states to maximize their capacity to mobilize human resources, hence with loyalty and nationality in the spirit suggested by Arendt. From that perspective, immigrant labor was a liability in that heterogeneity weakened the society's moral fiber. In the United States, a movement arose for the drastic reduction of immigration, which undermined the collective power of American workers, and the screening out of those who deviated from northwestern European Protestant culture.[5] Another approach was to erect barriers against the incorporation of foreign labor into the receiving society, which also had the advantage of facilitating its disposal when no longer needed. Advocated by Max Weber in Germany at the close of the nineteenth century, this was institutionalized most effectively in Switzerland in the early decades of the twentieth. Temporary and disposable labor emerged as the universal pattern, including in the United States.[6]

Committed to the reconstitution of an open international economy, the architects of the post-World War II international system by and large agreed with Polanyi --indeed, many were inspired by his views-- that the dynamics of unmitigated international liberalism potentially interfered with the domestic objectives of states responsive to democratic electorates. To reestablish capitalist democracy on a sounder footing, the international economic system must therefore allow for some degree of domestic protection. In order to secure adherence by Britain (then ruled by Labour) and other Europeans to the principle of multilateralism in trade, the United States agreed to mitigate obligations under GATT to provide for full employment policies, as well as to allow price supports in agriculture. The IMF was constrained in the same manner as well, at least with respect to the developed countries. Hence participants were able to pursue domestic demand-management policies and international trade policies in partial isolation from one another: it was to be Keynes at home, Adam Smith abroad (Gilpin, 1987: 355). The post-war "Bretton Woods" system thus entailed a recognition of some form of the welfare state as the national norm of capitalist states. Ruggie (1983a) has dubbed this "embedded liberalism," using the Polanyian term to indicate its anchoring in the social order of the component societies.

However, it became evident early on that capitalist welfare states committed to full employment and a rising real wage rate are plagued with a structural inflationary problem. The overall solution was to externalize adjustment costs via inflation, private markets (leading to higher domestic interest rates), and by shifting the costs from the developed to the developing countries, to which "embedded liberalism" was never fully applied (Ruggie, 1983: 229-231).[7] The use of external labor was another device permitting rapid growth while minimizing inflationary pressure. In retrospect, immigration had come to

be recognized by economists as a key element in accounting for the spectacular growth rates the United States in the decades preceding World War I (the "Lewis model of growth with an unlimited supply of labor").[8] A similar approach was applied to the reconstruction of Europe, with a focus on alleviating manpower shortages for reconstruction by transferring human resources from `surplus' to `deficit' countries (OECD, 1979: 7). At the time, the relevant surplus countries included Italy and the Netherlands, which had a high rate of natural population increase, as well as West Germany, which had a large influx of refugees from the east. Free movement of persons was incorporated into the terms of reference of the Organization for European Economic Cooperation established under U.S. leadership to coordinate the distribution of Marshall Plan aid. From there it was but a small step for the free movement of labor to be incorporated into the Treaty of Rome in 1957. The strivings of economic liberalism complemented the Council of Europe's efforts to foster more open borders to enhance political liberalism.

With the exhaustion of Europe's excess supplies of labor in the early 1960s, the receivers recruited farther afield, mostly in the Mediterranean periphery. The arrangements that arose were predicated on an expansion of the world economy and the subjection of the periphery to the "great transformation." The underlying processes have been well analyzed and need not be restated here (see especially Burawoy, 1976; Portes, 1978; Portes, 1983; Sassen, 1988). In effect, each segment of the "core" developed a special relationship with a segment of the "periphery." The expanse of the peripheries, rendered steadily more accessible by the secular reduction in the costs of long-distance transportation, and the acceleration of the disruptive processes within them, compounded by considerable population growth, provided the privileged few with a situation approximating the unlimited supply of labor ideally called for under the doctrine. In the case of Europe, relationships were sometimes established during the

colonial period --notably in Algeria-- and presented newly independent governments with a fait accompli. Among the senders, the labor-exporting solution was generalized in part because it provided an important source of foreign exchange, by way of remittances; and this was rendered more necessary by the requirements of the IMF and the World Bank of a sound balance as a condition for loans. Pressures to engage in export agriculture also contributed to population displacement and emigration. The exchange brought benefits to senders as well as receivers; but there is little doubt that the receivers benefitted more, and that except in a few cases within Europe itself, involving senders that were already within reach of the privileged group, labor export contributed little more than stop-gap revenue, insufficient to overcome the underdeveloped status quo.

Each of the receivers resolved somewhat differently the problem of reconciling the use of foreign workers with the provision of protection to the indigenous labor force. The Swiss system operated like clockwork: one-year permits, no dependents allowed, rotation to further reduce the likelihood of settlement, employment confined to specific sectors (mostly hotels and restaurants). Germany turned to southern Europeans in the mid-1950s, after the influx of Germans from the Russian occupation zone and Eastern Europe was absorbed; and after the Berlin Wall was erected foreign recruitment became a major policy. This was cast within the framework of neo-corporatist "concertation" among labor and management under the aegis of the state, which provided protection to indigenous workers by imposing tight controls on the mobility of foreign workers, somewhat on the Swiss model. Similar "guestworker" systems were established in the Benelux countries as well as Denmark and Norway.

The major exceptions to the "guestworker" pattern were Britain and France. Britain had enacted severe restrictions on immigration in the 1920s, but left the door wide open to the Irish, even after the Free State became an independent Republic. In the post-war period, attempts to use European refugee workers for

reconstruction, particularly in mining, were defeated by British miners. As part of its efforts to transform the Empire into a Commonwealth, in 1948 the Labour government enacted a new nationality law which in effect granted citizens of the independent states of the Commonwealth such as India, as well as British colonial subjects such as Jamaicans or Nigerians, free entry to Britain. Concurrently, the government sought to manage political tensions in the Caribbean colonies by providing employment for their young men in Britain. These developments quickly fostered a substantial migration from South Asia and the Caribbean. Within the prevailing legal framework, the new arrivals possessed all the citizenship rights of British-born subjects; and by virtue of just soli, their British-born children possessed all these rights on their own behalf as well. Concomitantly, the prospects of a substantial non-white permanent population propelled immigration issues to the fore earlier than anywhere else in Europe.

France resumed its traditional pro-immigration stance in the name of population growth and to facilitate reconstruction, with workers initially coming mostly from Italy and Spain, and later from Algeria and Portugal. Despite the state's prominence in the economy generally, labor migration remained largely unregulated and controlled essentially by employer demand, as in the United States. This state of affairs is probably attributable to the marginal role of French organized labor in economic policy-making.[9] Since the legal framework facilitated incoporation, the transition from labor migrations toward substantial immigration began earlier in France than elsewhere on the continent.

Although there was a large turnover of workers, as the migration wore on some remained for increasingly long periods; many were sent back to their home countries during the 1968-69 recession, but quickly sent for when the boom resumed the following year. At this time, because of increasing demand, some of the more experienced and better qualified workers were able to bring in some of their dependents.The two-decades long boom was finally brought to an abrupt end

by the oil shock of 1973. Since admissions were regulated by administrative authority, most of the receivers were able to impose an immediate freeze on further recruitment. There is evidence that the workers generally behaved in keeping with the model of "rational actors" (Penninx, 1986: 960). Over the next few years, many of those originating in the southern tier of the European Community (Italy, Greece, Spain, Portugal), in fact did go home, where a combination of earned savings and welfare state support enabled them to better weather the storm. However, for those originating in Europe's southern and eastern periphery --the Maghreb and Turkey-- it made sense to stay on, because of the very large gap in economic and political conditions. In theory, the authorities should have been able to send surplus workers back to their home countries; but in this respect they found themselves faced with insurmountable constraints, arising from the efforts of the workers themselves, and the support they were able to muster from segments of the public, particularly churches and "new left" organizations, imbued with a "post-industrial" sensibility.

Moreover, the residue generated additional numbers. As noted, family members trickled in all along. Initially the freeze applied to dependents as well. However, the authorities soon relented under pressure from both xenophobes and supporters of the workers --the first advocating family reunion to assuage the sexual ardor they attributed to non-white young adult males, the latter on humanitarian grounds. By and by, large-scale family reunion took place in the late 1970s. Concomitantly, the transition from a population of mostly young, single males, to one of families whose females have a high rate of fertility, resulted in a high rate of natural increase --significantly higher in fact than that of the "natives" of the appropriate country. As a result of these processes, in the decade following the oil shock, the overall number of foreign residents in the receiving countries remained quite stable; but the composition

of these populations underwent major changes, from mostly young adult males to families, and simultaneously into a mix that was much less "European" and concomitantly non-Christian.

The dawning awareness that these strangers were in Europe for good, at the very moment when for the first time since post-war recovery there were grounds for concern over the economic future, undoubtedly contributed to the crystallization of hostile reactions. However, these had been in the making for a long time. Remarkably, we do not yet have a systematic study of the determinants of variation in their form and intensity among the various European countries. If the rise of explicitly anti-immigrant parties is taken as the major indicator, we must start with England, where the issue appeared in local elections as early as 1963, and the National Front was launched as early as 1967. A dozen years later, G. Freeman (1979) appeared to provide a persuasive explanation of why such a party had arisen in Britain and not in France. However, the explanation was subsequently mooted by the dramatic success of a similar Front National in France, as well as by the waning of the original one in Britain. In 1987 yet another analyst told us why in France and England, but not in Germany . . . (Brubaker, 1987).

The starting point for an understanding of the mechanisms involved is the obvious fact that the process of international migration brings about relatively sudden encounters between heterogeneous groups that are normally separated in space. But it must be added immediately that the groups under consideration here are not just any groups. In short, the attributed characteristics that make foreign workers suitable as labor are thought simultaneously to make them undesirable from the perspective of membership in the receiving society. This functions as a self-fulfilling prophecy, since the life experiences to which the workers are subjected in the receiving society tend to reinforce their apparent disqualification. Traditionally, the contradiction tended to be resolved by way

of segregation, such as still prevails in South Africa, often coupled with the imposition on the subjected group of some form of "invisibility." However, these mechanisms are today much less practicable because in constitutional societies even aliens have acquired significant rights. The contradiction thus remains largely unresolved.

This does not matter much so long as the two segments interact only in the economic sphere, constituting a variant of the "plural society" familiar to students of plantation colonies (Furnivall, M.G. Smith). However, if an attempt is undertaken to integrate these segments, the nexus of their relationships emerges as a major obstacle, not only because of the deeply formed prejudices that prevail among the dominant group, but also because of the understandable diffidence that prevails among the subjected one. This provides a framework for reviewing some recent developments pertaining to the incorporation of recent arrivals, including the native-born.

[SECTION TO BE PROVIDED IN REVISED DRAFT, focusing on "membership" (Walzer, 1981), particularly varying and changing conditions for access to citizenship and for political participation. Discussion of proposals for "denizen" status and evolution toward a concept of non-mutually exclusive natioalities (Hammar). Also, brief discussion of constitutional issues arising from prejudice and discrimination, whose complexity is familiar to students of the U.S.]

2. Refugees: Strangers or Brothers?

Most of Europe's other foreign residents are refugees, who were admitted because the various states acknowledged an obligation toward them. This arises from a determination that they are not ordinary strangers, but innocent victims. In contrast with foreign workers, who start off with a negative presumption

regarding political membership, refugees start off with a positive one: by virtue of putatively shared political values, they are members of the receiving community even before they come in.

In the historical experience of western states, obligation toward strangers in need has evolved from a narrow and particularistic conceptualization, to a broader and more universal one. In early modern Europe, as Christianity was torn asunder, each state sought to maintain or regain religious homogeneity; accordingly religious minorities came to be viewed by rulers as obstacles to be eliminated, usually by forcing their conversion. Threatened with spiritual death, many who could, fled (Zolberg et al., 1989). The obligation to grant asylum was limited to correligionists who were, by the standards of the receivers, innocent victims. It will be noted that the dictates of conscience were congruent with those of statecraft; acquiring valuable population from another state constituted a shrewd move in mercantilist competition. In the age of revolution, confrontations took place in the nascent language of ideology; but the dynamics of refugee-formation and of the granting of asylum were similar. The comings and goings of political refugees became a commonplace spectacle on the western scene in the nineteenth century (Marrus, 1985). They stemmed overwhelmingly from the ranks of revolutionary and nationalist movements, which were for the most part unsuccessful, at least in the short term. Although they did not hesitate to repress indigenous revolutionaries, the governments of the liberal states were generally tolerant of the exiles, mostly from the ranks of the well-to-do, who made few demands on them beyond asylum itself, so long as they refrained from involvement in domestic politics, and as their presence was compatible with ongoing foreign policy. After a time, refugees tended to go home.

The protracted collapse of "nineteenth century European civilization" generated a refugee crisis of unprecedented scope, lasting until the middle of the twentieth, which propelled refugee issues to the fore of international concern and gave rise to the institutional apparatus that prevails today. Erupting in the context of restricted entry regulations, it was characterized by a resurgence of the classic types, on a much larger scale and under circumstances that rendered their plight more urgent and more difficult to resolve, but especially by the appearance of a largely new type, which arose in the wake of attempts to reorganize the ethnically heterogeneous "successor" states of southern and eastern Europe in keeping with the western nation-state model. As Hannah Arendt observed in 1951, "since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state" (Arendt, 1973: 290).[10]

The emergence of target minorities as a result of what she terms the "nationalization of rights" can be seen as a particular instance of a more general process, whereby the state's choice of an integration formula determines positive and negative categories of persons, and its ensuing relationships with the groups thus constituted. The formula was now based largely on ascendancy, conceptualized as "blood" (national, racial, etc.). Whereas religion and ideology are generally conceived as matters of individual will, delineating a category of "dissenters" on whom the state applies pressure to conform, "blood" is thought to be immutable, and hence the state could not achieve its objective by transforming the deviants into persons of the approved mold. They must be made to disappear.

These dynamics unleashed a protracted process of "unmixing of peoples," with some episodes still ongoing today (e.g., Rumania, Cyprus, ethnic Germans from the Soviet Union etc.)[11] The regions involved were very populous; at the

time the refugee-producing conflicts got under way, they had been experiencing for some time the tensions and conflicts that accompany the transition from traditional socio-economic and political orders, and were already generating massive emigrations. In the aftermath of World War I, these population exchanges, together with the movements occasioned by war and revolution, produced an estimated 9.5 million displaced persons. Most of the refugees remained within the domain of their erstwhile empires, usually moving from what had become one new state, in which they constituted a minority, to another where their nationality was dominant. Nevertheless, these huge flows prompted a rush to secure protective barriers. The upheavals also prompted a reinstatement of draconian prohibitions against exit, such as were common in the age of absolutism, but now implemented by states with a much greater capacity to control movement across their borders (Dowty, 1987).[12]

In the face of the huge outpouring from Russia, voluntary agencies that were trying to alleviate their immediate problems appealed to the League of Nations to establish a central office operating under its authority. Even as the post-war flows were being absorbed, new ones were generated by proliferating authoritarian régimes. The refugee crisis was exacerbated by deepening worldwide economic depression and mounting xenophobia, often directed at precisely those who were being driven out, which together triggered another round of immigration restriction. The rudimentary international institutions that came into being were tragically ineffective, and this was compounded by the stony individual comportment of the surviving liberal states.[13]

The total number of Europeans displaced in the six years of World War II was of the order of thirty million; at the end of the conflict, eleven million survivors were outside their country and in need of assistance (Kulisher, 1948: 3-5). Additional refugees were generated by post-liberation conflicts, such as the civil war in Greece, as well as among countries of eastern and southern

Europe which resumed their elusive pursuit of ethnic homogeneity and geopolitcally desirable boundaries. Most of the huge mass was disposed of within a few months after the end of hostilities, albeit sometimes under in a questionable manner. Few remained in Europe, except for Germany.[14]

Awareness of the consequences of restrictive immigration policies of the inter-war period fostered a more receptive climate for the formation of an international refugee régime, founded on a more universalistic definition of "refugee." But this was deliberately kept narrow, so as to avoid conferring the status on too large a number, which the architects of the régime feared would jeopardize assistance for those in greatest need (Vernant, 1953). Distilling European experience to date, they insisted on evidence of persecution --i.e., deliberate targeting by some agent, usually the government. Hence, as defined in the 1951 Protocol, a refugee is "any person who is outside the country of his nationality . . . because he has or had well-founded fear of persecution" by reason of race, religion, nationality, social origin, or political opinion. Initially, this was applicable exclusively to European victims of events occurring before 1951, but the time was later extended to the ongoing present as well as to non-Europeans.

Most European countries adopted formal legislation concerning refugees congruent with the incipient international régime (U.S. Commission, 1952: 1939-1944; Aleinikoff, 1984). The outstanding exception is Britain, which did not recognize refugees as a distinct class; but successive immigration laws gave the Home Seretary power to exempt any person or class of persons from the usual requirements for entry. The Federal Republic of Germany, France, and Italy explicitly set forth the right to political asylum in their constitutions.

In the case of France, this was firmly anchored in republican tradition, albeit egregiously violated by Vichy.[15] A decree enacted in 1938 specified that any refugee could gain temporary admission by merely presenting herself as a

refugee at any frontier point of entry, and secure protection while the claim was investigated. The right to asylum was solemnized in the preamble to the Constitution of 1946, itself incorporated by reference into the Constitution of 1958.[16] This applies to persons recognized as refugees by the UNHCR, who are taken in by France as "quota refugees," as well as to those who present themselves at the border and qualify under the 1951 Convention. It is implementated by the Office for the Protection of Refugees and Stateless Persons (OFPRA), created in 1952 to deal with the determination of claims to asylum, protection to those recognized, as well as the coordination of assistance to them. Although OFPRA is administratively under the authority of the Minister of Foreign Relations, who appoints its Director, it is endowed with independent decision-making authority, and its operations are overseen by an interministerial council compromised of representatives from the Ministries of Foreign Relations, Interior, Social Affairs, Justice, Economy and Finance, and Labor. The 1952 law and implementing decrees also provided for a suspensive appeal procedure to a Commission des recours, composed of a member of the Conseil d'Etat, a representative from one of the oversight ministries, and a representative from the UNHCR's office in France, who sits as a full voting member. This element of supranationality has prompted a commentator to characterize the French approach as "extraordinary" in comparison with adjudication systems in the United States or in Germany (Aleinikoff, 1984: 216). When a claim is turned down by OFPRA, matters usually end with the decision of the Commission (or of OFPRA, which may reverse itself while the appeal is pending). Beyond this the alien may also file an appeal before the Conseil d'Etat, but only with respect to legal issues.[17]

Asylum was included in the Basic Law of the Federal Republic (Art. 16, sec. 2) in recognition of its importance to Germans fleeing Nazi persecution; and the constitution provides further (Art. 19, sec. 4) for judicial review of administrative determinations (Aleinikoff, 1984: 198, n. 56-57). However, this

was rarely invoked in the post-war decades because the bulk of those coming in from behind the Iron Curtain originated in the DDR or qualified as people of German ancestry under Art. 116 of the Basic Law. The Federal Republic was initially unenthusiastic about Poles and Czechs, but subsequently welcomed refugees from the socialist countries more generally (U.S. Commission, 1952: 1940).

As it emerged in the 1970s, the German system allowed asylum applicants to work while their claims were being processed; they were entitled to the full array of welfare state benefits, and eligible for welfare payments in case of unemployment. Claims were adjudicated by a Federal Agency for the Recognition of Foreign Refugees, under the jurisdiction of the Ministry of Interior. However, by law agency officials exercise independent judgment, founded on a variety of information concerning conditions in the country of origin, including non-governmental sources. Appeals were heard by a trial-level administrative court, which in Germany consists of professional magistrates independent of the executive. The relevant procedures and services were implemented by the Länder, which were also responsible for the deportation of aliens denied refugee status. Since they exercise a certain degree of autonomy, the resulting situation varied somewhat from one part of the country to another. In 1966 the Interior Ministers of all the Länder collectively decided not to return any aliens from European socialist countries. This was in accord with general European practice, whereby persons originating behind the Iron Curtain qualified as refugees under the "persecution" clause without any burden of proof, or were routinely granted a more limited form of asylum akin to the American "parole" or "extended voluntary departure" (formalized in Scandinavia as the "B" status).[18]

Aside from the massive flow of East Germans to the Federal Republic prior to the construction of the Berlin Wall, the refugee experience of Europe in the post-war decades was limited to small numbers, largely by virtue of prevailing

prohibitions against exit, and of nearly exclusively European character, except for some "native auxiliaries" or people of mixed descent, taken in by the former imperial powers along with their own nationals in the years of decolonization (the Netherlands in 1949, France in 1963, Portugal in 1975).[19] In 1972, when it had already begun to restrict immigration from the non-white Commonwealth, Britain was faced with demands for admission from tens of thousands of Asians expelled from Uganda by Idi Amin, or under pressure to leave Kenya (Zolberg et al., 1989: 65-66). Despite their reluctance, the authorities had little choice but to admit those who held British passports, about 40,000 altogether; but this reinforced Britain's determination to redefine British nationality more narrowly, so as to exclude non-white colonials, and to enact legislation disaggregating the holding of a British passport and the right to live in Britain. This is particularly significant today with respect to the approximately 3.25 million Hong Kong Chinese who hold British passports (NYT, July 23, 1989).

The impact of the refugee crisis that arose in the developing world in the 1970s was initially limited because few of the refugees had connections with Europe. Europe's benevolent disposition during this period is indicated by the European Parliament's adoption in 1976 of a recommendation on the situation of "de facto refugees," which urged countries to apply the Geneva definition liberally, focusing on the unwillingness of the refugees to return to their country of origin for valid reasons (Costa-Lascoux 1987: 242). However, the "hydraulic" nature of the world migratory system, whereby when obstacles are erected to deflect flows in one place, pressures for admission increase elsewhere, foreclosed Europe's persistent insulation.

The crisis itself is attributable to a conjunction of several factors. As in the past, refugees are a by-product of two major historical transformations, the formation of new states and attempts to change or to maintain traditional

social orders, particularly based on control of land; however, today they are occuring under conditions that occasion more massive population displacements (Zolberg et al., 1989). Violent conflicts are more destructive today because both governments and their opponents have access to firepower in all its forms. The impact of violence on poor and densely populated countries is particularly catastrophic because it often reduces agricultural production below the subsistence level. Given the availability of roads, bicyles, and trucks, even very poor peasants are today much better able to flee violence than their forebears. The shift of the locus of confrontation between the superpowers to the periphery in the wake of the thermonuclear stalemate fostered the internationalization of domestic conflicts, providing antagonists with substantial external support, and hence making for more extensive and protracted confrontations. The circumstances of the 1970s also fostered bureaucratic authoritarianism among the "NICs," including its most virulent form, the "national security states" of South America.

One measure of the crisis is that in the late 1970s there was a step-level increase in the total number of refugees in need at a given time from a previous range of between five and ten million, to a higher one of between ten and fifteen. At the end of 1988, the figure stood at 14.4 million; moreover, refugees abroad constitute but one segment of the total number of persons uprooted by violence; the same upheavals also produced 14-20 million internally displaced, bringing the current world-wide total of those uprooted to at least 30 million (USCR, 1989).

The vast majority of those outside their country remain within the region of origin, in some of the world's poorest countries, themselves badly hit by the global economic downturn, where opportunities to resettle and fend for themselves are extremely limited. A mounting proportion linger on indefinitely, unable either to return to their country of origin or to find a permanent haven,

parked in camps while awaiting resettlement to a "third country" willing to take in some "quota" refugees. But their status is often ambiguous because displaced persons in the developing world are much more likely to be victims of generalized violence than of "persecution" properly speaking. This is compounded by the fact that the character of refugee-generating conflicts also negates the distinction between "political" and "economic" causes of displacement. By and by, sizeable numbers enter into the world migratory stream. However, the swelling of the refugee population came at a period of economic retrenchment for all but oil-producers; in the face of rapidly mounting unemployment, the affluent liberal countries imposed more severe restrictions on general immigration and were more reluctant to take in refugees for permanent settlement as well. Concurrently, in the face of closing doors, people from developing countries cast out by desperate economic conditions were driven to try their luck as asylum claimants.

Europe was called upon for the first time to take in "quota" refugees from the developing world under the aegis of the UNHCR after the Pinochet coup of 1973, which drove out also many refugees from other Latin American countries who had found asylum in Chile. Understandably, given its role in the affair, the United States refused to grant asylum to any of Pinochet's victims. France, Britain, and Spain took the largest numbers. Other Latin Americans flocked to Spain as well under an informal "law of return" for people of Hispanic descent; albeit not granted refugee status, they were given work permits and granted citizenship after only two years. The "boat people" crisis of 1979 prompted the convening of an international refugee conference, which again led to the organization of a quota system for taking in refugees, but in much larger numbers. Because of historical ties with the area, France was the largest European

receiver; Britain accepted 17,000; Germany was initially reluctant to participate, but ultimately agreed to take in a 20,000 share (Aleinikoff, 1984: 200, n.65).

As of the early 1980s, about two-thirds of the 700,000 registered refugees originated in eastern Europe; the second largest group were the Indochinese quota refugees; and the third group were Latin Americans. Non-European applicants then increased very rapidly, mostly "spontaneous" asylum seekers, who appear more threatening than quota refugees because the receivers have no control over the process. The main groups were Turks, Tamils (from Sri Lanka), Pakistanis, Bangladeshi, Afghans, and Iranians, including many young men escaping war-time military service; to these were added Africans from a variety of countries. The distribution of claimants was determined by a combination of two factors: relative ease of entry, and attractiveness of conditions for applicants. The response was a general hardening of criteria for admission, as well as efforts to render access to the receiving country's borders more difficult (Costa-Lascoux, 1987).

The impact of the crisis was most dramatic in Germany, where the number of asylum claims filed escalated from 5,595 in 1973 to 107,818 in 1980. The refugee issue intruded into the 1980 electoral campaign, when opposition Christian Democrats accusing the Schmidt Coalition of incompetence and excessive leninency; the Mayor of Frankfurt, whose city bore the greatest load because the airport is a hub for Europe-Asia flights, asked that new arrivals be relocated; they were sent to Bavaria, where Premier Franz-Joseph Strauss in turn demanded that determination of the claims take place at the border itself. In response, the government tripled the number of courts handling refugees; made entry visa mandatory for travelers from Ethiopia, Sri Lanka, Afghanistan, India, Bangladesh, and Pakistan, as well as Turkey; and barred refugees from working during their first year in Germany. Food and shelter continued to be provided,

in accordance with German law, but the refugees' movements were now restricted. However, applicants from eastern Europe were processed rapidly and granted asylum almost without exception.

As the result of these measures, further reinforced after the Kohl government came to power, by 1983 applications were reduced to about 20,000. However, they began rising again afterwards and reached 74,000 in 1985, about half arriving from the DDR via West Berlin. This arose because local agencies of the DDR's Interflug airline throughout the developing world were happy to sell a round trip ticket to Berlin to anyone with a tourist visa for some other eastern European destination. The DDR authorities concomitantly issued the appropriate transit visa. Although the travelers often bore false passports, with equally fake visas, this was of little concern to the DDR since there was no likelihood they would remain on its territory. Upon landing in East Berlin, the travelers quickly crossed by subway to West Berlin, to which the western Allies maintain free access by virtue of World War II settlements, and either filed an asylum claim locally or continued on by train to the Federal Republic and points beyond. Although the ratio of approval was steadily reduced, in 1986 Foreign Minister Genscher revealed that of every ten people refused asylum, only three in fact left the Federal Republic.

In mid-1986, with new legislative elections in the offing, West Berlin, "the last open door to Western Europe," was swamped by new flows (NYT, July 25, 1986; The Economist, July 26, 1986: 39--40). In response to sustained demand from the developing world, Interflug continued its thriving business; however, under pressure from the Scandinavian countries to implement visa requirements, as noted below, the DDR authorities merely dumped those without visas on the subway at Friedrichstrasse.[20] With access to other countries closing down, most of those coming through this "Berlin loophole" remained in the Federal Republic. In July 1985, Bonn negotiated a committment from the DDR to refrain from selling

flights to Sri Lankans unless they could show a visa delivered by a western consulate in Colombo, in return for expanding an interest-free "swing" credit from $285M to $404M (The Economist, Aug. 23, 1986).[21] Nevertheless, claimants continued to come, reaching 74,000 in 1985. In July of the following year, Foreign Minister Genscher put the issue of the loophole on the agenda of discussions with Sec. Gorbachev, and in early August, about the time of the commemoration of the 25th anniversary of the Wall, the western Allied powers in turn expressed their concern to the USSR (Le Monde 10-11 Aug. 1986).[22] New rumors surfaced that Bonn was prepared to pay 1.5 million DM to obtain the DDR's further cooperation in extending enforcement of the Tamil visa requirement to all refugees (Le Monde, Aug. 19, 1986; The Economist, Aug. 23: 39). On September 18, the DDR authorities announced --by way of the SPD leader-- agreement to this effect as of October 1, "in view of the introduction of visas in many countries of western and northern Europe." Although Bonn insisted no financial concessions had been made, they indicated the concession removed the last obstacles to an accord on environmental aid, whereby Bonn would help pay to clean up East German industrial pollution, as well as another on technical and scientific cooperation, which would give the DDR better access to western technology. A few days later Bonn announced it thwarted an attempt to rush 27,000 Iranians before the deadline of October 1 from Turkey by bus via Bulgaria (NYT Sep. 29, 1986)

With elections once again pending, groups from the extreme right demanded a revision of the constitution to eliminate the right of asylum. While resisting this, on both internal political grounds (a revision requires a two-thirds majority) and because it would harm the country's hard-earned international respectability, in August 1986 Chancellor Kohl intoned once again that "We are not a nation of immigrants, and we do not want to become one," and announced proposals for an array of yet more draconian deterrrent measures. They included posting officials at border points to make an immediate determination of claims

whenever possible; extending the work ban from two to five years; confining the claimants in camps while the procedure was pending; and denying asylum to any person who spent over three months in another receiving country ("first asylum rule"). With respect to border controls, he proposed requiring people from "problem" countries to have advance transit visas for stopovers at German airports; fining airlines $1,000 for each person boarded without proper visa, and making them bear the cost of returning such travelers to their home countries. These proposals were approved by an all-party Round Table convened in September. Despite the accumulation of deterrents, in 1988 the number of claimants reached 103,000, not including people originating in the DDR or ethnic Germans. Following the victory of the Republican Party in Berlin in early 1989, Chancellor Kohl pledged to speed up the process of application, and to insure that those rejected are booted out (The Economist, Feb. 18, 1989: 49).

Mutatis mutandis, similar developments took place in other countries, with Tamils as the initial object of deterrence. In the fall of 1984, Switzerland peremptorily rejected the claims of all but 1 of 1,700 Tamils in Bern on the basis of a report from its own civil servants that the violence to which Tamils were subjected in Sri Lanka was the result of "clumsiness" on the part of the authorities rather than of "a determination to exterminate them," and that they were not subject to discrimination. Henceforth, those turned down were to be expelled (Le Monde, Oct. 4, 1984). The backlog of pending claims rose to 22,000 the following year, while those who filed them remained in the country. In the October 1985 elections, a xenophobic party obtained a surprising one-fifth of the votes in Geneva, becoming the largest party in the cantonal assembly; a similar party scored write-in victories in Lausanne as well. However, there was also a humanitarian reaction, mostly under Church leadership, insisting that "the boat is not full" (Le Monde Nov. 16, 1985). Applications were filed at the level of 1,000 a month in 1987, with the leading groups including Turks,

Iranians, Africans, and Sri Lankans; the rate of acceptance declined from 90 per cent to 12, but remained at 30 for Eastern Europeans. Despite opposition from both Protestant and Catholic church groups, in April 1987 voters approved by a 2-1 margin a government-initiated proposal for further restrictions. They include power to indefinitely limit the admission of refugees in case of a sudden increase in arrivals; limitiation of asylum-seekers to 24 border-crossing points; disposition of their claims within 12 hours; internment of those rejected for up to 30 days to prevent them from going underground to avoid deportation (NYT, Apr. 6 and May 30, 1987; The Economist, Mar. 28, 1987). However, at the end of 1988 a referendum initiated by the Action Nationale for reducing the foreign population over the next decade and a half, and including refugees within the maximum, was rejected by a similar ratio (Le Monde, Dec 6, 1988). The major reason for opposition was undoubtedly fear of losing foreign labor; but the government also pointed out in case of approval, it would have to denounce international conventions on refugees, as well as agreements with France and Italy regarding border-crossers.

Asylum-seekers recorded in France rose from 3,070 in 1977 to 7,864 in 1980, and 11,196 two years later (Aleinikoff, 1984: 197). In the fall of 1984, the French authorities deported forty Tamils to Berlin via Vienna, after disposing of their claim in three days, during which they were housed at Orly airport at the expense of the airline which had brought them in. Nevertheless, numbers continued to mount: 20,000 new applications in 1984, 25,000 in 1985. To reduce the accessibility of its borders, France imposed advance visa requirements on all non-European Community nationals, and penalized airlines that landed travelers without them. These deterrents initially proved remarkably effective: there were 26,000 asylum applicants in 1986, out of which 10,600 were approved, and France was able to issue judgments within six weeks of filing. The Front National has been exercising pressure to reduce these numbers further, but this is

counterbalanced by the mobilization of a strong associational network, including the popular S.O.S. Racisme, on behalf of liberalization. In mid-1988, the director of OFPRA resigned on the grounds his organization lacked the means to carry out its mission (Le Monde, June 28, 1988).

Denmark liberalized its asylum law in 1983, and as of mid-1986 claimants were landing at the rate of nearly 1,000 a week, prompting massive resignations from the Red Cross. The government confined entrants awaiting determination of their claims on ferries, much as New York City does with criminals, and decided that only people in direct danger would have the right to enter Denmark without visas. This was designed largely to deter Iranians arriving from Turkey or Germany (The Economist, Oct. 4, 1986). Thanks to new policy, admissions were limited to 9,000 for 1986 as a whole, and reduced further to only 1700 in the first ten months of 1987. Nevertheless, advocating more draconian measures, the ultra-right Progress Party jumped from 4 to 9 seats in the September, 1987, parliamentary elections. Danish restrictions deflected the flow from the Middle East to Norway, where applications soared to 6,500 in the first ten months of 1987; they included also 1,000 ethnic Albanians from Yugoslavia. Some of the new arrivals were also confined to a ship docked at Oslo.

In early 1985, Sweden was faced with escalating numbers of asylum-seekers arriving by ferry from Sassnitz, in the DDR. The Swedes then imposed a visa requirement on nationals from the relevant countries, and imposed fines on East German ferries which landed people without them (Le Monde, Aug. 24, 1985). It should be noted that Sweden concurrently continued to accept quota refugees by agrement with UNHCR, for a total of 12,000 admissions in 1987. In the face of urban rumblings, the election of right-wing candidates to the municipal council of Malmo, the government decided to scatter the refugees throughout the country; however, at the initiative of a rightist group, in the fall of 1987 one of the towns voted by referendum to reject thirty-five refugees assigned by the central

government (Economist, Nov. 14, 1987). A similar policy of decentralization prompted a parallel reaction in the Netherlands, where despite adoption the principle of first asylum, applications grew from 5,865 in 1986 to 12,000 the following year (Liberation, Paris, Oct. 5, 1987). The Belgian government obtained the authority to expel anyone who might constitute a threat to public order or national security, and instructed consular officials to carry out special checks at airports in developing countries of flights going directly to Belgium.

Britain imposed a visa requirement on Tamils in 1985, and in October 1986, against the advice of the Foreign Office, extended this to the other non-white Commonwealth countries (India, Bangladesh, Nigeria, and Ghana), as well as Pakistan. The ratio of acceptances declined from about half in the early 1980s to 12 per cent in 1986; fewer than 4,000 were admitted to file claims, and nearly all those admitted were granted "exceptional leave" to stay, which allows the government to review their cases annually and enables them to apply for permanent settlement only after seven years (The Economist, Oct. 17, 1987). In October 1987, however, a court of appeals ruled that the Home Secretary had misinterpreted the law when denying refugee status to six Tamils on the grounds they failed to produce evidence of actual persecution, since the Protocol merely requires "reasonable fear" of persecution. The Home Secretary indicated if the law lords concurred, he would consider introducing legislation to maintain the present policy [TO BE FOLLOWED UP].

Overall, some 750,000 people arrived in Europe seeking asylum from 1977 to 1986, with 200,000 in 1986 alone. However, it is impossible to get information on how many people were turned back before they could apply; for example, about 100,000 claimants entered Germany in 1988, but reportedly, another 124,000 were denied entrance (IHT, Mar. 28, 1989, citing the Minister of Interior as reported in Der Spiegel). Despite the hue and cry, asylum seekers admitted in the three years 1984-86 ranged from a minimum of 240 per million population in hard-nosed

Britain, to a maximum of 5000 per million in generous Sweden. The largest groups were Tamils (50,000) and Iranians (40,000). As of the end of 1988, ten of the European states ranked among the fourteen top resettlement countries in the world as a whole (USCR 1989: 36). In terms of refugees resettled in relation to indigenous population, among the industrial democracies Australia is the most welcoming (1/109), with Canada next (1/117). Then come Sweden (1/126) and Denmark (1/192), which outrank the United States (1/211); the ratio then drop very rapidly --Switzerland and France a mere 1/330, and Germany 1/855 (Britain, Belgium, Netherlands were not included in the source table).

Following enactment of the Single European Act, both governments and advocacy organizations called for a coordinated policy in preparation for 1992. Joly (1989a) has pointed out that for government the issue of asylum policy brings to mind security and control; and The Economist commented in the same vein that if the bureaucratic view of "harmonization" were followed, "All Europe's rules would then drop to the level of the most LePennish" (editorial dated May 7, 1988).

Throughout her interviews, Joly found officials identified refugees as Third World immigrants trying to circumvent immigration controls. One of the major concern of "harmonization" is to foreclose successive applications which, as one French civil servant pointed out, might enable someone to live in Europe for 36 years before being finally expelled. They are also seeking to achieve a more balanced distribution of refugees among countries: for example, France is trying to persuade Italy --which now recognizes only Europeans-- to drop its geographical limitations, as well as Spain to keep asylum seekers on its own territory (particulary Latin Americans). The "Schengen" initiative in this as with respect to border controls more generally represents an attempt by the

"northerners" to protect themselves from the consequences of southern permeability, and to develop a model that could be imposed on the rest of the Community.

One of the major issues is the handling of asylum applications. The guideline here is the notion of "first asylum country," focusing on the idea, expressed in the proposed directive, that the more a state manifests its agreement to the arrival or even to the stay of an asylum seeker, the more this state becomes responsible. The granting of a visa is the most important operational indicator of such "agreement." Each state would be responsible for expelling those it turned down, and should they turn up in another, would be sent back to the original one. The group also proposes to generalize fines for transport companies lading people without proper documentation, as well as exchange of information, notably the creation of a data bank on all applicants to avoid duplication.

As against this, in 1985 concerned humanitarian organizations founded the European Consultation on Refugees and Exiles (ECRE) to develop a comprehensive plan of their own. Their proposal, entitled A Refugee Policy for Europe, advocates granting asylum to applicants who do not meet Convention critera, but have a valid claim on humanitarian grounds, as advocated in 1976 by the European Parliament. This is particularly relevant to victims of generalized violence, who as noted earlier constitute a large part of contemporary refugees from the developing world. Some victims of economic circumstances would qualify as well if the hardship is the direct result of political oppression. The proposal would also restrict the ability of governments to deter applicants and to deport unsuccessful ones, on the basis of recent court decisions which ruled that Art. 3 of the European Convention on Human Rights, prohibiting inhumane and degrading treatment, could be invokved to prevent refoulement, and Art. 8, protecting family life, to stay the deportation of family members. In the editorial men-

tioned, The Economist endorses the broader "humanitarian" definition as well, and proposes separating refugee from immigration policy, with an EEC official appointed as Commissioner for Refugees for the Community as a whole. An additional practical suggestion is to levy an annual charge on member countries which, per head of population, take fewer than the average of reognized refugees, to be redistributed among those who take in more.

Although refugees from the developing world remain the major concern, the liberalization of exit in eastern Europe, advocated for so long by western constitutional states, is prompting them to have second thoughts. Should these become the basis for policy, most of the population of the countries involved would remain immobilized because they would have no place to go.

The main stage is once again the Federal Republic. As of 1987, in keeping with previous policy, asylum claimants from eastern Europe remained privileged, and allowed to work after one year. (NYT Aug. 28, 1986). However, a problem was in the making here as well, particularly with respect to Poles. The Minister of the Chancellery pointed out that when the decision was made in 1966 not to expel any refugee from the Soviet bloc, eastern European countries had strict travel regulations; now, however, 400,000 Poles were granted visitors' visas every year, and many of them overstayed. At this time, there were an estimated 170,000 East Europeans without asylum, 100,000 of them Poles. The government therefore reduced the duration of these visitors' visas from three months to one or two, and undertook a general review of its asylum policy for Eastern Europe as well.

The steady liberalization of exit, combined with deteriorating conditions, also fostered the relocation of many of eastern Europe's remaining ethnic Germans (outside the DDR), in accord with the long-established wishes of successive Bonn governments, which at various time provided economic incentives to this effect. Estimates of the potential pool run as high as three million --about two in the Soviet Union, nearly one in Poland, and over 200,000 in Romania. Numbers

have risen quickly, from 43,000 in 1986 to 80,000 the following year, and about 200,000 in 1988. Like their post-war predecessors, these spätaussiedler ("belated refugees") benefit from a constitutionally guaranteed recognition as German nationals (Art. 116) upon appropriate documentation of their ancestry. For obvious political reasons, in the past applicants were granted the benefit of the doubt. However, most of the recent arrivals hardly speak German, if at all; and there are some indications of a growing traffic in fake documentation of German ancestry. When receptions camps became hopelessly overcrowded, the Kohl government pledged vastly increased assistance. Notwithstanding the government's firm commitment, public reactions have become increasingly negative, with many questioning the newcomers' status as Germans (Le Monde, Aug. 27, 1988; The Economist, Sep. 10, 1988; NYT, Sep. 14, 1988).

Conclusion

[TO BE PROVIDED IN REVISED DRAFT]

NOTES

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1. The emphasis here is on admission of refugees, not "refugee policy" more generally, which includes assistance to refugees abroad. With regard to the latter, it should be noted that the Scandinavian countries lead the way on a per capita basis (%USCR1989: 35).

2. The quotation is cited by Plender from the Bulletin of the European Com-

munity, I, 11 (1968): 5-6. It should be noted that Plender himself viewed the matter with skepticism.

3. The myth of "naturalness" is by no means exclusive to the just sanguinis tradition: in the alternative jus soli tradition, dominant in the United States, "soil" has the same magical properties as "blood" in the other.

4. I have borrowed this phrase from the title of a recent essay which covers the subject of uses of foreign labor more generally (%Zolberg, 1987c).

5. I am alluding here to the "left" and "right" components found in many anti-immigration movements, a combination which makes for strange bedfellows.

6. By enacting an annual cap of 150,000 on immigration from Europe in 1924, the United States in effect relinquished the use of Europe as a significant source of labor; but the door was kept wide open for entry from the Western Hemisphere, a policy which was defended on the grounds it would produce self-regulating flows of temporary workers from Mexico and Quebec. During World War II the United States organized a formal guestworker program to recruit Mexicans and reinstated it at the outset of the Korean emergency. Concurrently, growers relied heavily on undocumented workers.

7. Instead, these countries were subject to the orthodox stabilization measures of the IMF, often with no beneficial results in export earnings but substantial increases in import bills and consequent increases in domestic prices. Concomitantly, the liberalization of trade fostered by GATT benefitted only the few among them that have evolved into NICs.

8. This approach was founded on a theory, originating with J. M. Keynes and A. Sauvy but formalized by W. Arthur Lewis, which stated that growth and full employment in the more industrialized countries depend on the availability of an abundant supply of labor --as in the United States in the second half of the nineteenth century-- and that the problems of the poorer countries could be more easily overcome if they were able to reduce the pressure of their manpower surpluses on their society and economy.

9. The leading labor federation in the post-war period was the CGT; although it played an important role in political affairs by way of its links with the Communist Party, the CGT's refusal to participate in planning and policy-making on the grounds this would constitute "class collaboration" left things by default to the employers.

10. For a critical discussion of her analysis, see %Zolberg, 1983b).

11. The expression "unmixing of peoples" has been attributed to Lord Curzon, with reference to the Balkan Wars (Marrus: 41).

12. The classic case is the Soviet Union which, after the revolutionary upheavals generated about one million refugees, in the mid-1920's adopted a no-exit policy. Prohibition of emigration emerged as the common stance of a disparate array of modern authoritarian régimes, including during much of their life Fascist Italy, Spain, and Portugal, as well as Nazi Germany. It can be understood as a concomitant of state-directed economic autarchy more generally, particularly in the case of states that seek to overcome underdevelopment by imposing great sacrifices on the current generation. In periods of international tension, the prohibition also prevents dissenters from joining enemies of the

state But most of all, it serves purely political objectives; since exit is tantamount to "voting with one's feet," an alternative to protest, authoritarian régimes which claim to rest on democratic consent cannot afford such concrete evidence of deep alienation.In addition to Dowty, see the discussion by Albert O. Hirschman, "Exit, Voice, and the State," in Essays in Trespassing: Economics to Politics and Beyond (Cambridge: Cambridge University Press, 1981), pp.246-65. Against this background, emigration may be used exceptionally to relieve tensions, or to rid the state of some unwanted ethnic or national minority; however, in some cases permission to leave may be disguised as expulsion, or coupled with humiliating measures, so as to avoid appearing to grant undesirables a privilege refused to the majority of nationals.

13. The first High Commissioner for Refugees coming from Germany resigned "in the conviction that he was virtually powerless..."(%Vernant, 1953: 25). In 1938, as the crisis became more acute, the Assembly decided to set up a single High Commissioner's office responsible for all League work on refugees; but the severe limits on the High Commissioner were evident from the unwillingness of member states to assume greater responsibilities in dealing with the crisis. Nor were they open to persuasion by anyone else, as indicated by the failure of the Evian Conference initiated by Franklin Delano Roosevelt in 1938 on the problem of refugees from Germany and Austria --i.e., Jews-- to come up with any substantial solution to their plight. Its one contribution was the formation of an Intergovernmental Committee on Refugees, headed from 1939 onward by the High Commisioner himself. Nevertheless, inter-war developments were significant in that they entailed an a distillation of the concept of "refugee" from the European historical experience to date, and the concretization of this abstraction by way of the creation of a set of specialized agencies, located within a more comprehensive institution that represented an attempt to give substantive expres-

sion to yet another abstraction, the concept of "international community." This process fostered the notion that member of the League collectively owed some obligations to a category of persons designated as "refugees." The notion of "refugee" thereby gained some independence from the actions of particular states. The other significant step was a specification of the rights to which those so identified were entitled --travel documents, education, right to work in the receiving country, and so forth-- as codified in a 1933 convention relating to the International Status of Refugees (%Holborn, 1975: 15).

14. Some were disposed of by way of negotiated population exchanges between neighboring countries, similar to earlier ones in the Balkans. Despite vociferous protests from many of the people involved, the Allies agreed to Soviet demands for the return of two million Soviet citizens who were outside of their country, including prisoners of war, forced laborers, and anti-Soviet activists who had fought on the German side --mostly non-Russian ethnics from European Russia; however, return operations slowed down when it was learned that that many were being dealt with very harshly. The largest single mass of displaced persons were over twelve million people of German descent --some old settlers, others recently implanted by the Nazis-- who retreated with the German forces or were expelled from Czechoslovakia, Poland, Hungary, Rumania, and Yugoslavia; nearly all ended up in the western Allied zones that became the Federal Republic of Germany. As the result of both foreign policy considerations and domestic pressures from relevant ethnic groups, the United States opened its doors to many remaining "displaced persons"; and some of the others went to Commonwealth countries or, after 1948, Israel.

15. In the inter-war period the country received some 80,000 Russians, who were under the protection of the League of Nations High Commissioner for Refugees,

and more than a million Central and Eastern Europeans. 400,000 Spaniards fleeing the civil war were so admitted, but many were interned. Refugees still in France after Vichy came to power were treated variously according to nationality, ranging from continued protection to betrayal into the hands of the Nazis.

16. As of the mid-1950s France's refugees included about 100,000 Russians and 160,000 Spaniards, left from the inter-war period; and 100,000 Eastern and Central Europeans, some of them recent arrivals.

17. However, in March 1988, after being turned down by both OFPRA and the Commission, a claimant from Bangladesh obtained recognition as a refugee from an ordinary court, which acted on the grounds that international conventions take precedence over domestic law (Le Monde, May 3, 1988: 14). This arose from the fact that while in the course of being deported to Dacca, he refused to board the airplane, an offense for which he was indicted and brought to trial. The defense insisted he was a refugee, and produced new evidence which persuaded the tribunal. If the accused was a refugee, he had committed no offense. . . Le Monde reported further that OFPRA insisted the tribunal's determination did not obligate them to deliver a refugee card, but that they would probalby reexamine the case.

18. It might be noted that although the United States at this time did not adhere to the Protocol, its own legislation provided for admission of all "defectors from Communism," even when it was clealry established that their motive for leaving was mainly the aspiration to economic betterment (%Zolberg, 1988a).

19. As of 1957, for example, Germany had 60,700 refugees, approximately one-third of the total enumerated by the UNHCR in Europe as a whole, many of them probably recent arrivals from Hungary. Another 59,000 were in Austria (mostly recent arrivals from Hungary, about half of them in transit camps), and 36,000 in France --many of them old-time Spanish opponents of Franco (%Holborn, 1975: 429).

20. Besides reaping income from the air traffic, the DDR may have been taking advantage of the situation to promote its long-established objective to get the Allied authorities to impose normal border controls at the access points to West Berlin (ibid.)

21. Such financial negotiations were not new, as the Federal Republic had earlier paid the DDR to extract dissidents from jail, or for issuing exit permits, as well as Poland for allowing the emigration of ethnic Germans.

22. The Berlin loophole had repercussions overseas: on August 11, 154 Tamils were found drifting in open lifeboats off the coast of Newfoundland; upon investigation it turned out they embarked the previous month on a German-ownded ship of Honduran registry at Hamburg, an operation for which the captain admitted pocketing DM700,000.

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